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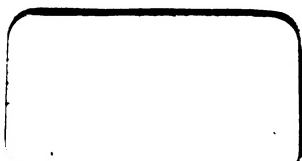


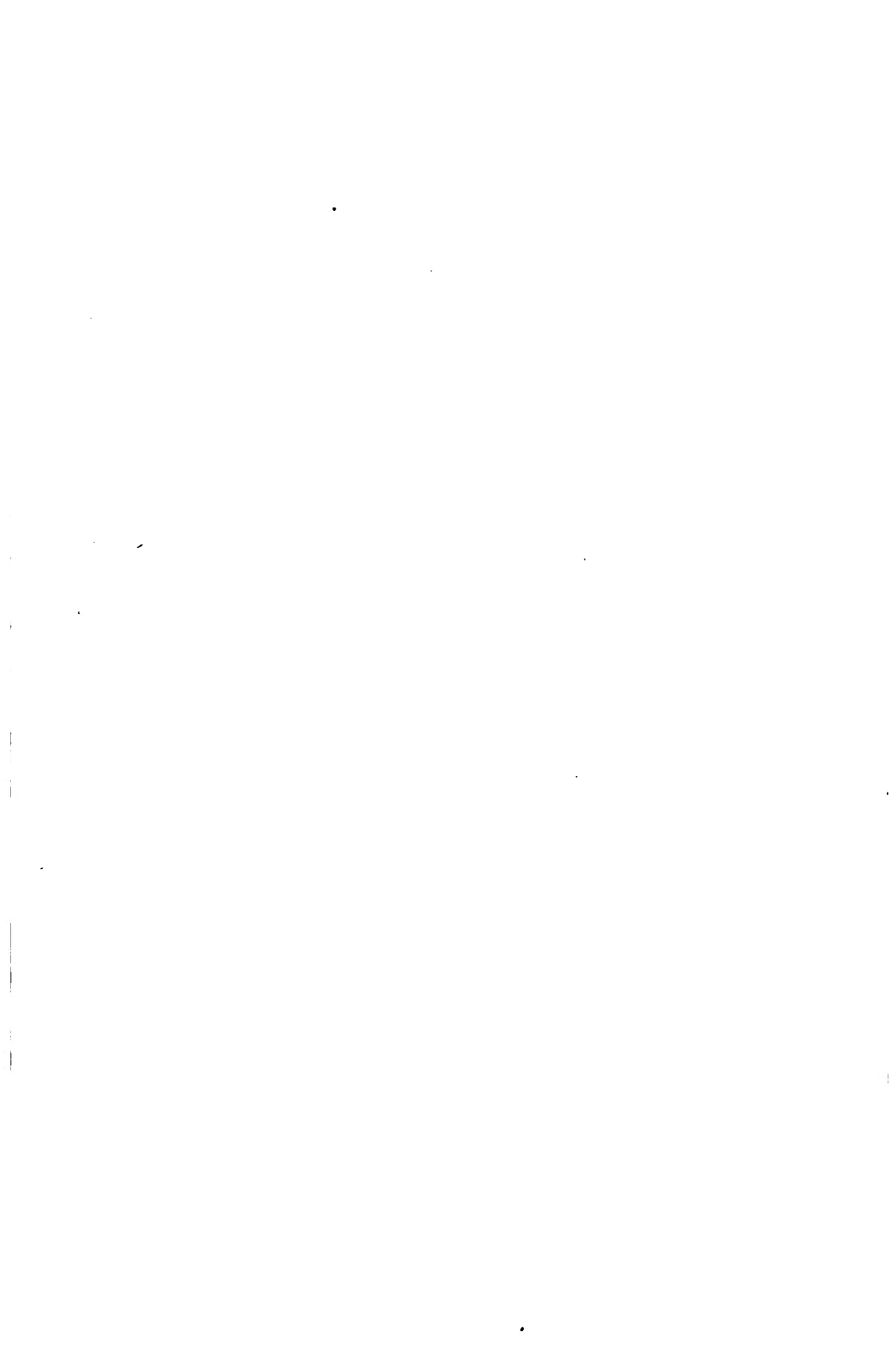
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Virginia Reports and Vol. 55 West
Virginia Reports

UNDER THE EDITORIAL SUPERVISION OF

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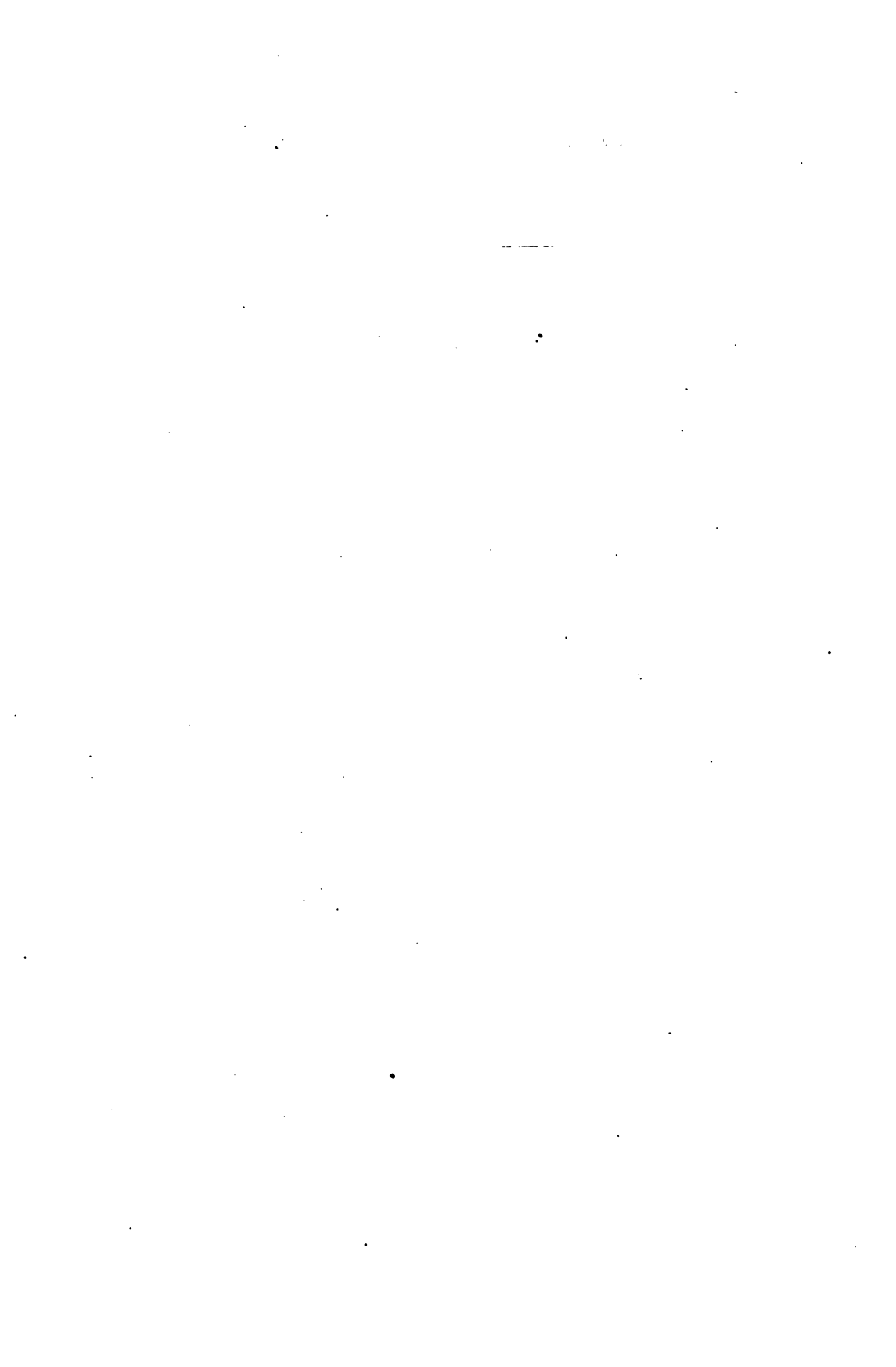
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As to joinder of counts, see the title ACTIONS, vol. 1, p. 135. As to equitable defenses, see the title ACTIONS, vol. 1, p. 142. As to necessity for filing bill of particulars, see the title BILL OF PARTICULARS.

I. Definition, Nature and Distinctions.

Definition.—The action of assumpsit is defined to be at common law an action for the recovery of damages for the nonperformance of a contract not under seal nor of record. It is not sustainable unless there has been an express contract, or unless the law will imply a contract. *State v. Harmon*, 15 W. Va. 115.

Nature Is Equitable.—The action of assumpsit is in some sense an equitable action, and is applicable to almost every case where money has been received by one, which in equity and good conscience ought to be refunded. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

And it is immaterial whether the title to the money be legal or equitable; if the plaintiff has title thereto he may recover the money in this action. *Thompson v. Thompson*, 5 W. Va. 190.

As was said by Nelson, J., in *Eddie v. Smith*, 13 Wend. (N. Y.) 490, "The principles of this action are liberal, beyond that of any known to the practice of the courts." Or by Mr. Justice Blackstone, "It is applicable to almost every case where a person has received money which, in equity and good conscience, he ought to refund."

It is equally beneficial to the defendant, because the defense to the claim as well as the claim itself is governed by the same principles. *Thompson v. Thompson*, 5 W. Va. 190.

Assumpsit and Debt Contrasted.—The West Virginia statute has to a great extent made the action of assumpsit concurrent with the action of debt. Section 10, ch. 99, W. Va. Code, p. 537. Assumpsit is an equitable action and may be substituted for several other forms of action. The act of Congress authorizes any "action in the nature of an action of debt." Assumpsit has more of the characteristics of an action of debt than any other form of action in our practice. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 556. See *Butcher v. Hixton*, 4 Leigh 520, opinion of Carr, J.

In the case of *Eib v. Pindall*, 5 Leigh 109, Judge Carr in his opinion at page 110, says: "Debt lies in all cases of determinate contract, whether verbal or written, and is distinguished from assumpsit in this, that the latter must be brought, where the object is to recover damages for the nonperformance of a parol or simple contract; but when the sum is ascertained, debt may be brought. Of the simple contract, for which debt lies, there is no doubt that a contract for money due on an account stated is included." *Somerville v. Grim*, 17 W. Va. 809.

Assumpsit and Case Contrasted.—"Where there is an express promise, and a legal obligation results from it, the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where, from a given state of facts, the law raised a legal obligation to do a particular thing, and there is a breach of the obligation, and a consequential damage, there, though assumpsit may be maintainable upon a promise implied by law to do such act, still an action on the case is the more proper form of action in which the declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519.

II. Grounds of Action.

A. NECESSITY OF CONTRACT.

Assumpsit, however, is not sustainable, unless there has been an express contract, or unless the law will imply a contract. *State v. Harmon*, 15 W. Va. 115.

In action by owner against bailee of a slave, to recover damages for his loss, declaration contains three counts: The first is a common count in trover; the second alleges, that plaintiff being an infant, and known by defendant to be such, one J. S. agreed with defendant to hire plaintiff's slave to him for a year, to be employed on his farm, according to the usage of the country concerning similar bailments, defendant agreeing to return the slave at the end of the year, and the amount of the hire, being fixed with reference to the employment of the slave in agricultural labor in the country; that the slave was delivered to defendant, and employed on his farm, until, etc., when defendant, contrary to his agreement, and to the usage of the country in like cases, and without the knowledge

or consent of J. S. or the plaintiff, put the slave on board a flat boat in Ohio river, to aid in navigating the same to New Orleans, and carried him beyond the limits of the county, whereby defendant failed to redeliver the slave, as he was bound to do by his agreement, and the slave was wholly lost to the plaintiff; the third count does not allege that the slave hired was to be employed in agricultural labor in the country, nor that the amount of the hire had reference to such employment, but in other respects is substantially like the second; defendant demurs generally to the whole declaration, and also to the second and third counts: Held, 1. the second and third counts are not counts in assumpsit. *Spencer v. Pilcher*, 8 Leigh 565.

Rent Reserved in Deed.—A writ of prohibition ought to be awarded by the district court against a justice's warrant, brought to recover rent reserved in a deed, to the grantor and his heirs forever, the rent being a freehold estate of inheritance in an incorporeal hereditament, for which debt, account or assumpsit will not lie. *Miller v. Marshall*, 1 Va. Cas. 158.

Demurrer.—To make a count one in assumpsit there must be an agreement laid down between the parties, or a promise from the defendant to the plaintiff for a consideration. Therefore, where there is no agreement, the declaration is bad on demurrer. Opinion of Tucker, J., in *Spencer v. Pilcher*, 8 Leigh 584.

Contract Express or Implied.—But the action of assumpsit lies at common law on an implied as well as an express undertaking. *State v. Harmon*, 15 W. Va. 115.

How Implied Promise Pledged.—"An action of assumpsit lies upon a promise expressly made or upon a promise implied by law as a legal inference from a given state of facts. But there is no such thing as an im-

plied promise in pleading. That fact comes out only in the evidence, so that the promise, whether express or implied as matter of law, must, as matter of pleading, be alleged as an express promise; and, except in the cases of bills of exchange, promissory notes, and checks, the declaration must also disclose the consideration upon which the contract or promise is founded. Each party tacitly admits all such traversable allegations made on the opposite side as he does not traverse. Therefore each party must be allowed to deny in some form, either by the general traverse of the general issue or precise traverse, all material facts alleged against him. This promise, alleged in the declaration as an express one, constitutes its essential part, and must be denied or avoided." *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996.

B. SPECIAL AND GENERAL ASSUMPSIT.

Executory and Executed Contracts.

—Where the contract sued on continues executory the plaintiff in assumpsit must declare specially, but where it has been executed, and nothing remains but the payment of the price by the defendant, the plaintiff may declare generally using the common counts, or may declare specially on the original contract. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104, citing *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447.

Where the terms of a special contract have been completely performed by the party who was to render the services, and nothing remains but a mere duty on the defendant's part to pay money, the plaintiff need not declare specially but he may recover on the general counts in indebitatus assumpsit. *Brown v. Ralston*, 9 Leigh 532; *Moore v. Wetzel County*, 18 W. Va. 630; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

Contract for Work and Labor.—

Where the terms of a special contract for work and labor, not under seal, have been performed, the stipulated compensation, if payable in money, may be recovered in an action of general indebitatus assumpsit. *Brown v. Ralston*, 9 Leigh 532, citing *Brooks v. Scott*, 2 Munf. 345.

Work Not Done According to Contract.—

Where it appears that what was done by the plaintiff, was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and is or has been accepted and enjoyed by him, the plaintiff can not recover upon the contract from which he has departed; yet he may recover upon the common counts for the reasonable value of the benefit which upon the whole the defendant has derived from what he has done. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104, citing *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447. See post, "Work and Labor," II, C, 7.

Plaintiffs and defendant entered into a special contract, by which the plaintiffs were to make certain sections of defendant's railroad, in a special manner, under the supervision and control of the defendant's engineers, to be completed by a specified time and at a specified price; estimates were to be made by the engineers and acquittances executed by the plaintiffs. Much of the work was done under the contract, and the road partly finished and partly paid for, but the plaintiffs failing to complete it in the time specified, they continued the work with the consent of the defendant, until it was completed, or accepted as completed by the defendant's engineers having the supervision and control of it, and final estimates made and rendered. Held, that the plaintiff can recover, in assumpsit, under the common counts. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

Contract Partly Performed but Abandoned.—Where the contract, though partly performed, has been abandoned by mutual consent, the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104, citing *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447.

For Breach of Express Warranty.—The action of general indebitatus assumpsit does not lie for the breach of an express contract of warranty. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73; *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80.

"Whenever, therefore, the plaintiff brings general assumpsit, he grounds his claim, not on the special contract (see *Robinson v. Welty*, this term, 40 W. Va. 385, 22 S. E. 73), but upon an existing precedent debt or liability; and this suit, therefore, can not be treated as a suit for the breach of the contract of warranty if the representation be so regarded, but upon the proof of the tort which creates the legal liability. *Huffman v. Hughlett*, 11 Lee 549; *Keener, Quasi-Cont.* 207. See *Catts v. Phalen*, 2 How. 376. It may be that the plaintiff would have had the right to treat the contract of assignment as rescinded on account of its fraudulent procurement, and recover back his money in general assumpsit on the count for money had and received, without proof of the scienter or guilty knowledge on the part of the defendant; but that question does not arise in this case." See 1 *Bigelow, Frauds*, 520, 413. *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80.

For Price of Land Sold.—The action of general indebitatus assumpsit will not lie for the price of a tract of land, but a special action ought to be brought stating the circumstances of the contract. *Hoskins v. Wright*, 1 Hen. & M. 378.

Money Paid under Rescinded Contract.—Where money has been paid on a contract which has been wholly rescinded, or the consideration of which has wholly failed, if the party has been guilty of no fraud or illegal conduct, he may recover back his money under the common count for money had and received, or on a special count properly setting out the facts, from which the cause of action arose. *Buena Vista Co. v. McCandlish*, 92 Va. 302, 23 S. E. 781; *Haigh v. U. S., etc., Ass'n*, 19 W. Va. 802; *Johnson v. Jennings*, 10 Gratt. 1.

Goods Sold and Delivered.—The plaintiff in an action on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract, brought before all the purchase money is due, can not recover on the common counts. *James v. Adams*, 16 W. Va. 245. See post, "Goods Sold and Delivered," II, C, 2.

Recovery of Oil from Common Carriers Not in Wrongful Possession Nor Tortiously Disposed.—The declaration in an action of assumpsit brought to recover the value of oil claimed by the plaintiff, contained no good counts except the common counts. The oil was in possession of the defendant (a common carrier), at the time the action was brought, and not wrongfully, nor had it been sold or in any way tortiously disposed of. There also being no evidence of such sale or disposal, it was erroneous to instruct the jury that they should find for the plaintiff if they believed the oil belonged to him, as he is not entitled to recover the value of the oil under the common counts for oil sold and delivered to the defendant, or for money had and received for the plaintiff's use, there being no special count covering the case. *Dresser v. Transportation Co.*, 8 W. Va. 553.

Terms of Contract Sued on Binding.—When a party declares in assump-

sit attempting to recover upon a special contract, he is bound by its terms; to hold otherwise would clearly involve a legal absurdity. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, cited with approval in *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11.

A lessee of a store room can not recover in an action of assumpsit against his lessor for damages sustained by reason of the failure of said lessor to repair damages to said building caused by unavoidable accident, where there is a written lease between said contracting parties, in the absence of an express covenant that said lessor should make such repairs. *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11.

Allegation of Nonpayment.—A special count in a declaration in assumpsit brought on a promise of one person to pay the debt of another, which shows a consideration for the promise, but does not allege that the other has not paid the debt, is fatally defective. *Winkler v. C. & O. R. Co.*, 12 W. Va. 699; *James v. Adams*, 16 W. Va. 245.

The Consideration.—In an action of assumpsit on a special contract to recover damages for failure to accept and pay for property under that contract, it is necessary that the entire consideration and the act to be done in return for it be stated in substance in the declaration; and if the proof establishes a contract materially different from the one alleged in the declaration, the court on motion should exclude the evidence from the jury. *James v. Adams*, 16 W. Va. 245. See post, "Consideration," IV, A, 5.

If a count in assumpsit upon a special contract between the plaintiff and defendant allege no sufficient consideration moving from the former to the latter, the action will not be sustained upon the ground of the promise and undertaking imputed to him. *Hale v. Crow*, 9 Gratt. 263.

Evidence.—In an action of general indebitatus assumpsit, for services ren-

dered as an overseer, or of quantum meruit for like services, the plaintiff can not give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement. *Brooks v. Scott*, 2 Munf. 345.

Proof by Record.—Where a special count in assumpsit alleges as the gist of the action, that money was by the plaintiff paid to defendant with the agreement at the time made, that if the plaintiff failed to recover the land in another suit, which land was the consideration for the payment of the money, in such event the money should be repaid, it is only necessary, that so much of the record in such suit should be produced on the trial, as was necessary to establish the facts alleged. *Sayre v. Edwards*, 19 W. Va. 352.

A judgment and verdict for the plaintiff in a declaration containing the common counts and also a special count will be prima facie but not conclusive evidence of the existence and validity of the contract set forth in such count. It is not conclusive, because the verdict may have been based upon the common counts. *Linke v. Fleming*, 25 Gratt. 709.

C. THE COMMON COUNTS.

1. Account Stated.

Justice of Items.—The defendant in an action of indebitatus assumpsit upon a settled account, can not go into an inquiry concerning the justice of the several items of demand stated in the account. *Lyne v. Gilliat*, 3 Call 5.

Necessity of Filing Account.

Construction of § 86, Ch. 128, 1 Rev. Code.—Section 86, ch. 128, 1 Rev. Va. Code provides that "in every action of indebitatus assumpsit, the plaintiff shall file with his declaration an account, stating distinctly the several items of his claim against the defendant; and on failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly

described in the declaration, as to give the defendant full notice of the character thereof." It was held, in *Fitch v. Leitch*, 11 Leigh 471, construing this statute, that if the proof offered by the plaintiff is such as to sustain the count of insimul computassent, it is of no importance whether there be any account filed or not, for this count so particularly describes the plaintiff's demand, as to give the defendant notice thereof.

Promise to Pay Admissible.—The plaintiff in assumpsit filed with his declaration an account commencing in these words: "1833, Jan'y 1. To balance due per account rendered, \$1,405.07," which account he produced at the trial, and a witness was introduced to prove, that, at the date of this item, the plaintiff delivered to the defendant a full bill or account to the amount of \$1,405.07, and that the defendant acknowledged the same, and promised to pay it. It was held, that such proof may be received under the insimul computassent count. *Fitch v. Leitch*, 11 Leigh 471.

Variance.—If a declaration in assumpsit contains only the insimul computassent count, stated for \$600, without a bill of particulars, the plaintiff can not introduce evidence to prove an account stated for \$500. Under the ruling of *Minor v. Minor*, 8 Gratt. 1, such evidence was properly excluded as irrelevant to the issue under the pleadings as they were. *Mann v. Perry*, 3 W. Va. 580.

Count of Account Stated in Insurance Policy.—A general insimul computassent count in a declaration in an action of assumpsit brought for recovery under a policy of insurance is sustained by proof of an adjustment of the amount due from the defendant to the plaintiff on account of the loss by fire of the property insured. *Stolle v. Ins. Co.*, 10 W. Va. 546. See post, "Insurance Policies," II, I.

Open Account against Executor.—The act of 1792, 1 Rev. Code, p. 167, which makes it the duty of the court "in an action upon an open account against an executor or administrator, to cause to be expunged from such account items appearing to have been due five years before the death of the testator or intestate," relates only to open accounts and does not extend to settlements or assumptions, and therefore plaintiff in an action of assumpsit, in order to take his case out of the act, may give in evidence an assumpsit of the testator or intestate, within five years, to pay a stated balance. *Brooke v. Shelly*, 4 Hen. & M. 266.

Partnership.—If there be several partners, and one of them after the partnership is dissolved assumes a partnership debt, but afterwards pleads the act of limitation jointly with the other partners, to an action of assumpsit brought upon an account stated, the assumpsit may be given in evidence, for the plea of nonassumpsit admits that the defendants did once assume. *Brockenbrough v. Hackley*, 6 Call 51.

Bill in chancery stating running accounts for many years between plaintiff and defendant, consisting of numerous items of debt and credit or claims for them on both sides, and praying an account and decree for balance; held, is a bill for an account which equity will entertain, though assumpsit might have lain at law. *Hickman v. Stout*, 2 Leigh 6.

2. Goods Sold and Delivered.

See the title SALES.

Goods Procured by Fraud.—Indebitatus assumpsit will lie for the value of goods which the defendant by fraud procured from the plaintiff to sell to an insolvent person, and which the defendant has gotten into his possession. The law in such a case will imply a promise to pay for the goods from the circumstance of their having been the plaintiff's property and having come

into the defendant's possession. *Maloney v. Barr*, 27 W. Va. 381.

Failure to Accept Goods.—An action of assumpsit may be brought to recover damages for failure to accept goods sold under a special contract, when the defendant repudiates the contract before the time has elapsed when he was allowed to pay the balance due. *James v. Adams*, 16 W. Va. 245.

No Recovery before All Purchase Money Is Due.—The plaintiff in an action of assumpsit on a special contract to recover damages for failure to accept and pay for property sold thereunder, can not recover on the common counts, the action being brought before all the purchase money is due. *James v. Adams*, 16 W. Va. 245.

Cancellation of Special Contract.—In an action of assumpsit on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract, the plaintiff can in no form of action recover, if the defendant accepted the goods sold, and subsequently the plaintiff took possession of the goods as his own, and sold them as his own without the defendant objecting, such conduct of the parties being a cancellation of the contract. *James v. Adams*, 16 W. Va. 245.

Mere Fact That Article Is Worthless.—The mere fact that an article proves to be worthless will not entitle the purchaser to recover the price paid in an action of assumpsit. *Mason v. Chappell*, 15 Gratt. 572.

Mere Fact That Article Fails to Equal Representations of It.—The mere fact that an article sold does not come up to the representations made respecting it, is not ground to assume that it was not the genuine article sold, so as to entitle the plaintiff to recover in an action of assumpsit for a failure by the vendor to comply with his contract. *Mason v. Chappell*, 15 Gratt. 572.

Specific Article Ordered—No Implied Warranty.—Where a specific article is ordered and furnished there is no implied warranty on the part of the vendor that it is suitable for the purposes to which the purchaser intends to apply it, although the purchaser states his purpose to the vendor, and in such a case the latter was not held liable in an action of assumpsit for the purchase price, in the absence of fraud or an express warranty, however unfit and defective the article may turn out to be. *Mason v. Chappell*, 15 Gratt. 572.

Freight for Goods Lost by Act of God Recovered by Carrier.—A common carrier contracts to deliver a crop of wheat at an agreed price per bushel. A large proportion of the crop is delivered in good order, but from the unavoidable effects of a storm, a small part is delivered in a damaged condition, and another small portion is lost. In an action of assumpsit by the carrier for the freight, he is entitled to recover under the common indebitatus count, the agreed price for the whole quantity so delivered or lost. *Galt v. Archer*, 7 Gratt. 307.

Sale on Credit or Cash.—In an action of assumpsit by a principal to recover from his agent the value of goods sold by him to insolvent persons on credit, in violation of his instructions, it is not necessary in the declaration to aver an express contract that the defendant should sell for cash only. It is sufficient to aver in a special count that the plaintiff had instructed the defendant not to sell on credit. *Maloney v. Barr*, 27 W. Va. 381.

Allegation of Nonpayment.—In an action of assumpsit on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract, a declaration which simply alleges that the defendant refused to accept the goods, and fails to allege that he

refused to pay for them, is fatally defective. This is a necessary allegation, as the gist of the action is a non-payment of the money agreed to be paid. *James v. Adams*, 16 W. Va. 245.

Defenses—Payment by Check.—Where an action of assumpsit is brought for goods sold and delivered, the declaration filed contains only the common counts, the bill of particulars is filed, and the only count in the declaration to which the evidence applied, was that for goods sold and delivered. If it is shown that the goods were absolutely paid for by a check, the demand upon the account is thereby extinguished, and there is no count in the declaration upon which the plaintiffs can recover. *Blair v. Wilson*, 28 Gratt. 165.

Variance between Allegations and Proof.

Common Counts—Goods Paid for by Check.—Where an action of assumpsit is brought for goods sold and delivered, the declaration filed contains only the common counts, the bill of particular is filed, and the only count in the declaration to which the evidence applied, was that for goods sold and delivered. If it is shown that the goods were absolutely paid for by a check, the demand upon the account is thereby extinguished, and there is no count in the declaration upon which the plaintiffs can recover. *Blair v. Wilson*, 28 Gratt. 165.

Action for Balance Due on Account with a Tanner—What Admissible.—In an action of assumpsit there were two counts, one for the agreed price of goods sold, and the other, quantum valebant for the same. The proof under the general issue is that the plaintiff (a tanner) received raw hides from the defendant, and credited him for the value, and sent him in return tanned leather and charged him with the value thereof. The debt claimed is the balance due on these dealings, and the

proof is properly applicable to, and sustains the declaration. *Gore v. Buzard*, 4 Leigh 231.

3. Money Had and Received.

a. In General.

The action of indebitatus assumpsit for money had and received will lie whenever one has the money of another which he has no right to retain, but which ex æquo et bono, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract, quasi ex contractu as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay. *Lawson v. Lawson*, 16 Gratt. 232, 80 Am. Dec. 702.

Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; *Baltimore, etc., R. Co. v. Burke*, 102 Va. 643, 47 S. E. 824; *Langhorne v. McGhee*, 103 Va. 288, 49 S. E. 44.

The action of assumpsit for money had and received is applicable to almost every case where money has been received which in equity and good conscience ought to be refunded. *Thompson v. Thompson*, 5 W. Va. 193.

The action for money had and received may generally be maintained where the money of one man has without consideration got into the pocket of another; or, as it is sometimes expressed, a man can not have something for nothing; "a man shall

not be allowed to enrich himself unjustly at the expense of another." *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

b. Illustrative Cases.

Bonds Assigned as Security.—Where bonds are assigned to A, not in payment of land purchased from A, but merely as security for the payment of the purchase money, so long as A has a right to demand the purchase money of the land, he has a right to retain in his hands bonds, or so much of the money received therefor, as should not exceed the purchase money and interest. But so soon as the purchase money, with the interest, should be paid, or the purchaser should be forever discharged from the liability to pay it, it would be manifestly unjust for the vendor to retain what he had received merely as a pledge or security for the purchase money. He became bound, *ex æquo et bono*, to restore it; and the action of assumpsit for money had and received, is the proper action to compel him to do so. *Brockenbrough v. Ward*, 4 Rand. 352.

Recovery Back of Money Paid.—See generally, the title PAYMENT.

The proper action to recover back money which has been paid, when it can be recovered back, is, as all the authorities agree, an action of assumpsit for money had and received to the plaintiff's use. This is a kind of equitable action to recover back money, which ought not in justice to be kept; and it lies only for money, which *ex æquo et bono* the defendant ought to refund. *West Virginia Transportation Co. v. Sweetzer*, 25 W. Va. 447; *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80; *Crumlish v. Cent. Imp. Co.*, 38 W. Va. 390, 18 S. E. 456; *Johnson v. Jennings*, 10 Gratt. 1. See post, "Money Paid," II, C, 5.

Excess of Payments.—In such action to recover back excess of payments made beyond the legal rates of charge, there is no necessity for the plaintiff

to prove that he demanded the repayment of such excess by the railroad company before instituting such suit. *West Virginia Transportation Co. v. Sweetzer*, 25 W. Va. 434.

Initial Carrier Liable for Excess Charged by Connecting Carrier.—It is provided in Virginia by statute (Va. Code, 1887, § 1295) that when a common carrier accepts for transportation anything directed to a point beyond its own terminus, it shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless released or exempted by contract at the time of acceptance, and the action of assumpsit will lie to recover from the initial carrier the excess of freight above the guaranteed rate, which had been paid to the connecting carriers. *Virginia, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310, 6 Va. Law Reg. 738.

Agreement by Purchaser under Deed of Trust to Repay Excess Paid by One of the Debtors to the Creditors Secured.—A debt owed by two debtors jointly was secured by a deed of trust upon the land of one of them. The other debtor paid more than his share of the debt. The land was sold and the purchaser agreed to pay a certain sum, and in addition the excess of the share of the debt paid by the debtor who did not give any security for the debt. The purchaser failed to pay this excess, and the debtor who had paid it brought assumpsit against him for it. It was held, that the action could be maintained, in *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977.

Overpayment to Creditor.—Where, by a lawful agreement between two partners, all of certain partnership funds are the property of one of the partners, and a creditor of that partner receives them in excess of a debt he holds against him, to the extent of the overpayment the creditor has in his hands, that to which the partner is entitled, which the latter can recover

in an action of assumpsit in his own name, for whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. *Langhorne v. McGhee*, 103 Va. 282, 49 S. E. 44.

Exercise of Diligence by Plaintiff.—

The right to recover back money paid by mistake was not precluded by the circumstances that the plaintiff might, by the exercise of greater diligence, have learned the material facts involved in the alleged mistake, where his ignorance of such facts was in good faith. *City Nat. Bank v. Peed*, 2 Va. Dec. 623.

Recovery of Usurious Interest.—

Under the general rules of law a party who has paid usurious interest may recover it back from the lender in an action of assumpsit for money had and received. *Norvell v. Hedrick*, 21 W. Va. 529. See the title USURY.

Where usurious interest has been paid and the transaction closed, the borrower may recover back from the lender the excess so paid beyond the legal rate, in an action of assumpsit for money had and received; but if the debt or any part of it, on which such usurious interest has been paid, remains unpaid, a court of equity in stating the account between the parties will credit upon the principal of such unpaid part whatever usurious interest has been paid, and give the lender a decree for his debt with legal interest only. *Norvell v. Hedrick*, 21 W. Va. 523.

Recovery of Taxes.—If, under the Code of Virginia of 1860, a sheriff settled in full with the auditor, and paid all the state taxes not returned delinquent, he can not thereafter, by distraint, or in any other manner, make out of any taxpayer not returned delinquent the amount of his taxes so advanced for him by the sheriff, as he can not be subrogated to the state's rights or remedy for such taxes; nor can he in any manner make it out of his es-

tate, real or personal, either before or after his death; and when he has made this settlement and payments in full to the auditor, without any promise expressed or implied by the taxpayer to refund him the amount, he cannot recover it of him in any action of assumpsit or any other action; nor can he make the amount of these taxes out of his estate either as taxes or as a debt due to him. *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863. See the title TAXATION.

Payment under Mistake of Fact.—

If one under legal duty to ascertain, and with means to ascertain, a fact, pays money in ignorance of it, he can not recover it back in an action of assumpsit. *Simmons v. Looney*, 41 W. Va. 738, 24 S. E. 677, citing *Harner v. Price*, 17 W. Va. 523. For a full discussion, see the title PAYMENT.

A corporation, of which the plaintiff firm was a stockholder, gave its note for money borrowed of defendant, and, under an arrangement with its stockholders, pledged their stock notes as security therefor. Subsequently the stockholders, to release the company from such indebtedness, made their several notes, payable directly to the defendant, in lieu of their stock notes, which were payable to the company, and placed them in the hands of an agent to procure the transfer of such indebtedness from the company to the individual stockholders. Without fully disclosing to the defendant his instructions, such agent took up the company's note in exchange for such individual notes, but left in the defendant's possession the stock notes for which they were intended to be substituted. Some time after the payment of the note given by the plaintiff, the defendant demanded payment of the stock note made by such firm to the company, claiming to P., who had attended to such business on behalf of his firm, that it was held as collateral security for certain in-

debtedness of the company to the defendant; and P., thereupon, under the supposition that such was the fact, gave to defendant a new note, for the amount due thereon, in the name of the firm. J., one of the members of such firm, who had no knowledge of the circumstances under which the several notes referred to had been given, afterwards, on demand of defendant, made a payment on such new note; supposing, from the fact that defendant held it and demanded payment thereof, that it was valid; held, that plaintiff was entitled to recover back, as paid under a material mistake of fact, the money so paid on such new note. *City Nat. Bank v. Peed*, 2 Va. Dec. 623.

Money Paid under Compulsion.—If a person be engaged in buying oil in an oil region and shipping it over a railroad, and there is no other outlet for this oil except over this railroad, and under these circumstances he agrees to pay to the railroad company more than its legal rates of charge for the freight of such oil and does make such payments from time to time, in order that he might get his oil transported to market in the only manner, in which he can transport it, though such payments are made after each shipment of oil has been made and the oil delivered, such person must be considered as making such payment not voluntarily but by compulsion, and he has a right in an action for money had and received for his use to recover back the excess of freight so paid by him over the amount, which the railroad company has a legal right to charge, or to offset this excess against the railroad company's charge, if it brings an action of assumpsit against such shipper. *West Virginia Transportation Co. v. Sweetzer*, 25 W. Va. 34. For a full discussion, see the title PAYMENT.

Money Lost at Gaming.—Indebitatus assumpsit for money had and re-

ceived will lie at common law to recover money lost at gaming. *O'Connor v. Dils*, 43 W. Va. 54, 26 S. E. 354, citing *Thompson v. Thompson*, 5 W. Va. 190. See the title GAMBLING CONTRACTS.

Money Paid on Rescinded Contract.

—Where money has been paid on a contract which has been wholly rescinded or the consideration of which has wholly failed, the usual and better mode of recovering back the money paid under the agreement is on the common money counts of money had and received in an action of assumpsit, but it may be recovered on a special count, which must properly set out the fact that the consideration has wholly failed, and did not result from fraud or illegal conduct on the part of the plaintiff. *Johnson v. Jennings*, 10 Gratt. 1; *Buena Vista Co. v. McCandlish*, 92 Va. 302, 23 S. E. 781; *Haigh v. U. S., etc., Ass'n*, 19 W. Va. 802. See post, "Money Paid," II, C, 5. See the title RESCISSION, CANCELLATION AND REFORMATION.

Evidence.—In an action of assumpsit to recover money paid on a contract which has been rescinded, it is competent for the plaintiff to introduce in evidence the contract, though under seal and not signed by him, which has been rescinded, and which shows the amount paid by the plaintiff, and the consideration therefor. The contract is not in support of the form of the action, but is a part of the evidence necessary to prove the plaintiff's case. *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781.

Retaining Pay of Employees.—

Where a merchant furnished railroad hands goods and groceries upon the promise by the railroad to retain the amount of the same out of the wages of such hands and pay it over to such merchant, but after deducting the same due by each man it refuses to pay the same over, an action for money had

and received will lie in favor of the merchant against the railroad. *Handley v. Chesapeake, etc., R. Co.*, 9 W. Va. 474.

Where Agent Detains Money of Principal.—Wherever an agent secures the payment of money belonging to his principal, and detains it, he is liable in an action of assumpsit for its recovery. This rule will apply to anyone, who knowing the facts, collects money belonging to another, and keeps possession of it. *Thompson v. Thompson*, 5 W. Va. 190.

Fees from Usurper of Public Office.—Where a person has usurped an office belonging to another, and taken the fees of that office, an action of assumpsit for money had and received will lie at the suit of the party entitled to the office against the intruder for the recovery of such fees. *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584; *Bier v. Gorrell*, 30 W. Va. 95, 3 S. E. 30.

"In the case of *Bier v. Gorrell*, 30 W. Va. 97, 3 S. E. 30, Judge Snyder, delivering the opinion, says: 'It seems to be a principle of natural justice as well as law, that where one person has injured another, or received compensation which in equity and good conscience belongs to another, he may be required by action to account to such other for the injury done him. In like manner will an intruder in office be required to account to the legal officer for injury done by the intrusion. The legal right to an office confers the right to receive and appropriate the fees and perquisites legally incident thereto. When such officer performs the duties of his office, he may demand and receive the compensation therefor allowed by law, and he is as fully entitled to such compensation as he would be in any other case entitled to pay for skill and labor done for another at his request. The legal fees and emoluments of an office are a part thereof, and belong to the right-

ful incumbent; and, where a person receives such fees and emoluments on the pretense of title to the office, the de jure officer may recover the profits of the office from him by an action of assumpsit for money had and received to his use.'" *Booker v. Donohoe*, 95 Va. 363, 28 S. E. 584.

Conditions Precedent—Qualification.—"These authorities establish the right of the plaintiff in error to recover against the defendant in error, who intruded himself into the office to which the former had been duly elected. They establish further that, having received the fees and emoluments to which the plaintiff in error was entitled, the latter may recover in an action of indebitatus assumpsit; and finally, that it was not necessary, as condition precedent to the recovery against the defendant, that the plaintiff should have qualified himself to discharge the duties of the office to which he was elected by taking the oaths and executing the bonds prescribed by law. Not only are these propositions established by authority, but they are consonant with reason, and accord with sound public policy." *Booker v. Donohoe*, 95 Va. 367, 28 S. E. 584.

Contest between Attaching Creditors.—Two attachments against an absconding debtor are levied on the same property. The first is quashed, but on appeal this judgment is reversed. Pending the appeal an order is made selling the property under the second attachment and the proceeds are paid over to the creditor in that attachment. The action for money had and received, will lie by the first attaching creditor against the creditor in the second attachment for the proceeds of the sale. *Caperton v. McCorkle*, 5 Gratt. 177.

Tax Collector Who Has Paid Money to Treasurer.—The action of assumpsit for money had and received does not lie to recover taxes paid by a tax-

payer to the collector, who in accordance with statutory provisions has turned the money over to the treasurer. *Mallan v. Bransford*, 86 Va. 675, 10 S. E. 977.

Money Obtained by Fraud and Deceit.—Where the defendant has obtained the plaintiff's money from him by fraud and deceit, the law implies a promise from the wrongdoer to restore it because *ex æquo et bono* the defendant ought to refund the money, and to enforce such obligation the action of assumpsit lies. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

A party buys and takes a conveyance of certain real estate from a second party, who is insolvent. The real estate is subject to three mortgages and a judgment lien. The first party, for the purpose of making a proper application of the purchase money, and in order to control and thereby clear off the charges and liens, having made known to a third party, one of the mortgagees, his object, takes from him a separate written assignment of one of the mortgages and the negotiable note payable to his order, not yet due, thereby secured, which was not indorsed; and the first party was ignorant of the facts, but was induced by the false and fraudulent representations of the third party, the mortgagee, who knew that the mortgage was fraudulent and voidable, to believe, and did believe, that the mortgage of \$2,000 was a valid and subsisting charge to the extent of \$1,203.82, which sum he paid the mortgagee for the assignment, when in fact, and to the knowledge of the third party, the mortgage was wholly without consideration, and had been given and taken with the intent to hinder, delay, and defraud the creditors of the mortgagor, and was so held in a suit to foreclose, of which the assignor had notice, and was therefore wholly worthless to the assignee. Held, such assignee is entitled to secure back the

sum with its interest, paid for the assignment. Such recovery may be had on a special count in general indebitatus assumpsit, setting forth specially the facts creating the liability, and averred as the consideration of the promise. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

Held, it may also be recovered back on the common count in general indebitatus assumpsit for money had and received, accompanied with a sufficient bill of particulars. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

Jailor Can Not Sue Creditor of Debtor for Prison Fees When Debtor Can Pay.

—Where an action of assumpsit for money had and received was brought against the creditor of a debtor for the expenses of the latter while imprisoned on a writ of *ca. sa.*, the jailor can not demand the prison fees of the creditor if the debtor is able to pay them, and the presumption is that he is able to pay them, until the contrary is shown. *Rose v. Shore*, 1 Call 540.

No Recovery by Plaintiff When Defendant Received Proceeds of Sale as Agent of Heirs.—The plaintiff in an action of assumpsit for money had and received can not recover of the defendant, when the latter did not receive the proceeds from the sale of certain salt as administrator of the owner, but only as the agent of his heirs, who therefore are the ones responsible to the plaintiff, the assignee of the money due on the sale of the salt. *Brooks v. Hatch*, 6 Leigh 534.

To Recover Commission for Sale of Land.—Where the plaintiff in an action of assumpsit sold land of the defendant without his knowledge, but the latter ratified the sale, agreeing to give the plaintiff one-half of one of the bonds for deferred payments of purchase money, but refused to do so when it was paid, an action of indebitatus assumpsit for money had and received, not for services rendered, was proper, having the common money

counts. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

Forfeiture of Insurance Policy—Recovery of Premiums Paid.—Where a contract of insurance is forfeited by failure to pay the annual premium, which is prevented by reason of the war between the states, the insured is entitled to have refunded so much of the premiums actually paid after the company retains an amount sufficient to compensate it for the risk which it incurred while the policy was in force, and the action brought by the plaintiff in such case should be assumpsit on the implied promise of the company to pay what *ex æquo et bono* is due, and the declaration need contain nothing but the money counts. *Abell v. Ins. Co.*, 18 W. Va. 400.

Assignments.—Recovery may be had by an assignee against an assignor of nonnegotiable paper on the common count for money had and received, in *indebitatus assumpsit*. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604, overruling *Nichols v. Porter*, 2 W. Va. 13. The court, on p. 447 of this case said: "There being a count for money had and received, there can be a recovery based on the assignment of a chose in action turning out insolvent, whether there was an express or an implied undertaking to stand good for it in case of failure to collect, since it is a case where money has been paid on a consideration failing; and the law says it shall be refunded, and is thus a case of money had and received by one person, which should be repaid, and is therefore, in legal contemplation, received for the use of the party who paid it, and is recoverable under the count for money had and received. Tucker's opinion *Drane v. Scholfield*, 6 Leigh 395; opinion in *Mackie v. Davis*, 2 Wash. (Va.), 219; *Roane, J.*, in *McWilliams v. Smith*, 1 Call 125. The case just cited from 1 Call is pointedly decisive of the question logically." See in accord *Merchants' Nat. Bank v.*

Spates, 41 W. Va. 27, 23 S. E. 681; *S. C.*, 41 W. Va. 37, 23 S. E. 685.

In an action of assumpsit by an assignee against a remote assignor of a bond or note, under the statute, 1 Rev. Code, ch. 125, § 6, the plaintiff may recover under the general counts for money had and received, and for money paid, laid out, and expended. *Drane v. Scolfield*, 6 Leigh 386.

When Assignor of Bond Liable to Assignee—Promissory Note.—The assignor of a bond is liable to the assignee in an action of assumpsit, if the assignee has used due diligence to recover the money from the obligor, and has failed to do so. The assignor of the promissory note was liable to the assignee before the statute of Anne, in case payment was not made by the maker, when demanded. *Mackie v. Davis*, 2 Wash. 219, 1 Am. Dec. 482.

The assignor of a bond assigns it by endorsing his name in blank for the purpose of enabling the assignee to buy goods on the face of the endorsement. H sells goods to the assignee on the faith of the endorsement, and before the time of payment for the goods arrived the obligor of the bond becomes insolvent. H may maintain an action of assumpsit against the assignor either as such or as guarantor of the bond. *Hopkins v. Richardson*, 9 Gratt. 485.

Bank Notes Given for Safe Keeping Can Be Recovered.—A sum of money in bank notes was given by a sick man to his wife for safe keeping. A few days later he died. The widow refused to deliver them to the executor, saying she intended to keep them. He sued her in an action of assumpsit for the money, the declaration containing only the common counts, and it was held that he was entitled to recover. *Lawson v. Lawson*, 16 Gratt. 230.

Lost Foreign Bill of Exchange.—If A purchase of B a foreign bill of exchange, which is afterwards lost before it is presented, and B refuses to give

a second bill, A may bring indebitatus assumpsit for the purchase money. *Murray v. Carret*, 3 Call 373.

c. Conditions Precedent.

(1) Necessity of Request.

When the Request Is Express, When Implied.—In an action of indebitatus assumpsit for money had and received, which has been paid for the use of the defendant, the request necessary may be either expressed or implied. It will be implied where the plaintiff has been compelled to do what the defendant was legally compellable; where the defendant has adopted and enjoyed the benefit of the consideration, and where the plaintiff voluntarily does what the defendant was legally compelled to do, and the defendant afterwards in consideration thereof expressly promises. In certain cases the request will be implied where the plaintiff voluntarily does what the defendant is only morally compelled to do, and there is a subsequent promise by the defendant. *Nutter v. Sydenstricker*, 11 W. Va. 535. Compare *West Virginia Transportation Co. v. Sweetzer*, 25 W. Va. 434.

(2) Necessity of Actual Reception of Money.

Money levied by the sheriff upon a judgment which is afterwards reversed, can not be recovered back by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use. *Isom v. Johns*, 2 Munf. 272.

(3) Necessity of Privity.

The action of assumpsit for money had and received can not be maintained unless there is some privity between the plaintiff and defendant. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837.

Where money was received by attorneys for the plaintiff under execution by due process of law from a court of competent jurisdiction, which was

received as his and disposed of as he directed, when the decree in the suit was subsequently reversed on appeal, a defendant who did not appeal can not recover from the attorneys in an action of assumpsit, there being no privity between them. *Green v. Lren-gle*, 84 Va. 913, 6 S. E. 603.

Two Claiming Same Sum from Third Party.—It is well settled, that where two persons claim, each in his separate right, the same sum of money from a third party, and the third party pays it to one of the claimants, the other can not recover it from him who receives it, in this or in any other form of action; for there is no privity between them. "Whether he can recover from the third party, who has rejected his claim and paid the money to his successful competitor, is another question, which does not belong to this case." *Burton v. Burton*, 10 Leigh 598.

The executor of a deceased officer, and his widow, prefer conflicting claims at the treasury of the United States, for the arrears of pay accrued to the officer during his life, under the act of congress of May 15, 1828, "for the relief of certain surviving officers and soldiers of the revolution;" the officers of the treasury reject the claim of the executor, and pay the money to the widow. Held, even if the payment to the widow was wrong, the executor can not maintain an action for the money against her, as money had and received by her to his use, there being no privity between them; his remedy is against the treasury. *Burton v. Burton*, 10 Leigh 597.

For Rent Paid to Wrong Person.—A decree was made for the sale of a tract of land on credit. Before the decree a contract had been made for the rental of the land, and in conformity to the contract a lease was made for a year. During this year sale was made under the decree, which was confirmed and the conveyance given to the purchaser. If in this case

rent has been paid to the representative of the former owner, the purchaser of the land under the decree may recover it from him by an action of assumpsit for money had and received. *Taylor v. Cooper*, 10 Leigh 317, 34 Am. Dec. 737.

Authority to Endorse and Collect Checks.—Where checks made payable to plaintiff company are, by its agent, endorsed and presented to the bank on which they are drawn, and by it paid, and the several amounts charged to the accounts of the respective drawers of such checks and credit received therefor by the defendant bank, there can be no recovery by plaintiff against defendant under a count for money had and received, although such agent was not authorized to endorse or collect such checks, and the bank therefore paid the money to an unauthorized person, because there was no privity between plaintiff and defendant, and the action of assumpsit for money had and received could not be maintained. *Baltimore, etc., R. Co. v. First National Bank*, 102 Va. 753, 47 S. E. 837.

d. The Declaration.

A declaration for money had and received is good after verdict, although the sum received is left blank. *Hall v. Smith*, 3 Munf. 550. See post, "Omission to Lay Damages," IX, B, 2.

e. Parties to Action.

Where the cause of action for money had and received does not occur until the death of the testator, his executor might sue for the money in his own name or as executor. *Lawson v. Lawson*, 16 Gratt. 230, 80 Am. Dec. 702. See post, "Parties to the Action," VI.

f. Limitation of Actions.

Against a demand for money had and received by one for the use of another, the period under the statute of limitations is five years, and it begins on the receipt of the money. *Jackson*

v. Hough, 38 W. Va. 236, 18 S. E. 575, citing *Scott v. Osborne*, 2 Munf. 413. See post, "Limitation of Actions," VII.

4. Money Lent.

Promissory Notes.—On the common counts for money loaned in an action of assumpsit the plaintiff may recover of all the makers of a promissory note although only one of them received the money from the note, and the others were sureties. *Bank of Wheeling v. Evans*, 9 W. Va. 373. See post, "Bills, Notes and Checks," II, G.

Money Advanced.—In an action of indebitatus assumpsit for a certain sum in pounds sterling of the value of a certain sum in current money of Virginia, for so much advanced by the plaintiffs to F. and S. at the request of the defendant, the damages were laid in current money. The verdict by the jury in current money was correct. *Barnett v. Watson*, 1 Wash. 372.

Evidence.—A check, which is offered in evidence under the money counts in an action of assumpsit, is only prima facie evidence of money lent, etc., and the presumption raised by the check is rebutted when it is proved that no money had come into the hands of the defendant. *Blair v. Wilson*, 28 Gratt. 165.

Payments and Set-Offs.—In an action of assumpsit for various sums of money lent to or paid for the defendant's intestate, though payments or set-offs can not be proved without an account of such payments or set-offs filed, yet defendant may prove that the money sued for or any part of it was not lent to or advanced for the intestate, but was paid out of money of the intestate in the hands of the plaintiff. *Johnson v. Jennings*, 10 Gratt. 1.

Harmless Error.—In such action, the issues being on nonassumpsit, and the statute of limitations, and the verdict being for the defendant alone on the latter plea, the admission of improper evidence having reference to the issue on the first plea only, and which could

have no influence on the issue on the last plea, is not ground for reversing the judgment. *Johnson v. Jennings*, 10 Gratt. 1.

5. Money Paid.

See the title PAYMENT. See ante, "Money Had and Received, II, C, 3.

a. In General.

Where money has been paid for the use of the defendant, the amount so paid may be recovered in an action of assumpsit. *Lee v. Virginia, etc., Bridge Co.*, 18 W. Va. 299; *Nutter v. Sydenstricker*, 11 W. Va. 535.

b. Illustrative Cases.

Payment to Personal Representative after Authority Ceases.—Money paid to an administrator after he has ceased to be such, can not be recovered back in an action of assumpsit from the administrator *de bonis non*. *VanWinkle v. Blackford*, 28 W. Va. 672.

"The principal obligor in this bond being P. G. VanWinkle, and he being also at the time not only one of the obligees as one of the trustees, but also treasurer of these trustees, this bond in point of fact when signed and sealed by the obligors remained in the possession and control of the principal obligor undelivered to any one till his death some eighteen months afterwards, and it then passed into the hands of his personal representative, who was W. W. VanWinkle, the other obligor in this bond, and he handed this bond with the other assets of said trustees to one of them. Held, this bond never having been delivered by the obligors to the obligees was inoperative and void as a bond and imposed no obligation either legal or equitable on either of the obligors in the bond; and the security in the bond, W. W. VanWinkle, having after the death of the principal paid the bond to the person, who had been appointed such treasurer of these trustees, after he had ceased to be the administrator of the principal, P. W.

VanWinkle, is not entitled in an action of assumpsit to recover the amount so paid from the administrator *de bonis non* of P. G. VanWinkle." *VanWinkle v. Blackford*, 28 W. Va. 672, distinguishing *Thompson v. Thompson*, 5 W. Va. 190.

Payment of Execution by Sheriff without Request.—A sheriff, who has an execution in his hands, gives the defendant indulgence on it and neither makes the money on it nor returns the execution promptly; and apprehending he has rendered himself liable to the plaintiff in the execution by his negligence he pays off the execution to the plaintiff without the request of the defendant and with no understanding or agreement with the plaintiff, that the judgment was to be thereafter for the use or benefit of the sheriff. Held, the defendant on motion can have the execution thereafter issued on the judgment quashed, because it has been paid. By such motion to quash the defendant ratifies the payment made by the sheriff without the authority of the defendant; and the sheriff can recover of the defendant in an action of assumpsit for money paid for his use at his request the amount of the first execution paid by him. *Hall v. Taylor*, 18 W. Va. 544.

In Case of Failure of Consideration or Rescission.—Where money has been paid under an agreement for a consideration which has wholly failed, there can be no doubt that the action of assumpsit is the proper remedy for its recovery. *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897; *Garber v. Armentrout*, 32 Gratt. 235; *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781; *Johnson v. Jennings*, 10 Gratt. 1.

Where the purchaser under a deed from a husband and wife is deprived of the property therein conveyed by reason of the deed being declared a nullity as to the wife, she recovering possession of the property, the grantee may

bring assumpsit to recover back the purchase money paid for the property in an action of assumpsit for money paid under an agreement, the consideration of which has wholly failed. *Garber v. Armentrout*, 32 Gratt. 235. See *Johnson v. Jennings*, 10 Gratt. 1; *Newberry Land Co. v. Newberry*, 95 Va. 111, 27 S. E. 897; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

Where a contract of sale is not by deed, and no conveyance has been made, the vendee can recover back in an action of assumpsit what he has paid on the contract, when the consideration has failed, or the contract has been rescinded, or the vendor refuses to comply with his part of the contract. *Bier v. Smith*, 25 W. Va. 830.

M. on behalf of himself and P., joint owners of a tract of land, by contract under seal, but which contract was not authorized by P., sold the same to A. receiving from A. on account of the cash payment \$250, and \$50, and A. also paid out for surveying the land for M. \$255; afterwards at the suggestion and request of M. the contract was mutually, orally, rescinded, M. agreeing to repay A. the said three sums so paid by A. with interest, M. acting upon such oral rescission resold the land to other parties. Held, that A. could recover in assumpsit from M. the money so paid by him. *Arbogast v. Mylius*, 55 W. Va. 101, 46 S. E. 809.

Militiaman Who Has Paid Substitute Subsequently Discharged.—If a member of militia employ and pay a substitute to perform his tour of duty, and thereupon the substitute be discharged by the commanding officer, the former can not recover back the money paid in an action of assumpsit, upon the ground that the defendant after commencing the march was discharged as a supernumerary, and therefore never performed the tour of duty. *Keys v. McFatridge*, 6 Munf. 18

Money Paid on Illegal Contract.—An action of assumpsit will not lie to recover back money paid on a contract, connected by its consideration with an illegal transaction. *Slifer v. Howell*, 9 W. Va. 391. See the title **ILLEGAL CONTRACTS**.

Money Paid Tax Collector under Protest.—Under the provisions of Va. Acts 1881-2, p. 37, the proper remedy to recover money paid to a tax collector under protest, after he had refused to accept coupons in payment of taxes, is by assumpsit. *Brown v. Greenhow*, 80 Va. 118. This section was repealed by Acts 1893-4, p. 381.

Illegal Salary Paid Attorney General.—Where a sum of money was illegally paid to the attorney general as salary by the auditor, and received by the former without authority of law, the commonwealth is entitled to recover the same in an action of assumpsit. *Com. v. Field*, 84 Va. 26, 3 S. E. 882. See the title **ATTORNEY GENERAL**.

Money Paid by Fraudulent Inducements.—Where the purchaser of real estate, which is subject to liens, is induced by false and fraudulent representations of a mortgagee in a fraudulent and voidable mortgage on said real estate, to pay off said mortgage with a part of the purchase money, the purchaser may recover back the money so paid in a special count in general indebitatus assumpsit, setting forth specially the facts creating the liability and averred as the consideration of the promise. It may also be recovered back on the common count in general indebitatus assumpsit for money had and received, accompanied with a sufficient bill of particulars. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

c. Necessity of Request.

Where money has been paid for the use of the defendant, the request necessary may be either express or implied. It will be implied as well as the promise, where the defendant has

adopted and enjoyed the benefit of the consideration. *Nutter v. Sydenstricker*, 11 W. Va. 535; *Lee v. Virginia, etc., Bridge Co.*, 18 W. Va. 305.

d. Money or Equivalent Must Be Paid.

The principal and his surety are bound in a bond to the obligee, which bond the obligee gives to the surety as an advancement to his daughter in marriage when the surety marries the obligee's daughter. The surety can not upon these facts support an action of assumpsit against the principal for money paid, laid out and expended, by him for the principal's use, or any of the common money counts, for to maintain assumpsit for money paid, laid out and expended, money or some equivalent for money must be in fact paid. *Butterworth v. Ellis*, 6 Leigh 106.

e. Necessity of Privity.

Whenever the plaintiff in an action of assumpsit shows that he, either by compulsion of law or to relieve himself of liability, or to save himself from damage, has paid money which the defendant ought to have paid, the count, for money paid will be supported, whether there be any privity of contract between the plaintiff and defendant or not, as where the promise was to a third person for the benefit of the plaintiff. *Nutter v. Sydenstricker*, 11 W. Va. 535.

Where the vendees in a contract for the purchase of real estate subsequently sell it to a corporation which was not in existence at the date of the contract, and the purchase was made only for their own benefit and not for the corporation, the latter, not being in privity with the vendor, can not maintain an action of assumpsit to recover money paid to the vendor under that contract, the consideration for which had wholly failed. *Newberry Land Co. v. Harman Newberry*, 95 Va. 111, 27 S. E. 897.

6. Use and Occupation.

See the titles IMPLIED CON-

TRACTS; LANDLORD AND TENANT.

Express or Implied Promise.—The action of assumpsit for the use and occupation of land by permission of the plaintiff, may be brought on an implied as well as on an express promise. *Sutton v. Mandeville*, 1 Munf. 407, 4 Am. Dec. 549.

Independent of the statute, 11 Geo. II., ch. 19, the action of assumpsit lies at common law for the use and occupation of land, by permission and assent of the plaintiff on an express promise to pay the plaintiff a certain sum, or in general terms to pay him to his satisfaction for such use and occupation. *Eppes v. Cole*, 4 Hen. & M. 161, 4 Am. Dec. 512.

A, having a perfect title during his life, defeasible on his dying without issue, and having conveyed that title to the defendant, the plaintiffs are not entitled to recover for the use and occupation of the premises during A's lifetime. *Corr v. Porter*, 33 Gratt. 279.

Agreement for Use of Land Not by Deed.—It was held in *Goshorn v. Steward*, 15 W. Va. 657, that the action of assumpsit for the use and occupation of lands, is maintainable under § 7, ch. 93, W. Va. Code, where the agreement is not by deed.

Relation of Landlord and Tenant.—Where two of four joint lessees entered upon certain premises, under a written agreement, made with the owner of the premises, and signed by all of them, but the other two did not make actual entry upon and occupy the premises, the occupancy of the first two was the occupancy of all four, and upon the terms designated in the agreement; and they are all lessees of the landlord, regardless of their relations to each other, and as such lessees they are responsible to the landlord in an action of assumpsit for the use and occupation of the land. *Goshorn v. Steward*, 15 W. Va. 657.

In an action by the landlord against

his tenant, whether the action be debt, assumpsit, covenant, unlawful detainer, or ejectment, where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord; for, in such case the tenant is estopped from denying the title of his landlord. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

Landlord Can Not Recover Rent for Land from Which He Has Evicted Tenant.—In an action of assumpsit for the use and occupation of a farm for a year, it appears, that the landlord entered on a meadow a part of the premises, within the year, and mowed and carried away the hay without the consent and against the will of the tenant, who, nevertheless, continued to occupy the farm during the rest of the year. The disturbance of the tenant by the landlord in this case amounts to an eviction from that portion of the premises, and suspends the whole rent, the landlord thereby losing the benefit of the entire contract. *Briggs v. Hall*, 4 Leigh 484.

Written Agreement Admissible to Prove Occupation of Land and Terms of Rent.—In an action of assumpsit brought for the use and occupation of a tract of land, the written agreement for the rental may appear in evidence as proof of the occupation of the land by the plaintiff, and of the terms of the rent. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. 834; *Goshorn v. Steward*, 15 W. Va. 657.

Plea of Statute of Limitations.—In an action of assumpsit for the use and occupation of land, where the cause of action arises upon the breach of the contract, and not at the time of making the same, a plea that the defendant did not assume, as in the declaration set forth, within five years prior to the commencement of this suit, is not a proper plea. It should be that the action did not accrue within five years, etc. *Atkinson v. Winters*, 47 W. Va.

226, 34 S. E. 834. See post, "Limitation of Actions," VII.

Where an action of assumpsit is brought for the use and occupation of a tract of land, and the declaration contains only two counts, one of which is indebitatus assumpsit, and the other on the quantum meruit, and a bill of particulars is filed with the declaration, if the defendants interpose the plea of nonassumpsit in five years, although a written agreement not under seal may appear in evidence, fixing the terms of the rental for one year, when the possession and occupancy continue for nearly six years thereafter, under our statute, the plaintiff shall not be nonsuited by reason of said writing appearing in evidence, but the same may be considered in fixing the value of the rental. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. 834.

7. Work and Labor.

See the title IMPLIED CONTRACTS.

Commissions for Selling Land.—Where A agrees with B to sell B's farm, A to take half its proceeds as his only compensation for his services, it was held, that A's action to recover for such services are properly indebitatus assumpsit for money had and received, and not for work, labor and services rendered. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575. See the title BROKERS.

Officers and Agents of Private Corporations.—Under the law of Pennsylvania, the president of a private corporation created by that state can not recover from the corporation upon a quantum meruit for official services there rendered, in the absence of any by-law or resolution of the directors allowing compensation. Nor can one who is treasurer and secretary of the corporation, and a stockholder and director, recover on a quantum meruit for his official services without such by-law or resolution. The law of that state raises no promise on the part of

the corporation in such cases, and the question whether, in such cases, there is an implied promise, depends on the law of the state. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Contract with a Town.—The action of assumpsit will lie against a town for the recovery of money due the plaintiff for work done under a contract for the town, notwithstanding void certificates have been issued and accepted for such work. *Johnson v. The Town of Alderson*, 33 W. Va. 473, 10 S. E. 815, distinguishing *Ratcliff v. County Court*, 33 W. Va. 94, 10 S. E. 28.

Work for County under Unauthorized Contract.—A contractor or laborer dealing with the county court is charged with notice of the constitutional limitation of its powers, and if he performs labor or does work for it under an unauthorized contract of payment out of the levies of future years, and not out of the funds on hand or the levy, for the current fiscal year, he can not recover for the same in an action of assumpsit, nor compel the county court by mandamus to lay a levy for payment thereof, even though the county court has issued certificates, orders, or evidences of debt therefor. *Davis v. Wayne County Court*, 38 W. Va. 104, 18 S. E. 373.

An assignee of such indebtedness has no greater rights to enforce payment thereof than his assignor. *Davis v. Wayne County Court*, 38 W. Va. 104, 18 S. E. 373.

Recovery of Attorney's Fees.—A firm of attorneys made a contract in writing with a client, which provided that the firm were to receive \$100 certain and if the suit referred to was decided in favor of their client then they were to receive \$200 extra. The attorneys in an action of assumpsit set out the agreement and alleged that

their client dismissed the suit without their consent, and thereby hindered them from prosecuting it to a final decision although they were willing and ready so to do. The declaration also contained the common counts for work and labor, and an account stated. On a demurrer to the declaration and each count thereof it was held that they were sufficient and that the plaintiffs upon issue joined on nonassumpsit may recover, in addition to the \$100 certain, such damages for their time and labor as they are reasonably worth, provided the whole recovery shall not exceed the entire amount stipulated in the contract. *Polsley v. Anderson*, 7 W. Va. 202. See the title ATTORNEY AND CLIENT.

Attorney's Fees for Obtaining Divorce for Woman Living Apart from Husband.—Where a wife, living apart and separate from her husband, employs an attorney and obtains a divorce, she is liable to an action of assumpsit on an implied contract for what his services are reasonably worth, if the husband is not liable to him for these services. *Peck v. Marling*, 22 W. Va. 708. See the title DIVORCE.

Contract Partly Performed.—It was held in *Balt., etc., R. Co. v. Polly*, 14 Gratt. 447, that "indebitatus assumpsit will lie to recover the value of work done under a special contract, if it be fully executed on the part of the plaintiff, and nothing remains to be done under it but the payment of a sum of money by the defendant." Even when the contract is not fully executed, and the plaintiff has only partially performed, the general weight of authority holds that under proper circumstances the plaintiff may recover in assumpsit on the defendant's implied promise to pay pro tanto for the benefit received. See ante, "Special and General Assumpsit," II, B.

Where there is a contract for work, and it is only partially executed, and so no recovery can be had on a special

count based on the contract, yet there may be recovery for the actual worth to the party of the work done upon a quantum meruit under the common count, if the failure to complete the work is without the fault of the plaintiff. "This would be the case if he had not been paid therefor fully, or if there was not a willful dereliction of duty by the plaintiff without the assent and against the will of the defendant,

by the abandonment of the contract because of an unwarranted demand for advance pay." *Barrett v. Raleigh Coal, etc., Co.*, 51 W. Va. 416, 41 S. E. 220.

When parties make a contract which is not apportionable, no part of the consideration can be recovered in an action on the contract, until the whole or that for which the consideration was to be paid is performed. But it must not be inferred from this that a party who has performed part of his side of a contract, and has failed to perform the residue, is in all cases without remedy. For though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract, and give him a remedy on a quantum meruit. Thus, if a party is prevented from fully performing his contract by the fault of the other party, it is clear that the party thus at fault can not be allowed to take advantage of his own wrong, and screen himself from payment for what has been done under the contract. The law will, therefore, imply a promise on his part to remunerate the other party for what he has done at his request; and upon this promise an action may be brought. "So too if one party, without the fault of the other, fails to perform his side of the contract in such a measure as to enable him to sue upon it, still if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, there-

fore, generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to cover that quantum of remuneration, an action of indebitatus assumpsit is maintainable." *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

Abandonment by Mutual Consent.—

"Where the contract, though partly performed, has been abandoned by mutual consent, the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement." "Where it appears that what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and is or has been accepted and enjoyed by him, the plaintiff can not recover upon the contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit, which upon the whole, the defendant has derived from what he has done." *Empire Coal and Coke Co. v. Hull Coal and Coke Co.*, 51 W. Va. 474, 41 S. E. 917, approving *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

Special Contract Mutually Abandoned.

—Where a contract partly performed, has been abandoned by mutual consent, the plaintiff may resort to the common counts alone for what he has done under the special agreement. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

The plaintiffs and defendants entered into a special contract, by which the plaintiffs were to make certain sections of the defendants' railroad, in a special manner, to be completed by a specified time, under the supervision of the engineers of the defendants. The plaintiffs failed to complete it in the time specified, but with the consent of the defendants continued the work until it was completed. In an action of assumpsit under the common counts,

the plaintiffs are entitled to recover. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

Wrongful Discharge under Contract.

—Where a decedent wrongfully discharges one who is bound by parol contract to work for him for a stipulated time, the action of assumpsit may be brought against his personal representative for breach of contract at common law. If the defendant dies while the action is pending, it may be revived against her personal representative. *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052.

Special Contract Must Be Fully Executed.—The plaintiffs bring an action of assumpsit for work and labor done, and declared under the common counts. If it appeared from their evidence that the work was done under a special contract in full force, they can only recover the contract price, on proving the contract fully executed on their part. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447.

Performance in Stipulated Manner.—Where work, which has been done by a plaintiff under a special agreement, but not in a stipulated manner, and was yet beneficial to the defendant, has been accepted and enjoyed by him, the plaintiff can not recover upon the contract from which he has departed, but he may recover on the common counts for the reasonable value of the benefit which the defendant has derived from what he has done. *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104; *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

Substantial Compliance with Contract Sufficient.—In an action of assumpsit upon a special contract for work performed by the plaintiff for the defendant, where the declaration contains the common counts and also special counts on the contract, if the plaintiff proves a substantial, though not strict, compliance with the contract alleged, and that the defendant has accepted the work as done, and received benefits

therefrom, the plaintiff is entitled to recover the contract price of his work less such sum as will fully compensate the defendant for imperfections in the work done or materials used. *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

Action on Contract for Building a House—Evidence Admissible to Show Work Defective, etc.—A contract under seal is made between a builder and another person for the erection of a house, with provisions that if it is not finished by a certain time deduction shall be made from the amount agreed to be paid equal to the rent for the period of delay. Before work is commenced a parol agreement is made between the parties changing the work to be performed. Advances are made to the builder, and after the completion of the work there is a disagreement between the parties, and the builder brings an action of assumpsit for the balance due him in three counts, indebitatus, quantum meruit, and insimul computassent. The defendant pleads nonassumpsit and set-off. It was held, that evidence is admissible to prove that the work done according to covenant was defective and insufficient, and that the house was not completed by the time agreed, and the rent which would have been received had it been completed; and the plaintiff's claim can be diminished by the amount of such damages arising thereby. *Davis v. Baxter*, 2 Pat. & H. 133.

Engineer's Estimate Conclusive by Contract—Proof of Fraud Sufficient to Recover.—In an action of assumpsit for work and labor by a contractor on a railroad, against the company, under a special contract which provides that the final estimate of the engineer shall be conclusive upon the parties, if the plaintiff proves that the final estimate made by the engineer was fraudulently made, he may recover without proving further that he was unable to procure such final estimate as is required by

the contract after demand on the company, or other proper exertions on his part. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447.

Condition Precedent.—In an action for work and labor by a contractor on a railroad against the company, under a special contract, which provides that upon receiving the full amount of the final estimate, made out agreeably to the terms of said contract, he shall give a release under seal from all claims or demands whatsoever, growing out of said contract; the giving such release is a condition precedent to his recovery, if the final estimate has been properly made out, but not if the final estimate was fraudulently made. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 448.

Services between Members of Family.—For a full discussion, see the title IMPLIED CONTRACTS.

It is well settled that a child, residing with his father as a member of his family, is not entitled to recover for work and labor performed or services rendered, in the absence of an express agreement to pay therefor, or its equivalent. And the same rule applies where the defendant merely stands in loco parentis. *Harshberger v. Alger*, 31 Gratt. 52; *Williams v. Stonestreet*, 3 Rand. 559 (father-in-law and son-in-law); *Stansbury v. Stansbury*, 20 W. Va. 23.

Services Rendered by Minor to Uncle.—Where a minor lives with his uncle and is furnished with clothes and is supported by him, and the minor renders services without any understanding or contract as to compensation therefor, he can not recover in an action of assumpsit the value of the services thus rendered, although they may have been greater in value than the support which he received. *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569; *Plate v. Durst*, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404; *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910.

Minor Living with Relatives—When Recovery for Services.—Where a minor, residing with a relative, is led to believe that she will be paid for her services, and in expectation of compensation, faithfully performs such services, but is afterwards discharged without the reward she expected, and the relative denies all liability to her, she is entitled to recover the actual value of such services in an action of assumpsit, even though the defendant testifies that his promises were made in jest, and that he had no expectation or intention of recompensing her for her services, but was only acting towards her in loco parentis. *Plate v. Durst*, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404. Compare *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569.

But see *Broderick v. Broderick*, 28 W. Va. 379, for a case in which it was held in the absence of direct proof of an express contract, that the surrounding circumstances authorized a natural son to recover from his father pecuniary compensation for work and labor done, for boarding and nursing furnished to, and moneys advanced, paid, laid out and expended for the father in his lifetime.

Special and General Assumpsit.

When Plaintiff May Declare Generally on Special Contract.—Wherever the plaintiff has done everything which was to be executed on his part before making his demand, and nothing remains but a mere duty on the defendant's part to pay money, the plaintiff need not declare specially, but may recover on a general count in assumpsit. *Moore v. Supervisors*, 18 W. Va. 630; *Davison v. Ford*, 23 W. Va. 619; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

In an action of general indebitatus assumpsit for services rendered as an overseer, or a quantum meruit for like services, the plaintiff can not give in evidence the proof that the defendant had employed him as overseer, and

was to pay him a certain quantity of tobacco. In such case he should declare upon the special agreement. *Brooks v. Scott*, 2 Munf. 344. See ante, "Special and General Assumpsit," II, B.

Special Contract for Work and Labor—Compensation in Money.—Where the terms of a special contract in writing for work and labor not under seal have been performed, the stipulated compensation, if payable in money, may be recovered in an action of general indebitatus assumpsit. *Brown v. Ralston*, 9 Leigh 532.

Value of Work under Special Contract.—In an action of indebitatus assumpsit, the plaintiff may prove that work was done at defendant's request, and the value of it. If it appear, in the course of his evidence, that the work was done under a special contract, which remains in full force and which ascertains the price, he has no right to prove the value of the work, and can only recover the price of it, as ascertained by the contract, upon proving that the conditions of the contract have been complied with, and that nothing remains to be done in execution of it, but the payment of the price by the defendant. So, if it appear from the plaintiff's evidence, that the work was done under a written contract, he will be required, before he goes any further, to produce the contract, or duly account for its nonproduction, and prove its contents by secondary evidence. Or, if it appear, for the first item, in the cross examination of the plaintiffs' evidence, or by the defendant's evidence, that the work was done under a special contract, or that the contract was in writing, the plaintiff will then be required to proceed in the same way as if the fact had appeared in the course of his own evidence in chief. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 456.

Case Made.—The defendant in an action of assumpsit can not arrest the plaintiffs in the making out of their

case, by appearing to show that the work sued for in the common counts, was done under a special contract, it not appearing from the plaintiffs' evidence that there was any such contract. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447; *Baltimore, etc., R. Co. v. Lafferty*, 14 Gratt. 478.

Building Contract—Unnecessary to Set Out Dimensions.—In an action of assumpsit brought by a contractor against a county for the price contracted to be paid for building a jail, it is not necessary to set out in a special count the dimensions, or a description of the building in the declaration. *Carroll County v. Collier*, 22 Gratt. 302.

Secondary Evidence.—If it appears from the plaintiff's evidence in an action of assumpsit for work and labor done, that the work was done under a written contract, it must be produced, or its nonproduction accounted for, and its contents proved, before the case can be further proceeded with. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447. See the title BEST AND SECONDARY EVIDENCE.

Witnesses.—In an action of assumpsit brought to recover for work and labor done by the plaintiff for the defendant of the defendant, it was an error to permit the plaintiff to testify in her own behalf, in accordance with provisions of § 23, ch. 130, W. Va. Code 1868. *Owens v. Owens*, 14 W. Va. 88. See the title WITNESSES.

Special Plea Amounting to General Issue.—In assumpsit, upon the common count for work and labor, etc., defendant offers a special plea setting out a special contract, and averring that the work, etc., sued for was done under it, and the acts to be done by defendant were done. The special plea, if it contains a defense to the action, only amounts to the general issue; and should be rejected. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447. See post, "Special Pleas Amounting to General Issue," IV, B, 5.

3. Evidence.

See also, the specific counts enumerated above.

A check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts; yet it is only prima facie evidence of money lent, paid and advanced, or had and received; and when it is proved that no money had come to the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts. *Blair v. Wilson*, 28 Gratt. 165, citing *Bank v. Jackson*, 9 Leigh 221. See the title **BILLS, NOTES AND CHECKS**.

D. SPECIALTIES.

See the title **SEALS AND SEALED INSTRUMENTS**.

1. At Common Law.

An action of assumpsit is not allowed at common law on a bond, nor by W. Va. Code, 1868, ch. 99, § 10, upon a bond which is not a sealed instrument in writing containing a promise, undertaking or obligation to pay moneys, and a demurrer will properly lie to the declaration in assumpsit brought on another kind of bond. *State v. Harmon*, 15 W. Va. 115. See § 10, ch. 99, W. Va. Code, 1899, containing same provision.

Specialty Not Ground but Inducement.—Assumpsit could be brought against the assignor of a judgment, which was afterwards reversed, notwithstanding the assignment was by a sealed instrument, for in such a case the sealed instrument was not the ground of the action, but only the inducement thereto. *Arnold v. Hickman*, 6 Munf. 15; *State v. Harmon*, 15 W. Va. 115.

Agreement Altering Prior One under Seal.—A parol agreement, made subsequent to one under seal, might be declared upon in assumpsit, though it should alter the terms of the written

agreement. The agreement was only the inducement to the real grounds of the action, the subsequent assumpsit stated in the declaration. *Baird v. Blaugrove*, 1 Wash. 170.

2. Under the Statutes.

But it is now provided in Virginia by statute that the action of assumpsit may be maintained in any case where the action of covenant will lie. Acts 1897-98, p. 103; *Pollard's Supp.*, § 3246a.

And in West Virginia an action of debt or assumpsit may be maintained upon any note or writing, whether sealed or not, by which there is a promise, undertaking or obligation to pay money, if signed by the party who is to be charged thereby or his agent. W. Va. Code, § 10, p. 718; *Laidley v. Bright*, 17 W. Va. 779; *State v. Harmon*, 15 W. Va. 115; *Kern v. Zeigler*, 13 W. Va. 707.

Writing Guaranteeing Repayment of Money.—Under § 10, ch. 99, W. Va. Code, providing an action of debt or assumpsit may be maintained on any note or writing, whether sealed or not, by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby or his agent; it was held, that assumpsit will lie on a writing under seal guaranteeing repayment of money borrowed evidenced by borrower's bond, and secured by collateral mortgage which is to be repaid in monthly installments and payment of monthly dues on stock, and providing that, after six months' default in monthly payments, at option of the lender the principal debt shall at once become due and collectible and the mortgage foreclosed, when default has been made and mortgage foreclosed in a court of competent jurisdiction having jurisdiction of the subject matter and parties, and a decree ascertaining the balance due after subjecting all the property embraced in the mortgage on account of the debt, if the insolvency of the principal

debtor be alleged. *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921.

Interest Coupons.—Under § 10, ch. 99, W. Va. Code, a municipal corporation is liable in an action of assumpsit for recovery upon interest coupons, even if under seal, attached to bonds which it has issued by legislative authority to aid in the construction of a railroad. *Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

Action on Rescinded Contract under Seal—Admissible Evidence.—In an action of assumpsit for the recovery of money on a rescinded contract, the plaintiff may introduce the contract which is under seal. Its introduction not being for the support of the form of action, but as evidence to support the plaintiff's case, it is competent for the court to permit the plaintiff to offer it as evidence. *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781.

Pleading.—In the absence of express legislation in relation to the pleadings in assumpsit upon a sealed instrument by which there is a promise, undertaking or obligation to pay money, it is advisable, as being more safe and simple, under the present state of the law to bring debt, where it will lie, instead of assumpsit under § 10 of said chapter 99 of the Code of West Virginia. *State v. Harmon*, 15 W. Va. 115.

For instance, the general issue in debt upon a writing obligatory is non est factum, and no such plea is known in the action of assumpsit. The plea of nonassumpsit is the general issue in assumpsit; and it puts in issue the consideration, etc., of the contract alleged in the declaration. This is so at the common law, and is still so with us, unless it can be determined that the said § 10 has by implication changed the common-law rules of practice in assumpsit, when the action is founded upon a sealed promise, undertaking or obligation in writing to pay money, so

as to make the pleadings and principles of law governing in actions of debt apply in actions of assumpsit. *State v. Harmon*, 15 W. Va. 115.

Under § 10, ch. 99, W. Va. Code, 1868, an action of assumpsit may be maintained on a sealed writing, promising to pay money, if it be signed by the party to be charged or his agent. In such case where the count is on a sealed instrument, the same particularity in pleading is required, as if the declaration was in covenant. *Kern v. Zeigler*, 13 W. Va. 707.

Non Est Factum.—Under § 10, ch. 99, W. Va. Code, providing that assumpsit will lie on a writing under seal containing dependent covenants, when the covenant sued on contains a provision, undertaking or obligation to pay money, if the instrument is signed by the party to be charged or his agent, it seems that the defendant may plead non est factum when such plea is necessary to make a complete defense. *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588, 31 S. E. 921.

E. CONTRACTS WITHIN STATUTE OF FRAUDS.

See the title FRAUDS, STATUTE OF.

It is a general rule, that where one has rendered services, paid a consideration, or sold and delivered goods in execution of an oral contract, which on account of the statute of frauds can not be enforced against the other party, such one can in a court of law recover the value of the services or of the goods upon a quantum meruit or valebant. *Kimmins v. Oldham*, 27 W. Va. 259.

The general rule, however, is limited and confined to cases, in which the services rendered, the goods delivered or consideration paid inured to the benefit of the defendant; and in such cases the recovery is not upon the contract but upon the quantum meruit or valebant or upon the money counts. *Kimmins v. Oldham*, 27 W. Va. 259.

Work and Material under Contract Required by Statute of Frauds to Be in Writing.—Where a special contract can not be enforced, because it is not in writing, as required by the statute of frauds, still the plaintiff may recover from the defendant in an action of assumpsit on an implied contract for the work which was done and the material furnished under the contract. *McCrowell v. Burson*, 79 Va. 290.

Payment Promised by Third Person for Subsistence Furnished a Married Woman Whose Husband Was Living.—A plaintiff in assumpsit is entitled to recover upon a parol agreement of the defendant, that if the plaintiff would furnish and supply a certain married woman and her infant children with board, washing and lodging for a certain time, he, the defendant, would pay him for it. The plaintiff averred and proved that he furnished the board, washing and lodging accordingly. The plaintiff may recover although the woman's husband be in the commonwealth at the time, and bound to furnish her and her children necessities, and the defendant is not morally or legally bound, except by his promise. *Janier v. Harwell*, 6 Munf. 79.

Promise to Deliver Prisoner under Ca. Sa. or Pay the Debt.—A debtor is taken in custody by a ca. sa. sued out by his creditor. N. and W. promise the creditor that if he will release the debtor they will deliver him up again under the process, or will pay the debt. They fail to deliver him, and in an action of assumpsit brought by the creditor against them on this promise, he is entitled to recover the amount of the debt, the objection to the promise not being in writing, having been expressly waived. *Noyes v. Cooper*, 5 Leigh 186.

F. RECOVERY OF PENALTY.

It seems that assumpsit would lie at common law for the recovery of a penalty. *Lynch v. Merchants Nat.*

Bank, 22 W. Va. 554. See generally, the title PENALTIES.

Assumpsit will lie for the recovery of the penalty prescribed by the National Currency Act, § 5198, Rev. Stats., U. S., for exacting and receiving usurious interest on loans made by a national bank. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554.

G. BILLS, NOTES AND CHECKS.

See generally, the title BILLS, NOTES AND CHECKS.

An action of assumpsit may be maintained on a negotiable note, together with other negotiable notes by the same makers, and with the simple endorsement of the same payees jointly against the makers and endorsers. *National Exchange Bank v. McElfresh Clay Man. Co.*, 48 W. Va. 406, 37 S. E. 541.

Holder May Sue Endorser of Promissory Note, Otherwise When for Accommodation.—As a general rule indebitatus assumpsit for money lent, or for money paid and expended, or for money had and received, lies against an endorser for the holder of a promissory note, and the endorsement is prima facie evidence to support those money counts; yet if it be found by special verdict that the endorsement and the discount of it was done for the accommodation of the maker, and the defendant received no part of the proceeds, in such case the holders can not recover against the defendant on the money counts in assumpsit. *Bank of U. S. v. Jackson*, 9 Leigh 221.

By Endorsee against Endorser.—Quære; if indebitatus assumpsit lies by the endorsee against the endorser of a bill of exchange. *Wood v. Luttrell*, 1 Call 232. See the principal case cited in *Bank of U. S. v. Jackson*, 9 Leigh 227; *Billgerry v. Branch*, 19 Gratt. 398.

Presentment for Payment.—A count in a declaration in assumpsit on a promissory note, omits to state that it was presented at the bank, where it was payable, for payment. But by Code of

Virginia, 1849, ch. 144, § 1, re-enacted by § 1, ch. 99, Code of West Virginia, 1868 (§ 1, ch. 99, Code of West Virginia, 1899), it is provided, that it shall not be necessary to aver, or prove presentation for payment, at the time and place, specified in a note, in order to recover of the makers. *Bank of Wheeling v. Evans*, 9 W. Va. 373.

Must Aver Nonpayment.—In an action of debt or assumpsit upon a promissory note or bond it is indispensable to aver nonpayment, and that to every party connected with the note entitled to receive payment, whether payee, assignee, decedent, or representative, or survivors of decedents, and each one of the parties jointly entitled to receive payment. *Smoot v. McGraw*, 48 W. Va. 144, 35 S. E. 914.

Check Admissible under Money Counts—Evidence of.—In an action of assumpsit, the declaration in which contains the money counts, a check may be offered in evidence thereunder, and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts. *Blair v. Wilson*, 28 Gratt. 165.

Joint Actions.—Since the passage of the West Virginia Code, as before, a single bill under seal is not a note, but a specialty; and therefore the drawer and endorser of such single bill, though it be made payable and negotiable at a bank in the state, can not be sued jointly in debt or in assumpsit by virtue of said § 11, ch. 99, of such Code. See *Mann v. Sutton*, 4 Rand. 253. *Laidley v. Bright*, 17 W. Va. 779. See ante, "Specialties," II, D.

For while at common law assumpsit would lie against any one of the parties, as the drawer of a bill, the maker of a note, or the endorser of either, if negotiable, yet no joint action of assumpsit before this change in this statute could ever have been brought against any two of them, as a maker and endorser or two separate endorsees. *Laidley v. Bright*, 17 W. Va. 779.

The only change in the pre-existing law produced by § 11, ch. 99, West Virginia Code, is to allow a joint action of assumpsit against certain defendants, who before the passage of that section could be sued jointly in an action of debt only. *Laidley v. Bright*, 17 W. Va. 779.

H. PHYSICIANS AND SURGEONS.

Where a physician or surgeon is employed to treat a patient without any express special contract defining the character and extent of his duty and undertaking, either an action of assumpsit or case may be maintained for the breach of the implied obligation arising from such employment caused by unskillful, negligent, and improper treatment of the patient. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519. See the title PHYSICIANS AND SURGEONS.

I. INSURANCE POLICIES.

See the title INSURANCE, and references there given.

Amount of Recovery.—The plaintiff is not limited in his recovery in an action of assumpsit on a policy of fire insurance by the amount of loss specified in the proofs of loss, in the absence of fraud. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

Sufficiency of Declaration.—A declaration in assumpsit on an insurance policy, not being intended to adopt the form prescribed by ch. 66 of the acts of 1877, but that of the common law, will be held sufficient on demurrer where it in effect contains all the allegations prescribed by the statute. *Travis v. Insurance Co.*, 28 W. Va. 583.

Adjustment of Loss with Insurance Company.—Where an adjustment has been made with an insurance company of the loss caused by a fire, it is necessary for the declaration in an action of assumpsit based thereon to allege that this adjustment was made with the defendant company, and that it promised to pay the amount of the

adjustment, and a failure to make these allegations is fatal to the declaration on general demurrer. An allegation that the adjustment was made with an agent of the company is insufficient. *Quarrier v. Insurance Co.*, 10 W. Va. 507. See *Eagan v. Fire, etc., Ins. Co.*, 10 W. Va. 583.

Defense of False Representations and Promises by Assured.—To an action of assumpsit on a policy of insurance, on a stock of goods, a plea was filed that the owner of the property insured made false representations to the defendant's agent when the policy was issued, as to the value of the goods, and false promises to keep the stock up to a certain value. This plea makes no good ground for defense, as the defendant's liability varies with the value of the stock, and any objection made to it should be rejected. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

Insurable Interest.—It is well settled that a policy of insurance is a contract of indemnity and that the assured must have an interest in the property insured, and hence in an action of assumpsit brought on such a policy the declaration must allege distinctly an insurable interest, when the policy is taken out, and also when the property was destroyed and damaged by fire. It is not a sufficient allegation that the property of the plaintiff was insured by the defendant. *Quarrier v. Insurance Co.*, 10 W. Va. 507; *Sheppard v. Insurance Co.*, 21 W. Va. 368. See *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

A declaration in assumpsit on a life insurance policy which is drawn in substantial conformity with the statute (Va. Code, 1873, ch. 167, § 14), and sufficiently and accurately sets out the interest of the assured is good, and a demurrer to it was properly overruled. *Valley, etc., Life Ass'n v. Teewalt*, 79 Va. 421.

Additional Statements.—In an action of assumpsit against an insurance com-

pany to recover the amount of a policy, where the declaration is drawn in accordance with the form prescribed in § 61, ch. 125, W. Va. Code, and additional statements are filed, as required by §§ 62, 63, 65, of said chapter, such statements so filed must be regarded as informal pleadings. *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670.

III. Matters of Defense.

A. COVERTURE.

The defendant to an action of assumpsit on the common counts pleads that she was a married woman at the time of making the promises and undertakings declared on. The plaintiff's replication alleges that at the time she was living apart and separate from her husband. This is a good replication. *Peck v. Marling*, 22 W. Va. 708. See generally, the title HUSBAND AND WIFE.

If a wife living separate and apart from her husband employs an attorney to bring a suit to obtain for her a divorce, which he does and succeeds in the suit, he may sue her in assumpsit on her implied promise to pay what his services are reasonably worth, whenever her husband could not be sued by him for her services; but he can bring no suit against her on such implied promise, where he would have such action against her husband. *Peck v. Marling*, 22 W. Va. 708.

B. PLEADING.

Matters of Defeasance May Be Omitted.

—It is sufficient for the plaintiff in an action of assumpsit to state in the declaration so much of the terms beneficial to him in a contract for the breach of which he sues, and he need not state matters in defeasance of his action. But wherever circumstances existed, the omission of which will defeat the plaintiff's right of action, *prima facie* well founded, it must be a matter of defense, and should be shown by the

opposite party. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Lien of Subcontractor under Mechanic's Lien Law.—It is not essential for the subcontractor in his declaration in assumpsit against the owner under the mechanic's lien law to allege that his account was approved by the general contractor; or that he after ten days' notice failed to file objection; or that it had been ascertained to be due the subcontractor from the general contractor. Va. Code, 1873, ch. 115; Code, 1887, §§ 2479, 2480. His claims to a lien are not made to depend by the law upon the admissions of the general contractor, or his failure to dispute the account within ten days. These may be matters of defense, but they do not constitute any part of the plaintiff's case, and are not necessary to the declaration. *Norfolk, etc., R. Co. v. Howison*, 81 Va. 125.

Application for Insurance Policy—Warranty.—Where no part of an application for insurance is set out in the policy, and no reference is made in the policy to the application, or any warranty therein, it is unnecessary for the plaintiff in an action of assumpsit brought on the policy, to state such warranties; they are matters of defeasance which should more properly come from the other side. *Simmons v. Insurance Co.*, 8 W. Va. 474.

IV. Pleading.

See generally, the title PLEADING.

A. THE DECLARATION.

1. In General.

It is an elementary rule in pleading that the declaration in assumpsit must allege all the circumstances necessary for the support of the action, and contain a full, regular and methodical statement, with such precision, certainty and clearness that the defendant may be distinctly informed of the grounds of the action. All beyond this is surplusage, and where the declaration fails

to conform in its averments to this rule it will be insufficient on general demurrer. *Patton v. Elk, etc., Co.*, 13 W. Va. 259. See *White v. Romans*, 29 W. Va. 571, 3 S. E. 14.

2. Express and Implied Contracts.

While the contract sued on must be truly set out in every declaration in assumpsit, it is well understood for purposes of pleading that there is no difference between an express and an implied contract, and that in every case, where the agreement is not in writing, the same identical words of description are employed to describe an implied as well as an express promise. *Payne v. Grant*, 81 Va. 164.

3. Declaration in Representative Capacity.

Where a declaration in assumpsit was commenced in the name of the plaintiff, executor of the intestate, it being necessary to sue as executor, although it alleged that the defendant was indebted to the plaintiff and promised to pay to the plaintiff, yet, in support of the justice of the case, the declaration may be construed as in the plaintiff's character of executor. *Lawson v. Lawson*, 16 Gratt. 230. See the title EXECUTORS AND ADMINISTRATORS.

4. Promise.

In General.—In assumpsit the promise of payment on the part of the defendant is the gist of the action, and must be alleged in the declaration or it will be fatally defective on demurrer, for it would present no averment on which the defendant could take issue by the plea of nonassumpsit. *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918, citing *Wolf v. Spence*, 39 W. Va. 491, 20 S. E. 610; *Sayre v. Edwards*, 19 W. Va. 352; *Bier v. Gorrell*, 30 W. Va. 95, 3 S. E. 30; *Sexton v. Holmes*, 3 Munf. 566; *Winston v. Francisco*, 2 Wash. 187; *Chichester v. Vass*, 1 Call 83, 1 Am. Dec. 509; *Spencer v. Pilcher*, 8 Leigh 565; *Cooke v. Simms*, 2 Call 39;

Kennaird v. Jones, 9 Gratt. 183. See post, "Limitation of Actions," VII.

It is sufficient for the declaration in an action of assumpsit for damages for breach of contract to allege a distinct promise, a valuable consideration for the promise and a breach of it. *Payne v. Grant*, 81 Va. 164.

On Special Contract of Bailment.—

A general indebitatus assumpsit may be joined with a count in assumpsit upon a special contract of bailment, setting out the promise and undertaking of the defendants, the consideration on which it was founded, the breach of that promise by the defendants and their neglect and carelessness, and the loss to the plaintiff occasioned thereby. *Kennaird v. Jones*, 9 Gratt. 183.

"Agreed" and "Undertook."—"In an action in assumpsit the promise is the legal cause of action, and where a count states that the defendant agreed or undertook, these words import a promise, and the count, therefore, is in form assumpsit." *American, etc., Trust Co. v. Milstead*, 102 Va. 687, 47 S. E. 853.

"Undertook and Faithfully Promised."—Where a promissory note has been assigned, for value received, to A., who sued thereon, and obtained judgment against the maker, and subsequently assigned and transferred said judgment, for value received, to B., who sued out execution thereon, which resulted in a return of "No property found," in an action of assumpsit, brought by B. against the original payee in said note, a declaration was filed, which contains but one special count, in which the date of said assignments, judgment, and return of "No property found," are set forth, averring that said assignments were made for value received, and that the defendant had notice thereof, and concluding "By reason whereof the said defendant became and was liable to pay," etc., "and undertook and faithfully promised the plaintiff to pay him the same sum," etc., although considerable delay may

be apparent, in said recitals, before bringing suit on said note, and suing out execution thereon, it is not necessary to aver any excuse for such delay in the declaration; and such declaration is good upon general demurrer. "Here is an express promise alleged to have been made by the defendant to the plaintiff to pay said sum of money, with its interest and costs, and the promise can not be said to be without consideration, for the law presumes that the defendant received the face value of said note in consideration of its assignment." *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440.

Express and Implied Promise.—In assumpsit the gist of the action is the promise of payment on the part of the defendant, which must be clearly averred. *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918.

The action of assumpsit lies in almost every case where one receives money which in equity and good conscience belongs to another, or ought to be refunded. While it lies upon an express promise, such a promise is not necessary. It may be maintained wherever anything is received or done from the circumstances of which the law implies a promise of compensation. The implied promise creates all the privacy necessary to support the action. *Baltimore, etc., R. Co. v. Burke*, 102 Va. 643, 47 S. E. 824.

Such promise of payment may be either express or implied by law. Whether express or implied, the averment thereof may be in the same form or language. *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918.

"The promise must be so averred, though the duty or allegation arises dehors all contracts, express or implied, in fact, and so solely created by the law; for in all cases the declaration in assumpsit must show that a promise has been made by expressly averring that the defendant undertook

or promised, or by other equivalent words (see 1 Chit. Pl. 392); and no distinction in this respect exists in common-law pleading between an implied promise and an express one." *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

Must Allege Express Promise.—

Some of the early cases, held that an express promise ought to be laid in the declaration in an action of assumpsit upon a written agreement; a mere recital of the writing, though a true copy, is not sufficient. *Woody v. Flournoy*, 6 Munf. 506; *Cooke v. Simms*, 2 Call 39; *Burton v. Hansford*, note in *hæc verba* is not sufficient. *Cooke v. Simms*, 2 Call 39.

Promissory Note—Express Promise Necessary.—In an action of assumpsit brought upon a promissory note, there must be an express assumpsit laid in the declaration; merely reciting the note in *hæc verba* is not sufficient. *Cooke v. Simms*, 2 Call 39. •

If a depository receives from an agent of his principal checks drawn payable to the principal, endorsed by the agent without authority, and upon such endorsement the depository, without fraud, pays the amount thereof to the agent out of his own funds, and thereafter collects the checks from the banks on which they are drawn, no action lies by the principal against the depository for the amount of the checks. In paying the amount of the checks to the agent the depository paid his own money, and in collecting the checks of the banks he collected as and for himself. If the checks were not properly endorsed, then he did not receive the principal's money. The mere fact of being depository without receiving the money in that capacity would not create a liability. There is no promise, express or implied, on the part of the depository to pay the principal, and without such promise no action of assumpsit will

lie. *Baltimore, etc., R. Co. v. Burke*, 102 Va. 643, 47 S. E. 824.

Delay in Completion of Oil Well.—

Where a party leases a tract of land for the purpose of mining and operating for oil and gas, the lessee contracting to deliver to the credit of the lessor one-eighth of the oil produced and saved from the premises, and to pay \$200 per year for the gas from each well drilled, and the lease also contains the following provision: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of \$350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed;" held, that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate for oil and gas, and, in the absence of some other clause binding the lessee to pay for such rent or delay, an action of assumpsit could not be maintained on such lease for failing to pay such rent, or for such delay. "The agreement contains no contract or promise to pay anything whatever for the delay in the completion of a well, and yet the declaration claims that, by the terms of the contract, there is due from the defendant to the plaintiff on account of the sums to be paid quarterly in advance the sum of \$1,400." *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820.

Torts.—Tort when there is a promise to pay for the injury may be the ground of assumpsit and will support an action founded on the promise. *King v. McDaniel*, 4 Call 451. This case cites and distinguishes *Winston v. Francisco*, 2 Wash. 187, where no assumpsit was alleged, and the court held that the omission of an averment

of a promise to pay was fatal as it was the very gist of the action.

Actions against Personal Representatives.—Where an action of assumpsit is brought by a legatee against an executor for a legacy, on the executor's promise to pay it, the declaration should charge the promise of the executor in his individual, not in his representative, character, and the attachment in such case must be *de bonis propriis*. *Kayser v. Disher*, 9 Leigh 357. See the title **EXECUTORS AND ADMINISTRATORS**.

In an action of indebitatus assumpsit brought against the administratrix of the intestate upon a store account, the declaration contained two counts, one for goods sold and delivered, and the other the quantum valent, and in both instances charged the assumpsit of the testator. To this declaration the plea of nonassumpsit was filed, and on the trial of the issue upon the assumpsit of the testator the assumpsit of his executor can not be received in evidence to establish the demand. *Quarles v. Littlepage*, 2 Hen. & M. 401.

Promise of Executor Not in Writing.

—In assumpsit against an executor, in his individual character, for the price of goods sold and delivered to him for the use of his testator's widow and legatees, upon evidence being given of such sale and delivery, of a promise by the defendant to pay for the goods out of his testator's estate, and of assets sufficient for that purpose, the plaintiff may recover although the promise was not in writing. *Collins v. Row*, 10 Leigh 114.

Costs.—If the declaration lay the assumpsit to the executor, instead of the testator, and the judgment be against him, he must pay costs. *Thorn-ton v. Jett*, 1 Wash. 138.

Pleading by Way of Recital.—It has always been a general rule in pleading, that facts necessary to constitute the cause of action should be directly and

distinctly stated in the declaration, and should not be left for inference from other facts therein, and arguments, inferences and matters of law should be excluded. But a general indebitatus assumpsit count in a declaration concluding "and whereas, the defendants, afterwards, to wit; on the day and year aforesaid, in consideration of the premises respectively, then and there promised to pay the said sum of moneys respectively to the plaintiff on request. Yet they have disregarded their promises, and have not paid any of said moneys, or any part thereof, to the plaintiff's damage \$1,000, and therefore they bring suit," was held good on general demurrer. *Burton v. Hansford*, 10 W. Va. 470; *Sayre v. Edwards*, 19 W. Va. 352; *Patton v. Elk, etc., Co.*, 13 W. Va. 259; *Cook v. Sims*, 2 Call 39.

The plaintiff in assumpsit must charge the promise by the defendant positively and not by way of recital only, for if the declaration be defective in this respect it is a fatal error and can not be cured by verdict. *Sexton v. Holmes*, 3 Munf. 566, cited in *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355. See *Syme v. Griffin*, 4 Hen. & M. 277.

If in the common indebitatus count in an action of assumpsit the promise is stated after a whereas, though the promise is the very gist of the action, yet such a count so framed will be held good on demurrer. See *Burton v. Hansford*, 10 W. Va. 470. The reason of this is, because the judges of England have prescribed for such a count in an action of assumpsit, and the Virginia courts have upheld this form of pleading in assumpsit, although it is in apparent violation of the general rule of pleading that facts necessary to constitute the cause of action should be stated directly. *Sheppard v. Ins. Co.*, 21 W. Va. 368.

Warranty.—In an action of assumpsit to recover damages for defective

machinery which the plaintiff had purchased, paid for, and returned as useless, the plaintiff must charge the promise, that the machinery would perform the work for which it was intended, positively, and not by way of recital. *Wolf v. Spence*, 39 W. Va. 491, 20 S. E. 610.

Cure by Verdict.—See generally, the title AMENDMENTS, vol. 1, p. 359.

In an action of assumpsit the gist of the action is the promise to pay, and if this be not averred, the omission is not cured by verdict. *Winston v. Francisco*, 2 Wash. 187.

The declaration in assumpsit must allege a promise on the part of the defendant; for if the declaration be defective in this respect, it is a fatal error, and not cured by the verdict. *Sexton v. Holmes*, 3 Munf. 566; *Moseley v. Jones*, 5 Munf. 23.

Grounds of Demurrer.—A declaration purporting to be a declaration in trespass on the case in assumpsit, which fails to aver any promise of payment on the part of the defendant, is demurrable. *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918.

5. Consideration.

See generally, the title CONTRACTS.

In General.—The declaration in assumpsit must show a consideration for the defendant's alleged promise. And the judgment of the lower court will be reversed if the declaration is defective in this respect. *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355, citing *Moseley v. Jones*, 5 Munf. 23, rehearing 99 Va. 394, 39 S. E. 144; *Noyes v. Cooper*, 5 Leigh 186; *Jackson v. Jackson*, 10 Leigh 448; *Spencer v. Pilcher*, 8 Leigh 565; *Hall v. Smith*, 3 Munf. 550.

It is sufficient for the declaration in an action of assumpsit for damages for breach of contract, to allege a distinct promise, a valuable consideration for the promise, and a breach of it. *Payne*

v. Grant, 81 Va. 164; *Kennaird v. Jones*, 9 Gratt. 183.

Attorney and Client—Malpractice.—

Where the declaration in an action of assumpsit states that the plaintiff by the advice of the defendant, his attorney, instituted a suit against a third person, and the said attorney undertook to conduct the suit to the best of his skill, and yet mismanaged it by failing to file a declaration, etc., the want of a consideration is not material. *Stephens v. White*, 2 Wash. 203. See the title ATTORNEY AND CLIENT.

Entire Consideration.—A consideration must be set forth in a declaration in assumpsit in support of the defendant's promises sued on; it forms an essential portion of the contract, on which its validity depends. It must be truly stated, and proven as stated, or the plaintiff will fail for variance. If the entire consideration is stated, the entire consideration must be proved, or there will be a variance. *Davisson v. Ford*, 23 W. Va. 617; *Beverleys v. Holmes*, 4 Munf. 95.

Special Assumpsit.—In an action of assumpsit founded on special contracts to recover damages for the failure and refusal to perform the same, generally the entire consideration must be stated, and the entire act to be done in virtue of such consideration; and generally in actions on special contracts, if any part of the contracts vary materially from that which is stated in the declaration it will be fatal, as a contract is an entirety. In cases of such material variance, on motion of the defendant's counsel, the evidence of the plaintiff should be excluded from the jury, but the variance must be manifest. *James v. Adams*, 16 W. Va. 245. See *James v. Adams*, 8 W. Va. 568.

Promissory Note — Consideration Must Be Stated and Proved—Common-Law Rule.—

At common law the plaintiff in an action on a promissory note must declare upon the contract, as in assumpsit, stating and proving the real

consideration at large. The note, though it could not be declared on, might be given in evidence in support of the contract stated, as in a count for money lent. *Peasley v. Boatwright*, 2 Leigh 198. See ante, "Bills, Notes and Checks," II, G.

No Averment of Consideration.—But a judgment of the lower court holding that the action of assumpsit can be maintained in Virginia on a promissory note, without averring a consideration in the declaration, was affirmed by a divided court in *Jackson v. Jackson*, 10 Leigh 448.

Bill of Exchange.—In an action of assumpsit brought upon a paper, purporting to be a bill of exchange, but which is not a bill of exchange, and which does not import a valuable consideration, nor a promise by the drawer to the payee to pay, if the money is not paid by the drawee, the court instructed the jury that they might infer a consideration moving from the plaintiff to the defendant. The court erred and the judgment will be reversed, as the jury could only regard it as their duty to make the inference, and hence peremptory upon them, regardless of the weight of evidence. *Averett v. Booker*, 15 Gratt. 163.

Mutual Promises.—A declaration in assumpsit based on mutual promises, which fails to allege the promises made by the plaintiff and that the defendant "in connection of such promises" undertook and promised to do the things alleged, is demurrable. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

"But it does not allege that the defendant in order to settle the intended suit and avoid litigation, made the proposition, nor the plaintiff accepted the proposition offered in full satisfaction of his said claim for damages and released the said defendant from liability therefor in pursuance of such compromise and adjustment. The declaration fails to allege any consideration

for the promises alleged to be made by the defendant; it is nowhere alleged that in consideration of alleged promises made or things done or to be done by plaintiff the defendant promised and undertook as in the declaration it is alleged. 1 Chit. Pl. (16th Ed.) 305." *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

Sufficiency of Consideration.

In General.—Trouble of the party to whom the promise is made and benefit to the party making it is sufficient consideration to support an assumpsit. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

For a full discussion, see the title CONTRACTS.

A, executor of B, writes to C, a creditor of B, that as soon as he is able to dispose of his crops, he will pay the claim, or will let him have any property in his possession at a moderate valuation. This will not bind A in his own right, without an averment of assets, or a forbearance to sue, or some other consideration sufficient to support an action of assumpsit. *Taliaferro v. Robb*, 2 Call 258.

Relinquishment of Right of Administration as per Agreement.—A declaration in assumpsit stated that the plaintiff, being a creditor of a deceased person, had moved the proper court to grant him administration of his estate, and the defendant, alleging that he was a creditor also, assured him that if he would withdraw his said motion, and suffer the defendant to have the administration, he (the defendant) would pay his debt out of the first money that should come to his hands as administrator. It also stated that the plaintiff then agreed to relinquish his right as administrator, and the defendant then and there administered upon the estate, but it did not aver that the plaintiff relinquished his pretension to the administration, in conformity with the said agreement; so that, if a recovery were had upon

this declaration, it might be, for aught averred therein, wholly without consideration. Such a declaration is altogether defective and can not be aided by verdict. *Daniel v. Morton*, 4 Munf. 120.

An unexecuted promise to make a gift is sufficient consideration to support the promise. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

Compromise of Claim for Personal Injuries.—A declaration in assumpsit based on a claim of plaintiff against a railroad company for personal injuries, which plaintiff claims was compromised by defendant agreeing to give plaintiff employment at a stipulated per diem as track walker, as long as defendant kept a track walker on the section designated, and from which service he was wrongfully discharged, which fails to allege a complete accord and satisfaction, is bad on demurrer. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147. See the title RELEASE.

Assignment of Bond without Consideration as Collateral Security.—A bond is assigned without consideration, and the assignee transfers it to H. as collateral security for goods purchased on credit, with the understanding that if the assignor does not acknowledge his liability on said bond, H. may return it and look out for other security. The assignor assures H. in writing that he was aware of nothing that would affect his liability on the bond. When the time for the payment of the goods arrived the obligor in the bond was insolvent. This was held not to be a sufficient consideration to support an action of assumpsit by H. against the assignor. *Hopkins v. Richardson*, 9 Gratt. 485.

Promise in Writing to Pay Debt of Another.—A special count containing a promise of one party to pay the indebtedness of another, which is in writing, must set forth the considera-

tion in declaring upon it, as such a promise in order to be binding must be founded upon a consideration. *Winkler v. C. & O. R. Co.*, 12 W. Va. 699.

Special Count Alleging Usurpation of Office.—A declaration in assumpsit contains the common counts, and also a special count reciting the election of the plaintiff as county clerk, and that the defendant wrongfully and illegally intruded into the office, and received and collected certain fees to which the plaintiff was entitled. This discloses a consideration which supports the promise alleged to have been made by the defendant to pay the sum of money demanded in the declaration. *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584.

Agreement to Pay Money in Discharge of Bona Fide Claim.—In a dispute between parties over a bona fide claim by one against the other, and there is in law some foundation for the claim, the one claimed to be subject to a liability agrees to pay a sum of money, or to do anything else, and such promise is based on a sufficient consideration and may be enforced in an action of assumpsit. *Davisson v. Ford*, 23 W. Va. 617.

Promise to Indemnify.—See the title INDEMNITY.

The plaintiff in a declaration in assumpsit made as agent a lease of lands seized in tail to D, who assigned to S, and bound himself with D in a bond to S to obtain a confirmation of the lease from the defendant, the issue in tail. The defendant promised to make the lease, and for years received rent from S, and then turned him out of possession. S then recovered damages from B on his bond. On suit by D against the plaintiff the same damages were recovered from him; pending this suit the defendant promised to indemnify D and the plaintiff against the suit of S. The consideration stated in this declaration is sufficient to main-

tain the action against the defendant for breach of promise to indemnify. *Field v. Spotswood*, 1 Wash. 280. See *Harris v. Harris*, 2 Rand. 431.

Agreement Indemnifying Constable from Removal of Property.—When three persons enter into a written agreement to indemnify a constable "agreeably to law" from any loss by removing property under an execution from premises of landlord, the latter claiming it liable for rent, and this agreement is delivered to the officer on the day and at the place of sale, and the three signers acknowledge it as their act, this is a joint assumpsit to indemnify the officer, and the sale of it by him is a consideration to support the assumpsit as to all of them. *Crawford v. Jarrett*, 2 Leigh 630.

A mill was devised to B on condition that he should pay to C \$250. B accepted the devise provided C would indemnify him from any loss that might be caused by overflow to the mill due to the erection of a dam below it. In an action of assumpsit by B against C, the declaration setting out this contract shows sufficient consideration to support the promise of indemnity, and it is not necessary to allege in the declaration notice to the defendant of injury resulting from the erection of the dam. *Chapman v. Ross*, 12 Leigh 565.

Promise to Indemnify Auctioneer if He Will Not Make a Resale.—The plaintiff in an action of assumpsit was employed by A and B to sell land at public auction, and sold it to C as the highest bidder. A, considering the sale inferior, directs the plaintiff to sell it again. B promises to indemnify the plaintiff if he will not resell it, to which he agrees. He is then sued by A and B and damages are recovered against him. The consideration of the promise made by B is both legal and sufficient to support an action against him upon his promise of indemnity. *Carr v. Gooch*, 1 Wash. 260.

Promise to Waive Discharge in Bankruptcy, and Reassume Old Debt.—A verbal promise to pay a debt will be sufficient to bind one discharged in bankruptcy, if the promisor intended deliberately to waive the protection of his discharge and to rebind himself legally to pay the old debt. The action of assumpsit will lie on this verbal promise. *Horner v. Speed*, 2 Pat. & H. 616.

Agreement of Appellee to Pay Costs, etc., if Appeal Is Dismissed.—If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed, the appellant will pay him the full amount of the debt, damages and costs then due upon the appeal, and the appellee consents thereto and the appeal is dismissed as agreed, the consideration of the assumpsit is sufficient and the appellee may maintain assumpsit on this promise. *Spotswood v. Pendleton*, 2 Call 209.

Grounds for Arrest of Judgment.—In an action of assumpsit, if no consideration for the promise be laid in the declaration, judgment ought to be arrested, notwithstanding it be founded on a written agreement. *Moseley v. Jones*, 5 Munf. 23.

Thus in an action of assumpsit against the assignor of a bond a consideration for the assignment should be set forth in the declaration, and if it be omitted judgment may be arrested. *Hall v. Smith*, 3 Munf. 550.

Effect of § 3246, Va. Code.—Where a declaration in assumpsit is defective for not alleging a consideration for the defendant's promise, the defect can be taken advantage of notwithstanding § 3246, Va. Code, provides that no action shall abate for want of form where the declaration sets forth sufficient matter of substance for the court to proceed upon the merit of the case. The rule is where there has been a demurrer to any pleading, and the same has been overruled, the statute cures no defect, imperfection or omission

therein, except such as could not be regarded on demurrer. *Southern R. Co. v. Willcox*, 98 Va. 222, 35 S. E. 355, rehearing 99 Va. 394, 39 S. E. 144.

6. Performance of Conditions Precedent.

See generally, the title CONDITIONS.

At common law, he who would recover against another, was obliged to show the cause of action explicitly in his declaration; in order that the defendant might know how to defend the suit, and plead the judgment in bar to another action for the same thing. Regularly, there must be an affirmative and a negative to make an issue; and a party is not bound to prove what he does not aver, as it is not included in the issue. The plaintiff, therefore, must aver all material facts, in order that the jury may inquire into them. A condition precedent must be averred in order that the court may decide whether the cause of action has accrued. *Chichester v. Vass*, 1 Call 101.

In an action of assumpsit, the condition precedent upon which the right to recover is predicated, must be alleged with certainty and clearness. *Sayre v. Edwards*, 19 W. Va. 352.

Readiness and Willingness.—Where a contract was to be performed on a certain day and at a certain place, if the plaintiff in his declaration in assumpsit alleges in a special count that the defendant was not at the place of performance, but was out of the state on the day specified, it will be a sufficient allegation on his part to declare that he was ready and willing to perform his contract, and on demurrer to the count will be good. *Kern v. Zeigler*, 13 W. Va. 707.

Delivery of Barrels under Agreement.—Where an action of assumpsit was brought upon an agreement for the delivery of a quantity of flour barrels at the defendant's shop at certain times, with a stipulation that if the

plaintiff was not ready to receive them, the same should be counted in the presence of a third party and be thereafter the property, and at the risk of the plaintiff, it was a sufficient plea in bar that the defendant was ready at the appointed times to deliver the barrels to the plaintiff, who was not then ready to receive them, and that the defendant according to the agreement counted the barrels, and at the time stipulated had them ready to be delivered to the plaintiff, and then and there required the plaintiff to receive the same, which he entirely neglected to do. *Jones v. Stevenson*, 5 Munf. 1.

But where a condition precedent must be performed before liability will attach under a contract, in an action of assumpsit on this contract, it is sufficient for the declaration to contain a general allegation that the plaintiff has performed the condition precedent according to its true intent and meaning, and it is not sufficient to allege only that the plaintiff was ready and willing to perform his part of the contract. *Kern v. Zeigler*, 13 W. Va. 707.

Excuse for Nonperformance.—Where an action of assumpsit is brought on an entire contract under seal, in which the covenants are dependent and the pleader sets forth the contract in a special count, it is not sufficient for the plaintiff to aver his readiness and willingness to perform the condition precedent contained in the contract, but he must go further and show a sufficient excuse for his nonperformance. *Jones v. Singer Mfg. Co.*, 38 W. Va. 147, 18 S. E. 478.

Dismissal of Suit.—The father of a surety agreed with the creditor, who was suing the principal debtor, that if he would dismiss his suit against the latter at his own costs, he (the father) would pay the debt with interest. The creditor dismissed the suit generally. It was held, in an action of assumpsit

by the creditor against the father on his conditional promise to pay the debt, that the plaintiff was bound to perform the condition strictly in order to enforce the promise, and that he can not recover, having dismissed the prior suit generally instead of at his own costs. *Couch v. Hooper*, 2 Leigh 557.

And though the father subsequently approved the general dismissal of the suit, the plaintiff not having averred this subsequent ratification in his declaration, that fact can not avail him. *Couch v. Hooper*, 2 Leigh 557.

Time of Presentment.—Where a bill is made payable at a bank, at which there is a special established usage that bills payable there should be presented on the fourth and not on the third day of grace, this special usage must be alleged by a special count in the declaration in an action of assumpsit upon such bill, otherwise proof of presentation on the fourth day of grace will not be permitted. *Jackson v. Henderson*, 3 Leigh 196.

Time of Completing Contract.—Where in a declaration in an action of assumpsit by a contractor against a county for the price contracted for building a jail, the contract as set out in a special count fixes a time within which the jail is to be completed, but there is no averment that it was completed within that time, the count was held to be defective. *Carroll County v. Collier*, 22 Gratt. 302.

Nonpayment of Damages.—In the declaration in an action of assumpsit based on a promise not to pay money but to perform some act, it is neither necessary nor proper to allege the nonpayment of the damages, for the object of the suit is to recover these damages, when they shall have been ascertained by a jury. *Davisson v. Ford*, 23 W. Va. 617.

Construction of Averment of Shipment of Goods as per Agreement.—The averment in each of the counts

in a declaration in assumpsit brought for the recovery of damages under a contract to carry goods, that they were delivered for shipment as they had agreed to furnish them, must be construed as averring that the goods were furnished within a reasonable time after the making of the contract. *Southern Railway Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144, 7 Va. Law Reg. 381.

Production of Officer's Certificate.—Where the declaration in assumpsit in a policy of insurance states as a condition precedent that the assured should produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, etc., fair pleading requires that the kind of officer should be stated in the declaration, so that the court may determine whether it was the proper officer. The production of the certificate of the proper officer is a condition precedent and must be complied with, unless waived by the defendant. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Insurance—Proofs of Loss.—A policy of insurance requires that after a loss, payment will be made sixty days after proof and notice are given the company in a certain manner. In an action of assumpsit brought on this policy it is necessary for the declaration to allege in this manner, and that proof and notice were given in accordance with the directions of the policy. Failure to make these allegations is fatal on general demurrer to the declaration. *Quarrier v. Insurance Co.*, 10 W. Va. 507.

Conditions Waived.—If the plaintiff in his declaration in assumpsit on an insurance policy, allege that he has on his part performed all the conditions of the policy, and has violated none of its provisions, he must be regarded as meaning such as have not been waived. Such as have been waived are in effect as if they had never been inserted in the contract. *Levy v.*

Ins. Co., 10 W. Va. 560. See *Ins. Co. v. Sheets*, 26 Gratt. 858; *Eagan v. Aetna Fire, etc., Ins. Co.*, 10 W. Va. 583.

Cure by Verdict.—The failure to allege the performance of a condition precedent in a declaration, will be cured by the verdict. *Bailey v. Clay*, 4 Rand. 346. See generally, the title AMENDMENTS, vol. 1, p. 359.

7. Notice and Demand.

See the title ACTIONS, vol. 1, p. 132.

In General.—It is true as a general rule, in an action of assumpsit, that a party, unless he has stipulated for it, is not entitled to notice before he can be held liable. But to this general rule there is an exception. When the obligation to perform a promise is dependent on something else to be done, and when from the nature of the case the knowledge of whether this preliminary act has been done lies peculiarly within the knowledge of the plaintiff and could not reasonably be expected to be known to the defendant, unless the information was given him by the plaintiff, then such information must be given to the defendant before he can be held bound to the performance of his promise; and therefore in such case notice must be alleged in the declaration. *James v. Adams*, 16 W. Va. 245, citing *Austin v. Richardson*, 3 Call 201; *Lamb v. Harrison*, 2 Leigh 525; *Pasteur v. Parker*, 3 Rand 458.

In an action of assumpsit on a special contract to recover damages for failure to accept and pay for property agreed to be purchased by a special contract, if the contract was for the sale of such of the goods as might be in the store at a future day named, and by the contract the plaintiff agreed to run down the stock of goods as much as possible by the future day named for their delivery by making sales of said goods, it is not only necessary to allege in the declaration that this obligation of the plaintiff had

been fulfilled, but also that the defendant had notice thereof. Such notice is sufficiently proven by showing the defendant's knowledge of its fulfillment, and an express notice thereof need not be proven. *James v. Adams*, 16 W. Va. 245, citing *Austin v. Richardson*, 3 Call 201; *Lamb v. Harrison*, 2 Leigh 525; *Pasteur v. Parker*, 3 Rand. 458.

Not Necessary When Defendant Undertakes to See Money Paid to Plaintiff.—When the defendant undertakes to see money paid to the plaintiff, it is his business to look to the performance himself, without any notice from the plaintiff, and in an action of assumpsit it is not necessary for the declaration to contain an averment of notice and request by the plaintiff. *Austin v. Richardson*, 3 Call 202.

"Under chapter 66 of (West Virginia) acts of 1877 these statements, whether filed by the plaintiff or by the defendant, are not in the nature of pleadings, but are in the nature of notices to the adverse party of the nature of the claim or defense intended to be set up against him. They resemble closely the bill of particulars, which under the provisions of the Code of West Virginia are required to be filed in actions of assumpsit with the declaration or with the pleas of payment or set-off, or the bill of particulars, which under the Code of West Virginia the court may require to be filed in any sort of action." *Capeller v. Queen Ins. Co.*, 21 W. Va. 577. See the title BILL OF PARTICULARS.

By Creditor on Debtor Unnecessary.—A demand on a person for whose benefit a promise is made is not necessary to be laid in the declaration, as he is the debtor, and must seek his creditor and pay him. *Pasteur v. Parker*, 3 Rand. 458.

Demand against Sheriff.—Indebitatus assumpsit will lie against a sheriff for money received by him, or his deputy, under an execution; but the declara-

tion ought to be so far special, as to distinguish the demand from one against him in his private capacity. *Overton v. Hudson*, 2 Wash. 172.

Cure by Verdict.—See the title AMENDMENTS, vol. 1, p. 359.

On Collateral Promise.—In a declaration in assumpsit on a collateral promise, the plaintiff should aver notice to the grantor, of the performance of the act contemplated by the promise, and perhaps of the failure to pay by the person in whose favor the undertaking was made. The omission of these averments will be cured by the statute of jeofails after verdict. *Pasteur v. Parker*, 3 Rand. 458.

8. Breach.

The declaration in an action of assumpsit for breach of contract, must allege a breach of it. *Payne v. Grant*, 81 Va. 164; *Kennaird v. Jones*, 9 Gratt. 183.

Several Counts—How Breach Should Be Charged.—In an action of assumpsit, if there be several counts in the declaration, the defendant should be charged, as having failed to pay the several sums of money aforesaid, and every part thereof; if this be not done, but the breach charged at the end of the last count be that he hath not paid "the said sum of money," and it appear upon a demurrer to the evidence, that the evidence adduced by the plaintiff applies to the first count, judgment ought to be given for the defendant. *Ellis v. Turner*, 5 Munf. 195.

Agreement for Sale of Land.—In an action of assumpsit upon a written agreement for the sale of a tract of land, which sets forth the agreement of the vendor to give to the vendee possession and a conveyance free of encumbrances by a certain day, for which the vendee agreed to pay to the vendor a part of the purchase money on that day, and secure the balance by deed of trust or such security as might be required, and the conveyance was not

to be executed until the payment was made and the security given; the declaration in this action sufficiently charged a breach by stating that the plaintiff was on that day in lawful and peaceful possession of the land, and ready to give the defendant possession with a proper conveyance free from encumbrances, but that the defendant failed to make the payment and give the security. *Moss v. Stipp*, 3 Munf. 159.

9. Affidavit with Declaration.

See post, "Affidavit," IV, D.

10. Amendments.

See the title AMENDMENTS, vol. 1, p. 316.

Of Declaration on Policy of Insurance.—In an action of assumpsit on a policy of insurance for loss by fire, claiming a certain sum as damages or for loss of certain property, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy, by the same fire. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

By Consent after Issue Joined—No Plea in Abatement.—If the plaintiff be permitted to amend his declaration in assumpsit by consent of parties after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration. *Moss v. Stipp*, 3 Munf. 159. See *Payne v. Grim*, 2 Munf. 297; *Bradley v. Welch*, 1 Munf. 284. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Pleading to Amended Declaration.—The defendant pleads the general issue to a declaration in assumpsit, and the plaintiff under leave to amend files a new declaration as a substitute. The defendant does not plead again, and the jury is sworn to try the issue, which results in a verdict for the plaintiff. As the plea to the first declaration

was applicable to the new declaration, and was not withdrawn, it must be understood that the defendant rested his defense on the same plea, and the verdict is good. *Power v. Ivie*, 7 Leigh 147.

Replication to Amended Declaration.—The plaintiff in an action of assumpsit, files by leave of court an amended declaration to which the defendant at once files his plea. The plaintiff is entitled of right to a rule to reply and it is an error for the court to refuse him a continuance and put him to a nonsuit. By § 4, ch. 171, W. Va. Code, 1860, a month is given to parties to a suit to declare, plead, etc., and it is immaterial whether the case be at rules or in term. *Bank v. Matthews*, 3 W. Va. 26.

11. Surplusage.

See the title PLEADING.

In General.—Any allegations in a declaration which are surplusage, do not vitiate the count, and may be rejected. *Patton v. Elk, etc., Co.*, 13 W. Va. 259.

Joint Plaintiffs—Description as Partners.—In an action of assumpsit, where the plaintiffs are described as partners, but have a joint right of action, the description of them as partners, may be regarded as surplusage. *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

Allegation of Suretyship.—When there are two signatures to an obligation to pay money, and it is expressed that one signs as surety, the word "surety" being annexed to his signature, both are jointly bound, and a declaration in assumpsit against both need not notice the suretyship, because it is immaterial. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

12. Demurrer.

See generally, the title DEMURRERS.

To Whole Declaration When One Count Is Good.—Where a general demurrer is filed to the whole declaration

in an action of assumpsit, if any one of the several counts therein be good, or if one of several divisible matters in a single count be good, the general and familiar rule is that the demurrer must be overruled. *Wright v. Smith*, 81 Va. 777. See also, *Power v. Ivie*, 7 Leigh 147; *Hollingsworth v. Milton*, 8 Leigh 50; *Henderson v. Stringer*, 6 Gratt. 130; *Ferrill v. Brewis*, 25 Gratt. 766; *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225; *Nutter v. Sydenstricker*, 11 W. Va. 535; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

A general demurrer to the entire declaration, if any of the counts be good, must be overruled, unless it be found united with some other which can not properly be joined with it. *Kennaird v. Jones*, 9 Gratt. 183, citing *Roe v. Crutchfield*, 1 Hen. & M. 361; *Henderson v. Stringer*, 6 Gratt. 130.

A declaration in assumpsit contains three counts, two of which are clearly in assumpsit; the third count is demurred to on the ground that the matter set forth therein is a tort, for which the action of assumpsit is not the proper remedy, but if sufficient matter is stated therein to maintain the action of assumpsit, the demurrer will be overruled. *Hopess v. Straw*, 10 Leigh 348.

Insufficient Allegation.—In an action of assumpsit on a promissory note, the count alleges by the defendants, the makers, "a promise to pay the further sum of \$6,000 (meaning and intending thereby \$4,000), whereby the makers became liable to pay \$4,000." This count was held bad on general demurrer. *Bank of Wheeling v. Evans*, 9 W. Va. 373.

Duplicity—Exceptions and Objections.—Upon a demurrer to a count of a declaration in an action of assumpsit on the ground of duplicity, the demurrer is sustained, and thus the plaintiff, with the leave of the court amends the count. He can not object in an appellate court that the court below

erred in sustaining the demurrer. *Hopkins v. Richardson*, 9 Gratt. 485.

B. THE PLEA.

1. The General Issue.

In assumpsit the general issue is non-assumpsit. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *State v. Harmon*, 15 W. Va. 115.

The general issue nonassumpsit is a denial, for that covers the whole declaration, and puts the plaintiff to the proof of every material fact. *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996.

2. Matter Provable under General Issue and Special Pleas.

Under the plea of nonassumpsit in all actions of assumpsit, whether founded on an implied or express promise, any defense whatever which tends to deny the liability of the defendant may be admitted in evidence. The statute of limitations, bankruptcy and tender are believed to be the only defenses which may not be proved under this plea, and they are excepted because they do not contest that the debt is owed, but insist only that no action can be maintained for it. 4 Min. Inst. (3d Ed.) 770; Va., etc., Ins. Co. v. Buck, 88 Va. 517, 13 S. E. 973; *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996. And by § 3298 of the Code of Virginia it is provided that: "In a suit for any debt the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." See also, § 4, ch. 126, W. Va. Code; *Smith v. Townsend*, 21 W. Va. 486.

Denial of Cause of Action.—Under the plea of nonassumpsit the defendants may give in evidence that the plaintiff never had any cause of action against them. *Bank v. Lockwood*, 13 W. Va. 392, citing *Merchants', etc., Bank v. Evans*, 9 W. Va. 373; *Van-*

Winkle v. Blackford, 28 W. Va. 671; S. C., 33 W. Va. 573, 11 S. E. 26.

"The authorities are agreed, that if the special plea is simply a denial, that the plaintiff ever had any cause of action, such defense should be made under the general issue of nonassumpsit, and if the filing of such special plea is objected to by the plaintiff, the court ought not to allow it to be filed (*Merchants', etc., Bank v. Evans*, 9 W. Va. 373, pt. 4, of syll., and 382; *Hale v. West Virginia Oil and Oil Land Co.*, 11 W. Va. 229 and 236, pt. 2, of syll.; *First Nat. Bank v. Kimberlands*, 16 W. Va. 595-6)." *VanWinkle v. Blackford*, 28 W. Va. 682.

Failure of consideration may be shown under the plea of nonassumpsit. *Sterling Organ Co. v. House*, 25 W. Va. 64.

Necessity of Affidavit.—In an action of assumpsit the defense of failure of consideration was set up under the general issue. It was claimed that this could only be done by special plea under § 3299, Va. Code, verified by affidavit, and in this case the requirements of the statute had not been conformed to, nor was it verified by affidavit. Prior to the enactment of this section in 1831, according to the practice at common law, it was competent to prove under the plea of nonassumpsit, failure of consideration, or anything which proved that no existing debt was due, with a few exceptions. (*Columbia Accident Ass'n v. Rockey*, 93 Va. 684, 25 S. E. 1009. The object of this statute was to enlarge the right of defense existing at common law by enabling defendants to make such defenses to sealed instruments, and also to recover against the plaintiff any excess of damages he might have sustained, in order to settle all the rights of the parties under the contract in one suit. It does not impair any previous right, nor take away the right of any defense which the law had previously permitted to

be made. *Columbia Accident Ass'n v. Rocky*, 93 Va. 678, 25 S. E. 1009. The contrary view is maintained in 1 *Barton's Law Pr.* (2d Ed.) 491; 4 *Min. Inst.* (3d Ed.) 770, 798, and in *Keckley v. Union Bank*, 79 Va. 458, where it was suggested that failure of consideration could not be proved under the general issue, but had to be filed as a special plea under § 3299, and verified by affidavit.

Accord and Satisfaction.—The defense of accord and satisfaction may be given in evidence under the plea of nonassumpsit, and it is not necessary that such a defense shall be pleaded specially. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Bantz v. Basnett*, 12 W. Va. 772. See the title ACCORD AND SATISFACTION, vol. 1, p. 81.

Usury.—Under nonassumpsit usury may be given in evidence. *Merchants', etc.*, *Bank v. Evans*, 9 W. Va. 373. See the title USURY.

Defense of No Complete Contract.—An action of assumpsit having been brought on an agreement by the administrator of *Mrs. M.*, and judgment recovered against *S. M.* for the purchase money agreed to be paid by him for her dower right, the said judgment is conclusive, and *S. M.* can not resort to a court of equity to set up the defense that there never was a completed contract between the parties; which defense he could have set up at law under the general issue. *Mackey v. Mackey*, 29 Gratt. 158.

Illegality of consideration may be shown under the general issue in assumpsit on a simple contract. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144, citing *Virginia F. & M. Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973. See the title ILLEGAL CONTRACTS.

ChamPERTY and Maintenance.—In an action of assumpsit on a contract to recover for professional services as attorney and solicitors for the defendant,

the defense of champerty and maintenance may be set up under the general issue. *Major v. Gibson*, 1 Pat. & H. 48. See the title CHAMPERTY AND MAINTENANCE.

Alteration of Instruments.—Such a material alteration of an instrument as has the effect of rendering the instrument void may be shown under the plea of nonassumpsit. *Bank v. Lockwood*, 13 W. Va. 392.

Under the plea of nonassumpsit, it may be given in evidence that the notes on which the recovery is sought, were altered without the knowledge or consent of the defendants, because these matters pleaded are a good defense in bar, it showing that the plaintiff had no cause of action; therefore, such matters were properly admissible as evidence under the plea of nonassumpsit. *Bank v. Lockwood*, 13 W. Va. 392.

Fraud.—"When fraud is intended to be set up as a defense, it may be given in evidence under the general issue in assumpsit." *Dillon Beebe's Son v. Eakle*, 43 W. Va. 502, 27 S. E. 214. See the title FRAUD AND DECEIT.

Fraud in Submission to Arbitration.—Under the general issue joined in an action of assumpsit, brought upon an award founded on parol submission, it is competent to prove at the trial that the submission of the defendant to the arbitration was procured by fraud. *Bierly v. Williams*, 5 Leigh 700.

Robbery.—In an action of assumpsit to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safekeeping in bank, under the plea of nonassumpsit the defendant was allowed to prove that he had been robbed. *Danville Bank v. Waddill*, 31 Gratt. 469.

Action against Corporation—Bill of Exchange Drawn by It Admissible.—In an action of assumpsit against a private corporation it is proper to receive in evidence, on the trial of the issue of nonassumpsit, the bill of ex-

change drawn by the defendant on its agent, in favor of the plaintiff, and particularly described in the bill of particulars filed with the declaration, which contains the common money counts. They are clear admissions by the defendant of the justice of the plaintiff's demand, and were made by the defendant in the most solemn manner. To reject them would be obvious error. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

Recoupment.—The defense of recoupment may be claimed on the trial of the general issue of nonassumpsit, provided he files with his plea of nonassumpsit a notice, that on the trial of the case he would claim to have damages recouped. *Sterling Organ Co. v. House*, 25 W. Va. 64. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

The defense of recoupment should never be set up by a plea. If the defense struck directly at the whole cause of action, it might be made under the plea of nonassumpsit. If it were a partial defense, it could not be introduced by plea, and as it can not be introduced by plea at common law, therefore it may be introduced under the plea of the general issue of nonassumpsit. *Sterling Organ Co. v. House*, 25 W. Va. 87.

Special Pleas.

Statute of Limitations and Bankruptcy.—"In actions of assumpsit, the defendant may give in evidence, under the general issue, anything going to show illegality in the contract at common law, as opposed to public policy; or that the contract has been declared void by the statute; or declared to be illegal by statute; or the incapacity of the party to contract, as duress, coverture, etc.; or that the plaintiff never had any cause of action, or a discharge by the act of the parties, as payment, release, or discharge by a new contract—yet matters in discharge, which not controverting the consideration of the

contract, and not objecting to it on account of any of the above recited defenses, or defenses founded on similar grounds, but which go to deny the remedy only, must always be specifically pleaded—such as the statute of limitations, bankruptcy, etc. And it is by virtue of this rule that the defendant in an action of assumpsit is held bound to plead the statute of limitations if he means to rely on it. For although the statute of limitations declares, substantially, that no action, after five years from the time the cause of action arose, shall be brought, yet if an action is brought, the defense is waived by not pleading the act. The statute of limitations, bankruptcy, and this statute we are considering, being enacted from considerations of policy for the protection of defendants, and for their benefit, if they mean to claim the benefit of the statute, they must plead it; and as they may waive the benefit of it, they are considered as having done so, when they fail to plead it. None of these defenses go to the consideration of the contract; to the incapacity of the parties to contract, or to matters of discharge by the act of the parties; but all go in denial of the remedy to recover on the contract, admitting the consideration to be legal, etc. It appears, therefore, manifest, that if the defendant meant to claim the benefit of the statute, he ought to have plead it." *Major v. Gibson*, 1 Pat. & H. 76.

Discharge in bankruptcy must be specially pleaded. *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 998; *Virginia Fire, etc., Co. v. Buck*, 88 Va. 517, 13 S. E. 973.

Payment and Set-off.—It seems that payment and set-off can not be pleaded under nonassumpsit. *Black v. Thomas*, 21 W. Va. 709. See the titles PAYMENT; SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Evidence of Source of Funds Admissible.—In an action of assumpsit for

various sums of money lent to or paid for the defendant's intestate, though payments or set-offs can not be proved without an account of such payments or set-offs filed, yet defendant under the general issue may prove that the money sued for or any part of it was not lent to or advanced for the intestate, but was paid out of money of the intestate in the hands of the plaintiff. *Johnson v. Jennings*, 10 Gratt. 1.

Payment.—In an action of assumpsit payment after the action is brought must be specially pleaded. *Shanklin v. Crisamore*, 4 W. Va. 134.

Payment before Action Is Brought.—The common-law rule provides in West Virginia that in an action of assumpsit payment before the action is brought need not be specially pleaded. *Shanklin v. Crisamore*, 4 W. Va. 134.

Specific or Partial Payment before Suit.—The common-law rule prevails in West Virginia that in an action of assumpsit payment before the action is brought may be given in evidence under the general issue. A general payment before the suit is brought may be proved without a bill of particulars, but no specific or partial payment before suit is brought can be proved unless its nature and the several items thereof are filed with the plea. *Shanklin v. Crisamore*, 4 W. Va. 134.

In *Johnson v. Jennings*, 10 Gratt. 1, it was held, in construing § 3298, Va Code, 1887, enacting that, "In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise," that in the absence of such an account as contemplated by the statute, under the plea of nonassumpsit evidence will not be admitted to prove specific payment. Approved in *Rich., etc., Ry. Co. v. Johnson*, 90 Va. 777, 20 S. E. 148.

Must Conclude to the Country.—The

general plea of payment in an action of assumpsit denying the necessary general allegation of nonpayment must in every case conclude to the country. *Douglass v. Central Land Co.*, 12 W. Va. 502.

Award Pending Suit Inadmissible.—An award made pendente lite can not be given in evidence upon the plea of nonassumpsit. *Harrison v. Brock*, 1 Munf. 22.

Existence of Corporation Must Be Proved.—In Virginia and West Virginia on an issue joined on a plea of nonassumpsit in an action of assumpsit against a private corporation, it is necessary to prove the existence of such corporation. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526, citing *Grays v. T. P. Co.*, 4 Rand. 578; *Rees v. Conococheague Bank*, 5 Rand. 329; *Taylor v. Bank of Alex.*, 5 Leigh 475; *Jackson v. Bank of Marietta*, 9 Leigh 244; *Hart v. B. & O. R. Co.*, 6 W. Va. 336.

In an action of assumpsit the writ and declaration is in the name of a plaintiff which indicates that said plaintiff is a corporation, but it is not stated to be a corporation. The defendant pleads nonassumpsit, but does not file an affidavit that the plaintiff is not a corporation. Under the statute it is not necessary that the plaintiff should prove it is a corporation. Va. Code, 1873, ch. 167, § 40, p. 1094. *Gillett v. American Stove, etc., Co.*, 29 Gratt. 565.

Harmless Error.—Where the evidence to sustain a special plea, the issue upon which has not been properly made up, was admissible under the general issue which had been pleaded, in an action of assumpsit a judgment on a verdict will not be reversed for such irregularity, because such error could not in any manner prejudice the defendant, as no evidence could have been received under such special plea, except such as could have been received under the plea of nonassumpsit. *Doug-*

lass *v. Central Land Co.*, 12 W. Va. 502.

3. Plea of Nil Debet.

Where a plea of nil debet was filed in an action of assumpsit, this plea might have been demurred to. But where the plaintiff did not do so, but chose to join issue upon it, after the rendition of a verdict, the appellate court will regard the issue as tried precisely as if the proper general issue rather than the improper one had been made up, and the case will be reviewed as if an issue had been made up on a plea of nonassumpsit. *Smith v. Townsend*, 21 W. Va. 486. See the title DEBT, THE ACTION OF.

4. Plea of Not Guilty.

In an action of assumpsit the plea filed was "not guilty;" after a fair trial of the case has been had, all the facts and circumstances of the case have been inquired into, and a verdict and judgment have been rendered for the plaintiffs, the court will not allow the defendant the benefit of his own mistake, and award a repleader. While the plea is informal, it is now too late for it to be taken advantage of. *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225. See *Hunnicut v. Carsley*, 1 Hen. & M. 153.

Cure by Verdict.—See the title AMENDMENTS, vol. 1, p. 359.

If to a declaration charging a tort, with an assumpsit upon it, the defendant pleads not guilty, it will be good after verdict, notwithstanding the double aspect of the declaration, and the irrelevancy of the issue of the assumpsit. *King v. McDaniel*, 4 Call 451.

5. Special Pleas Amounting to General Issue.

It is not an error for the court to reject special pleas setting up matter in defense to the action of assumpsit, when the plea of nonassumpsit has been filed, and the matter of the defense of such plea may be given in

evidence under the plea of nonassumpsit, as their rejection could not have prejudiced the defendant. *Bennett v. Perkins*, 47 W. Va. 425, 35 S. E. 8; *Crews v. Farmers' Bank*, 31 Gratt. 348; *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617; *Va., etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Hale v. W. Va., etc., Co.*, 11 W. Va. 229; *Baltimore, etc., Co. v. Laffertys*, 14 Gratt. 478; *Fant v. Miller*, 17 Gratt. 47; *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. 805; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 453; *Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209; *Moore v. Supervisors*, 18 W. Va. 641. See opinion of Holt, J., in *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996.

While a special plea, setting forth matters in discharge of the action, may be filed when the plea of nonassumpsit has been filed, yet, when the matters set up in said plea may be given in evidence under the general issue, it is not error to reject such plea. *Dillon Beebe's Son v. Eakle*, 43 W. Va. 502, 27 S. E. 214.

"And the matters sought to be set up in the said pleas as defense, so far as they are good, if sufficiently pleaded, could be given in evidence on the plea of nonassumpsit. It is not error to reject a special plea setting up matters in defense to the action, when the plea of nonassumpsit is filed, and the matter of defense of such plea may be given in evidence under the plea of nonassumpsit. *Hale v. Land Co.*, 11 W. Va. 229, 236; *Baltimore, etc., R. Co. v. Laffertys*, 14 Gratt. 478; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 454." *Dillon Beebe's Son v. Eakle*, 43 W. Va. 502, 27 S. E. 217.

"There is no defense set up in this plea which, if sufficiently pleaded, might not be proved under the plea of nonassumpsit, which had already been filed when this plea was rejected; hence, the defendant was not prejudiced by its rejection. In *Hale v. Land Co.*,

11 W. Va. 229, it is held 'not error to reject a special plea setting up matter in defense to the action, when the plea of nonassumpsit is filed; and the matter of defense of such plea may be given in evidence under the plea of nonassumpsit.' Baltimore, etc., R. Co. v. Lafferty, 14 Gratt. 478; Baltimore, etc., R. Co. v. Polly, 14 Gratt. 454; Dillon Beebe's Son v. Eakle, 43 W. Va. 502, 27 S. E. 214." Bennett v. Perkins, 47 W. Va. 425, 35 S. E. 8.

It is not error to reject a special plea setting up matter in defense to the action, when the plea of nonassumpsit is filed, and the matter of defense of such plea may be given in evidence under the plea of nonassumpsit. Hale v. West Va. Oil, etc., Co., 11 W. Va. 236, citing Baltimore, etc., R. Co. v. Lafferty, 14 Gratt. 478; Baltimore, etc., R. Co. v. Polly, 14 Gratt. 454; Fant v. Miller, 17 Gratt. 47; Major v. Gibson, 1 Pat. & H. 76.

Where it is apparent from the character of the evidence that it had been introduced by the defendant under the general issue, it is not error to reject special pleas provable thereunder, setting up the same defense. George Campbell Co. v. Angus, 91 Va. 438, 22 S. E. 167; Southern Ry. Co. v. Wilcox, 7 Va. Law Reg. 381; Richmond, etc., Ry. Co. v. New York, etc., Ry. Co., 95 Va. 386, 28 S. E. 573.

In West End Co. v. Claiborne, 97 Va. 734, 34 S. E. 900, it was said that special pleas should be rejected when they contained defenses which could be made under the general issue.

Matters by Way of Confession and Avoidance.—"It is commonly said that any thing may be given in evidence under the plea of nonassumpsit except the statute of limitations and tender. Set-off, with us, need not be specially pleaded, but, when specified in an account filed, may be proved without any plea except nonassumpsit. But discharge in bankruptcy must be specially pleaded. It follows from this that the

defense, if good in law, attempted to be set up in these two special pleas, could have been proved under the general issue. But it does not follow that they amount to the general issue, for, if they may be taken as confessing the truth of the declaration, and as setting up a bar by way of confession and avoidance, then such matters may be specially pleaded. But these pleas are not good as special pleas in bar by way of confession and avoidance because they do not attempt to confess and avoid the promise laid in the declaration as expressly made; and if the object was to deny such express promise, and no more, they could not do it in better form or more effectual than they had done by the pleas of nonassumpsit already in, and still standing on the record undecided. Therefore both special pleas should have been rejected in answer to plaintiff's motion to reject when they were tendered." Morgantown Bank v. Foster, 35 W. Va. 357, 13 S. E. 996.

Immaterial Plea—Confederate Notes.

—H. during the Civil War draws an order on the auditor of Virginia for interest due him, in favor of the cashier of the bank in Richmond, who collects the amount, and deposits the same to the credit of the drawer, as so much cash or dollars. In an action of assumpsit, the common counts are filed, and in addition to the plea of nonassumpsit, the defendant files a special plea alleging that the deposits were made in confederate treasury notes, and that H. agreed that the same might be paid and returned to him. The plea is immaterial. Harrison v. Farmers' Bank of Va., 6 W. Va. 1.

But in the recent case of Ches., etc., R. Co. v. Rison, 99 Va. 18, 37 S. E. 320, it was held, that it was not error to permit the defendant to plead specially matters provable under the general issue, but not amounting to it. Phlegar, J., said: "While it has been held by this court not to be error to reject special pleas

alleging matter which could be given in under the general issue (*Fant v. Miller*, 17 Gratt. 67; Va., etc., *Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973), no case has been found which was reversed because such pleas were admitted."

In *Maggort v. Hansbarger*, 8 Leigh 532, which was an action of assumpsit, Parker, J., delivering the opinion of the court, said: "I know of no rule which inhibits the party from pleading specially what he might give in evidence under the general issue, unless the matter pleaded amounts to the general issue, that is, denies the allegations which the plaintiff is bound to prove. But where the cause of action is avoided by matter ex post facto, it may always be specially pleaded, whether it could be given in evidence under the general issue or not."

Denial of Cause of Action.—A court ought not to allow a defendant in an action of assumpsit to file a special plea, when it is objected to and is simply a denial that the plaintiff ever had any cause of action; such defense should be made under the general issue of nonassumpsit. *VanWinkle v. Blackford*, 28 W. Va. 671; S. C., 33 W. Va. 573, 11 S. E. 26.

When the effect of a special plea is to deny that the plaintiff in assumpsit ever had such a cause of action as is alleged in the declaration, it is equivalent to the general issue, and will be rejected on objection. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447; *Bank v. Evans*, 9 W. Va. 373.

Special Plea in Discharge of Action May Be Filed.—But special pleas containing matters in discharge of the action might be filed; nevertheless, their rejection by the lower court will be no ground of reversal on appeal, where the case is decided on demurrer to the evidence, as no injury could have resulted to the defendants, all their defense being admissible under

the general issue of nonassumpsit: *Bank v. Evans*, 9 W. Va. 373.

While a special plea, setting forth matters in discharge of the action, may be filed when the plea of nonassumpsit has been filed, yet when the matters set up in said plea may be given in evidence under the general issue, it is not error to reject such plea. *Dillon Beebe's Son v. Eakle*, 43 W. Va. 502, 27 S. E. 214.

Rejection of Special Plea with Leave to Plead General Issue Not Error.—In indebitatus assumpsit, if the defendant, after office judgment and a writ of inquiry, offers to plead in abatement that the matter of the suit was contained in a covenant under seal, and the court reject the plea, but give leave to plead the general issue, it will not be error; for the defendant might have given the special matter in evidence under the general issue, and if it had been refused, might have filed an exception to the opinion. *Porter v. Harris*, 4 Call 485.

Demurrer Improperly Sustained—No Injury to Plaintiff.—Where there are common counts in a declaration, and a special count be included, all the facts alleged in which could be as well proven by the plaintiff under the common counts, and the court improperly sustains a demurrer to such special count and the record shows that at the trial of the case the plaintiff sustained no injury by reason of the court sustaining the demurrer to the special count, the appellate court will not reverse the judgment below because of such error. *Moore v. Supervisors*, 18 W. Va. 630.

Demurrer Improperly Overruled—Judgment in Other Court.—To a declaration in assumpsit containing two counts the defendant pleaded the general issue and afterwards filed two additional pleas to the first count. On demurrer to the pleas the lower court held them good and entered judgment for the defendant on the first count.

Subsequently the issue tried on the second count, and verdict and judgment were rendered for the defendant on that count. The appellate court held, that while there was error in overruling the demurrer, defendant was entitled to the benefit of the verdict and judgment on the second count. *Dunn v. Price*, 11 Leigh 203.

6. Withdrawal of Joint Plea.

Issue was taken on the joint plea of nonassumpsit filed by two defendants in an action of assumpsit. One of them asked leave to withdraw the plea as to himself, and file a separate one that they did not assume. This was refused, and he then asked leave to file such plea in addition, which was also refused. These rulings were held correct, as the issue on both pleas would be the same. *Steptoe v. Read*, 19 Gratt. 1.

7. Affidavit to Plea in Bar.

See post, "Affidavit," IV, D.

8. Right to File Additional Plea.

A new trial is granted to the defendant in an action of assumpsit on condition that he pay the costs of the first trial, and agree that any future trial be tried solely by the issue already made up by nonassumpsit, without any additional plea. On trial of the cause in another court the defendant on motion is permitted to file another plea. This can not be granted and the judgment will be reversed, and the cause sent back to be tried on nonassumpsit, or any new matter which has occurred since the new trial was granted. *Prunty v. Mitchell*, 30 Gratt. 247.

9. Joinder of Issue on Plea of Nonassumpsit.

There were two pleas filed by the defendant to an action of assumpsit, one the general issue, and the other the plea of the statute of limitations, on neither of which was issue joined. The trial was held before the court instead of the jury, under § 38, ch. 162, Va. Code, 1860. Judgment was

rendered for the plaintiff. The court occupied precisely the relation to the case a jury would have done, and trial without issue joined is erroneous in either case. *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180.

Cross-Examination—Demurrer to the Evidence.—In an action of assumpsit it is an error to permit the defendant to cross-examine the witnesses, or to demur to the evidence, without any plea having been filed or issue joined in the case. *Petty v. Frick Co.*, 86 Va. 501, 10 S. E. 886.

Reversal of Judgment.—It is not an error to set aside a judgment given in an action of assumpsit where no plea has been filed, and no issue made up. *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

But in West Virginia the appellate court will not reverse a judgment for want of joinder to a plea of nonassumpsit. W. Va. Code, ch. 134, § 3. *McSmithee v. Feamster*, 4 W. Va. 673.

Cure by Verdict.—See the title AMENDMENTS, vol. 1, p. 359.

To an action of assumpsit the pleas of nonassumpsit and the act of limitations were filed. To the first plea plaintiff replied generally, and specially to the second, but the defendant put in no rejoinder. In the transcript of the record it was said that a jury was impaneled to try the issues joined. But the court of appeals decided that no issue was joined on the second plea, and therefore a verdict for the plaintiff be set aside and a new trial directed. *Totty v. Donald*, 4 Munf. 430.

10. Conclusion of Plea of Nonassumpsit.

If the plea of nonassumpsit properly conclude to the country the plaintiff has the right to proceed to trial on it, without the formal addition of a similiter, as though issue had been formally joined upon it. *First Nat. Bank v. Kimberland*, 16 W. Va. 555; *Douglass v. Lard Co.*, 12 W. Va. 506;

Baltimore, etc., Co. *v.* Faulkner, 4 W. Va. 180; *Brewer v. Tarpley*, 1 Wash. 363.

C. VARIANCE.

See generally, the title VARIANCE.

1. Between Writ and Declaration.

A variance between the writ and the declaration in assumpsit can not be taken advantage of without cravingoyer of the writ, yet it may be referred to in order to amend it, withoutoyer. *Stephens v. White*, 2 Wash. 203.

Variance in Damages in Writ and Count.—In an action of assumpsit, the writ lays the damages at \$500, and the count lays them at \$600. For want of appearance a judgment was entered by default, and the jury assessed the damages. The variance between the writ and the count was held to be immaterial. *Dabneys v. Knapp*, 2 Gratt. 354.

What Variance in Name of Plaintiff Immaterial.—Where the writ states the initial letter of the middle name of one of two plaintiffs to be P, while the count in the declaration in assumpsit states it to be B, but in both the writ and the count the partnership name of the plaintiffs is given, the variance is immaterial. *Dabneys v. Knapp*, 2 Gratt. 354.

It is no variance between the writ and the declaration in assumpsit, if the writ states the first christian name of the plaintiff by the initial letter, and the count in the declaration states the name in full. *Dabneys v. Knapp*, 2 Gratt. 354.

2. Between Allegations and Proof.

In an action of assumpsit, the proof of the contract must conform to the contract laid in the declaration. *Harris v. Harris*, 2 Rand. 431.

In assumpsit, there are two counts; one for the agreed price of goods sold; the other, quantum valebant for the same; on the general issue, the proof is, that plaintiff, being a tanner, received raw hides from the defendant; and cred-

ited him for the value, and sent him in return tanned leather, and debited him with the value thereof, and the debt claimed is the balance appearing due the tanner on these dealings; held, the proof is properly applicable to, and sustains the declaration. *Gore v. Buz-zard*, 4 Leigh 231.

The defendant to an action of assumpsit plead the general issue. After the introduction of the plaintiff's evidence, the defendant moves to exclude it from the jury on the ground of a material variance between the proof and the declaration. This should be done if it clearly appears that the evidence offered by the plaintiff fails to support the issue on his part. *Dresser v. Transportation Company*, 8 W. Va. 553.

Where the declaration in an action of assumpsit states an agreement that the plaintiff would rent and furnish a house at L, and board the defendant and his clerks for so much each, and the agreement proved was that he would board the defendant and his clerks at L for the sums stated in the declaration, the variance between the averments and the proof is not material. *Wroe v. Washington*, 1 Wash. 357.

It is clear that in an action of assumpsit against a party on a promise or contract made by him to pay the plaintiff a certain sum of money, recovery can not be had, if the contract proven is not the one stated in the declaration, but a joint contract made by the defendant and another. This is a variance. *Davison v. Ford*, 23 W. Va. 617.

Locating Treasury Warrant on Waste Lands.—In assumpsit, plaintiff declares that defendant contracted to locate a treasury warrant for plaintiff on waste and unappropriated lands, and to cause the same to be surveyed and patented, and alleges a breach, that defendant did not cause lands by him located on the warrant, to be surveyed

and patented; but at the trial, plaintiff proves a contract whereby defendant did not undertake to cause the lands to be patented as well as located and surveyed; on demurrer to evidence, held, the evidence does not prove the contract laid in the declaration, and plaintiff is not entitled to recover. *M'Alexander v. Montgomery*, 4 Leigh 61.

Note Attached to Agreement Omitted.—A declaration in assumpsit brought upon a written agreement had no allegation concerning a note attached to the agreement, varying its terms. When the agreement was offered in evidence under the general issue it had the said note attached to it, and it was held inadmissible evidence, as there was a fatal variance between the agreement declared on and the agreement offered in evidence, unless it appeared that the note was attached without the knowledge or consent of the plaintiff, and hence was no part of the agreement. *Newell v. Mayberry*, 3 Leigh 250, 23 Am. Dec. 261.

Description of Article Sold.—In an action of assumpsit on a contract for the purchase of a stock of goods, if there be a material variation, in describing the article sold, between the declaration and the proof, such variation is material and fatal to the suit. *James v. Adams*, 16 W. Va. 245.

Special and General Assumpsit.—When a special contract is sued on in an action of assumpsit, and the proof varies materially from the declaration and is hence inadmissible, the proof, however, would have been admissible, if the declaration had contained a common indebitatus count. *Davisson v. Ford*, 23 W. Va. 617.

Carriers of Goods.—Where a declaration in assumpsit charges a common carrier for loss or damages in general terms, and an agreement is proved which shows that the transportation was at the plaintiff's risk, thus imposing a different liability from that

charged, and a verdict is rendered against the defendants, it should be set aside and a new trial granted because of the variance. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87.

Hire of Slaves by Copartners.—Where the declaration was upon a general indebitatus assumpsit for the hire of five slaves, for which the defendants, being copartners, promised on the 1st of January, 1811, to pay the plaintiff the sum of \$350, when they should be thereunto afterwards required, the plaintiff should not recover upon a writing signed by one of the defendants, certifying that he had hired of the plaintiff five slaves at the price of \$350, and that this should entitle the plaintiff to the other defendant's bond for the same, payable on the 1st of January, 1811. *Woody v. Flournoy*, 6 Munf. 506.

Qualification of Liability Must Be Noticed in Declaration.—Where the contract of the defendant, who is sued thereon in an action of assumpsit, contains as a part of it a provision qualifying his liability, the plaintiff in the declaration must notice such provision, or there will be a fatal variance. When this provision, however, in the written instrument is distinct from the clause on which the debt is charged, it is a matter of defeasance which should come from the other side. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Insurance—Omission to State Hour When Policy Began.—The declaration in an action of assumpsit brought on an insurance policy alleges that the policy was not in force "from the said 6th day of January 1870, until the 6th day of January 1871," whereas the policy states, "from the 6th day of January 1870, at noon to the 6th of January 1871, at noon." This is a material variance between the policy described and the policy produced. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Insurance—Notice and Proofs of Loss.—The declaration in an action of assumpsit on an insurance policy states that the money was "to be paid to the plaintiff in sixty days after notice and proof of the same," etc., while the policy states "the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same made by the assured and received at this office," etc. This is a material variance. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Count of General Law Merchant—Days of Grace.—In an action of assumpsit brought on a bill of exchange drawn in Virginia, and payable at the bank of Marietta, Ohio, the declaration counted on the general law merchant, and the general issue was joined. Proof of presentation on the fourth day of grace does not support the issue on the plaintiff's part, as the general law merchant requires presentation on the third day of grace. *Jackson v. Henderson*, 3 Leigh 196.

Date of Presentment of Note Stated under Scilicet Not Material.—In a declaration in assumpsit on a bill of exchange, brought by the holder against the endorser, it was alleged that it was presented for payment, "when the bill became due and payable according to the tenor and effect thereof, to wit, on the 27th of December 1816, at the bank of Marietta in Ohio," where it was payable and dishonored. The 27th of December was not the third but the fourth day after time of payment, but as it was averred that the bill was presented when it became due and payable according to its tenor and effect, and the date of the presentment was stated under a scilicet, the date stated was not material, and the plaintiff might have proved presentment on the third day of grace. *Jackson v. Henderson*, 3 Leigh 196.

Value of Cattle before and after They Had Been Killed.—Where the declaration in assumpsit contained a special count, which alleged that the defendant was to pay the plaintiff the value of certain cattle before they had been killed, and the evidence showed that the defendant promised to pay for the carcasses thirty dollars a head, this was held to be a fatal variance. *Davisson v. Ford*, 23 W. Va. 617.

Bill of Lading Should Not Go to Jury if Not Applicable to Any Count.—If the plaintiff declares in assumpsit against a common carrier, without regard to the special contract between them manifested by bills of lading, the latter, not being applicable to any of the counts in the declaration, ought not to be allowed to go to the jury as evidence in support of the same. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87.

Nonjoinder of Cocontractor Not Appearing in Declaration.—It is well settled that the nonjoinder of a cocontractor as a defendant cannot be taken advantage of under the general issue in an action of assumpsit, on the ground of a variance between the allegata and the probata, when the omission of the cocontractor does not appear on the face of the declaration. *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976. See *Prunty v. Mitchell*, 76 Va. 169.

Omission of Word "Treasurer" Immaterial When Defendant Was Personally Liable.—The defendant as treasurer of a jockey club agreed to rent for its use a piece of ground from the defendant, and bound himself in writing to pay the rent. The plaintiff brought an action of assumpsit on the parol agreement, and gave in evidence the written agreement not under seal, corresponding with that stated in the declaration, except, that in the latter the description as "Treasurer" is omitted. The variance is not material, as he was personally liable, and it was

unimportant to give him his title. *McWilliams v. Willis*, 1 Wash. 199.

Action on Contract Made by Agent for Disclosed Principal May Be Brought against Principal.—There is no variance between the allegation and proof where the declaration alleges a contract with the defendant, and the evidence shows that it was made through an agent for his principal, the defendant, who was disclosed. The account filed in the case was against the defendant and the agent, and the plaintiff offered to strike out the agent's name. But the defendants objected and this was not done, and for these reasons the decision that there was no variance was free from error. *Richmond, etc., R. Co. v. New York, etc., R. Co.*, 95 Va. 386, 28 S. E. 573.

Date of Judgment Not Material When Question of Time Was Not Involved.—When a declaration in assumpsit alleges that a certain judgment was rendered on the 30th of May, 1870, and the record produced shows that it was rendered on the 31st of May, 1870, it was objected that the record was inadmissible for this variance. The variance was held not material as the question involved was not when it was rendered, but whether it had been rendered. *Sayre v. Edwards*, 19 W. Va. 352.

Omission of One Commissioner in Order of Court Immaterial Where Three Were Appointed.—The declaration in an action of assumpsit brought against a county by a contractor for the price of building a jail, states that the county court appointed three commissioners to let out the building of the jail, and names the commissioners. The order of the county court offered in evidence by the plaintiff only names two of them. This was held no material variance and the order was admitted in evidence. *Carroll County v. Collier*, 22 Gratt. 302.

Consideration—Written Promise Not Mentioning It Admissible.—The plain-

tiff in his declaration in assumpsit brought on the promise of the defendant to pay the debt of another alleges a particular consideration. A written promise of the defendant which was produced in evidence, contained no mention of the consideration. This was no variance between the allegata and probata, as the written promise is proper evidence and the consideration may be proved by evidence aliunde. *Colgin v. Henley*, 6 Leigh 85.

Allegation of Credit Required and Proof of Note Given Will Not Prevent Recovery.—If the declaration in an action of assumpsit on a contract for the sale of property alleges that the defendant was required to pay a certain sum in cash and the balance on a certain credit, and the evidence shows that the defendant was required to pay the stated sum in cash and was to give his note for the balance, this is not a sufficient variance to destroy the right of the plaintiff to recover. *James v. Adams*, 16 W. Va. 245.

D. AFFIDAVIT.

An affidavit filed by plaintiff, under § 46, ch. 125, W. Va. Code, in an action on contract, which does not comply with the requirements of that section, will not exclude a plea, though the plea be not accompanied by an affidavit of the defendant, as required by that section. *Vinson v. Norfolk, etc., R. Co.*, 37 W. Va. 598, 16 S. E. 802.

Affidavit to Account by Plaintiff's Bookkeeper.—A bookkeeper may be an agent as well as a servant, but the word "bookkeeper" does not import agency, and, in the absence of all evidence on the subject, the affidavit of plaintiff's bookkeeper to an account filed with a declaration in assumpsit is not a sufficient compliance with the provisions of § 3286, Va. Code, to compel the defendant to swear to his plea. The statute requires the affidavit of the plaintiff or his agent, and, in the absence of evidence on the subject, a

"bookkeeper" will not be held to be such agent. *Merriman v. Thomas*, 103 Va. 24, 48 S. E. 490.

Affidavit to Plea in Bar Necessary.—

Where a plaintiff in assumpsit has filed with his declaration the affidavit required by § 3286, Va. Code, no plea in bar can be filed by the defendant which is not accompanied by the affidavit required of the defendant by said section, unless such affidavit has been waived. If no such plea be filed, the case should be placed by the clerk on the office judgment docket for the next term after the case is matured, to become final along with other office judgments. If, through error, the case is placed on the writ of inquiry docket, and unsworn pleas be filed, and the case continued to another term, and the plaintiff then moves to strike the pleas out because not sworn to, and the trial court overrules the motion and compels a trial on the pleas, which results in a verdict and judgment for the defendant, this court will, on a writ of error awarded to the plaintiff, set aside the verdict and judgment, strike out the pleas, and enter final judgment for the plaintiff. *Price v. Marks*, 103 Va. 18, 48 S. E. 499, citing *Spencer v. Field*, 97 Va. 38, 33 S. E. 380; *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993; *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466.

Court Has Jurisdiction—No Affidavit as Required by Statute.—Section 3286 of the Virginia Code provides that when in an action of assumpsit for money, an affidavit is filed with the declaration, stating that the amount claimed is justly due, etc., no plea in bar shall be received unless supported by an affidavit. Where in an action of assumpsit the plaintiff has proceeded in accordance with this statute and the defendant has not filed his plea of nonassumpsit with affidavit, which is stricken out and a subsequent plea with affidavit is rejected, final judgment for the plaintiff is not void as the court had juris-

diction of the parties and the subject matter. *Grigg v. Dalsheimer*, 88 Va. 508, 13 S. E. 993.

Waiver or Estoppel.—Where the plaintiff files with his declaration in assumpsit an account verified by his affidavit which is served upon the defendant with the writ, and the case goes to judgment in the office, unless the defendant shall file during term a plea in bar verified by his affidavit, this judgment will become final with the expiration of the term. But the statutory requirement that the defendant shall not be permitted to file his plea in such case unless accompanied by his affidavit (Va. Code, 1887, § 3286), was imposed for the benefit of the plaintiff in order to prevent him from delay by dilatory pleas, and may be waived by him either expressly or by implication, or he may by his conduct be estopped from taking advantage of it, as when he takes issue of such plea. *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466; *Spencer v. Field*, 97 Va. 38, 33 S. E. 380.

Interest.—The affidavit filed with a declaration in assumpsit under Va. Code, § 3286, should state the time from which the plaintiff claims interest. *Merriman v. Thomas*, 103 Va. 24, 48 S. E. 490. See the title INTEREST.

If a plaintiff fails to file an affidavit with his declaration in assumpsit, after the defendant has appeared and filed a plea of nonassumpsit, he can not then file such affidavit and have the defendant's plea stricken from the record because not accompanied with an affidavit. *Phoenix Assurance Co. v. Fristoe*, 53 W. Va. 361, 44 S. E. 253.

V. Waiver of Tort.

See the titles ACTIONS, vol. 1, p. 128; IMPLIED CONTRACTS.

In General.—The law seems to be settled by many cases that, where the plaintiff's money has been wrongfully obtained by the defendant by misrepresentation of fact or other false pre-

tense, the tort may be waived and an action for money had and received may be brought. *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73; *Bier v. Gorrrell*, 30 W. Va. 95, 3 S. E. 30, citing *Maloney v. Barr*, 27 W. Va. 381.

There are too many cases in which a party aggrieved who has a clear remedy by action as for a tort, may waive the tort and sue in assumpsit. *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702.

Where one undertakes to improve his own land, he impliedly contracts to use due care and skill, and to answer to the adjacent landowner for the consequences of his want of such skill and care. Where there is a breach of this implied contract, the party injured may waive the tort and maintain an action as for a breach of assumpsit. *Salamone v. Keiley*, 80 Va. 86.

Sale by Administrator.—Where an administrator, who sold a slave whereof his intestate died possessed, but which in truth belonged of right to another, and applied the proceeds to the payment of his intestate's debts in due course of administration, without any notice of the right or claim of the true owner, he might waive the tort and bring an action of indebitatus assumpsit for the money received by the wrongdoer. *Thompson v. Thompson*, 5 W. Va. 193, citing *Newsum v. Newsum*, 1 Leigh 86.

So a master whose apprentice has left him and entered into the service of another, who persuades him to remain with him after he had found out who he was and from what shop he had deserted, may waive the tort and bring assumpsit against the defendant for the work and labor of the apprentice. *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702. See the title APPRENTICES, vol. 1, p. 684.

The assignees of a bankrupt who after the bankruptcy had delivered goods to the defendant to meet an accommodation bill which they were

about to give the bankrupt, might waive the tort and sue in assumpsit. *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702.

If a bankrupt, on the eve of his bankruptcy, fraudulently delivers goods to one of his creditors, the assignees may recover the goods in trover, or waive the tort and bring assumpsit. *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702.

Trover.—"If a stranger takes my goods and delivers them to another a contract may be implied, and I may bring an action of trover for them or of assumpsit to recover their value." *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702. See *Thompson v. Thompson*, 5 W. Va. 193.

Trespass.—If a man takes a horse from another, and brings him back again, an action of trespass may be brought, but the owner may bring assumpsit for the use and hire of the horse. *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702.

If a man take the goods of another and sell them, the owner may waive the trespass and sue him for money had and received. *Lawson v. Lawson*, 16 Gratt. 233, 80 Am. Dec. 702.

VI. Parties to the Action.

A. PARTIES PLAINTIFF.

1. In General.

Generally, he for whose interest a promise is made may maintain an action upon it, although the promise be made to another and not to him. *Nutter v. Sydnestricker*, 11 W. Va. 535.

This question will be discussed at length in the title PARTIES.

Where A delivered a claim to B to be by him collected and paid to C, and B agreed with C to collect said claim and pay it to him, and B refusing after he has collected the claim to pay it over, C may either sue him at law for money had and received to his use, or he may enforce the trust in a court of equity. *Miller v. Lake*, 24 W. Va. 545,

citing *Nutter v. Sydenstricker*, 11 W. Va. 535.

But upon a parol contract between S. and R. whereby the latter on consideration moving entirely from the former promises to pay to the daughter of the former a sum of money after his death, the daughter can not maintain assumpsit for the money. The representative of the promisee only can maintain an action at law. *Ross v. Milne*, 12 Leigh 204, 37 Am. Dec. 646.

The Rule That No One Can Sue Himself.—The following agreement was entered into between L. and B. and reduced to writing: "It is hereby agreed between L. and B., that upon all claims against the United States procured by the former for the latter L. is to have twenty per cent. net to be paid to him by said B. as fast as said claims are audited and paid by the proper authorities at Washington. This agreement is to stand in place of any heretofore made and to apply to all claims heretofore secured as well as to any which may be secured in future. The condition of the above contract is that said B. is to receive fifty per cent. for prosecuting and collecting said claims. And on claims, upon which less than fifty per cent. is received by said B., L. is to receive in same proportion or pro rata." Held, that this agreement clearly created no partnership between L. and B. but simply provided what compensation B. should pay to L. for having such claims put into the hands of B. for collection; and under it L. could bring an action of assumpsit against B. for his compensation for procuring any claim to be placed in B.'s hands for collection as soon as it was collected and received by B. *Logie v. Black*, 24 W. Va. 1.

2. Agents.

Where a contract not under seal is made with an agent, and in his name for an undisclosed principal, either the agent or the principal may sue upon it in an action of assumpsit. Where the

agent has no beneficial interest in the contract, the declaration may be amended so as to show that the action is brought for the benefit of his principal. *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826. See the title AGENCY, vol. 1, p. 240.

3. Corporations.

When a charter for a corporation has been granted by a circuit court pursuant to § 1145 of the Virginia Code, and the tax thereon has been paid, the corporation has a legal existence, and may sue and be sued in assumpsit on its contracts. *Coalter v. Bargamin*, 99 Va. 65, 37 S. E. 779. See the title CORPORATIONS.

4. Executors.

It is proper for an executor to bring an action of assumpsit for money in his own name, or as executor, where the cause of action does not accrue until after the death of the testator. *Lawson v. Lawson*, 16 Gratt. 230. See the title EXECUTORS AND ADMINISTRATORS.

If it was necessary to sue as executor, as the declaration commenced in the name of B. as executor of the testator, though it alleged that the defendant was indebted to the plaintiff and promised to pay to the plaintiff, yet, in support of the justice of the case, it may be construed as a declaration in the plaintiff's character of executor. *Lawson v. Lawson*, 16 Gratt. 230, 80 Am. Dec. 702.

5. Guardians.

A guardian may bring assumpsit in his own name, upon a draft or order payable to himself as guardian, for money due his ward. *Jolliffe v. Higgins*, 6 Munf. 3. See the title GUARDIAN AND WARD.

B. PARTIES DEFENDANT.

1. Public Corporations.

Promissory Note.—Assumpsit will lie on the promissory note of a corporation given under sanction of a legislative provision. *Brown v. Point*

Pleasant, 36 W. Va. 290, 15 S. E. 209, citing 1 Chit. Pl. 119.

County Court.—The action of assumpsit will not lie against a county court, upon an order issued by said court upon the sheriff of a county, in favor of the owner of such order. *Ratcliff v. County Court of Wayne County*, 33 W. Va. 94, 10 S. E. 28, distinguished in *Johnson v. Alderson*, 33 W. Va. 473, 10 S. E. 815. See also, *Thomas v. Mason*, 39 W. Va. 526, 20 S. E. 580, distinguishing *Johnson v. Alderson*, 33 W. Va. 473, 10 S. E. 815.

Claim against Board of Education.—Under the act of the legislature passed April 12, 1873, entitled "An act to amend and re-enact the school law of the state," when a person having a claim against the board of education of one of the districts of a county for materials furnished and for labor done in building a schoolhouse in such district, and an order is made upon the sheriff of the county directing the sheriff of the county to pay such person the amount of such claim, specifying the amount to be paid and the fund to which it is to be charged, and signed by the president and secretary of said board, and such order is delivered to the person having such claim, and he accepts the same, he cannot afterwards maintain an action of assumpsit against the board based upon said order or said claim, for which said order was given, in case of his failure to receive or recover the same from the sheriff or his sureties for any cause; but his sole remedy in such case to coerce payment of his debt, if the board refuses to make a special levy for the same, is by mandamus from the circuit court of the county. *Canby v. Board of Education*, 19 W. Va. 93. See the titles MANDAMUS; SCHOOLS.

2. Private Corporations.

Turnpike Company.—Where a turnpike company is composed exclusively of officers of the government, having no personal interest in it or in its con-

cerns, and acting only as the organ of the commonwealth in effecting a great public improvement, an action of assumpsit will not lie against the president and directors of the company. *Sayre v. N. W. Turnpike Road*, 10 Leigh 454.

Corporate Deed Admissible to Prove a Corporation.—In an action of assumpsit against a private corporation, a deed of the corporation signed in the corporate name by the secretary, under its corporate seal, duly acknowledged by the secretary, reciting that it is a corporation formed according to law, is admissible as evidence to prove the legal existence of the defendant as a corporation. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

Proof of Existence of Corporation.—In a suit by or against a corporation it was necessary at common law to prove the existence of the corporation whenever that fact was put in issue by proper plea; and it was held, that the plea of nonassumpsit did put such fact in issue. *Jackson v. Bank of Marietta*, 9 Leigh 240; *Gillett v. American Stove, etc., Co.*, 29 Gratt. 567. See ante, "Matter Provable under General Issue and Special Pleas," IV, B, 2.

3. Agents.

Wherever an agent secures the payment of money belonging to his principal, and detains it, he is liable in an action of assumpsit for its recovery. *Thompson v. Thompson*, 5 W. Va. 190. See the title AGENCY, vol. 1, p. 240.

VII. Limitation of Actions.

See generally, the title LIMITATION OF ACTIONS.

Plea of Nonassumpsit within Five Years.—The plea of nonassumpsit within five years relates to the time of the bringing of suit, and not to the time of the filing of the plea. *Henderson v. Foote*, 3 Call 248, distinguishing *Smith v. Walker*, 1 Wash. 135.

The plea of nonassumpsit within five years, if general, will refer to the time

of the plea pleaded, whereas it ought to refer to the institution of the suit, and if it concludes to the country the plaintiff will be precluded from bringing himself within the benefit of some of the exceptions to the act of limitations, by a replication. *Smith v. Walker*, 1 Wash. 135.

In an action of assumpsit against an administrator, he pleads the statute of limitations. It is no answer to the plea, that the defendant's intestate sold to plaintiff slaves in payment of the debt declared on, and that the defendant, since the death of his intestate, had, as administrator, sued for, and upon the title alone, without regard to intestate's indebtedness to the plaintiff, had recovered the said slaves from the plaintiff within five years before the action brought. *Johnson v. Jennings*, 10 Gratt. 1.

Limitation of Trespass and Case.—It was held in *Gore v. McLaughlin*, 3 W. Va. 489, that the act of February 27, 1866, in relation to the statute of limitations, extending the time in which actions of trespass and case might be commenced in certain counties of the state, includes only actions of trespass and trespass on the case, and does not apply to actions on the case in assumpsit nor to actions ex contractu.

In assumpsit against a physician or surgeon upon his implied undertaking to exercise proper skill, one year is the period which is applicable under statutes of limitations. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519. See the title PHYSICIANS AND SURGEONS.

Lease.—An action of assumpsit, founded upon covenants to pay taxes contained in a lease, is not barred in five years, against a lessee who has not signed the lease. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

New Promise.

Bill of Discovery.—Where assumpsit

is brought at law, and the statute of limitations pleaded, the plaintiff may file a bill of discovery in equity, calling on the defendant to answer whether he has not made a new promise within the term of limitation, in order to use this matter, on the trial of the action at law, in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath. *Baker v. Morris*, 10 Leigh 285. See the title DISCOVERY.

Debt Discharged in Bankruptcy.—

Where a debt is discharged in bankruptcy within five years after it is incurred, and a suit is brought on a new promise to pay it within five years after the new promise, a plea is bad that five years have elapsed since the original cause of action, or since the discharge in bankruptcy, and should be rejected. *Horner v. Speed*, 2 Pat. & H. 616.

Promise of Executor.—In an action of assumpsit upon the case against an executor charging an assumpsit of the testator, and on the plea of nonassumpsit by the testator within five years, an assumpsit of his executor can not be given in evidence, to prevent the operation of the act of limitation. *Fisher v. Duncan*, 1 Hen. & M. 563.

Loose conversations of an executor are not sufficient to raise an assumpsit as a new promise, or as an acknowledgment, so as to revive an old debt of the testator. *Henderson v. Foote*, 3 Call 248.

Promise to "Settle" Not Equivalent

to Promise to Pay.—In an action of assumpsit against an executor for a debt of his testator on an open account, all the items of which appear to have been due more than five years before the testator's death, the plaintiff proves that the testator within five years after the date of the account promised to "settle" the account. Such a promise does not amount to a promise to pay, or such an acknowledgment of the debt, as would take the case out

of the general statute of limitations. *Aylett v. Robinson*, 9 Leigh 45.

Joining Promises of Executor with Those of Debtor.—In an action of assumpsit against an administrator d. b. n., counts upon promises made by the executor or a former administrator of the deceased debtor, as such, may be joined with counts on promises by the deceased debtor himself, to save the statute of limitations. In such case the counts upon the promises of the executor or former administrator, must distinctly aver the promises to have been made as executor or administrator, or they will be bad on general demurrer. *Bishop v. Harrison*, 2 Leigh 532. See the title **ACTIONS**, vol. 1, p. 140.

Acknowledgment of Defendant.—On a plea of nonassumpsit within five years, it was proved that the defendant within that time acknowledged the items in the plaintiff's account to be just, but said that he had some offsets; and that at a subsequent time, the defendant promises the plaintiffs to settle all their accounts fairly, and would not avail himself of the act of limitation. It was held, that this proof was not sufficient to justify a verdict for the plaintiff. *Sutton v. Burruss*, 9 Leigh 381, 33 Am. Dec. 246. See *Butcher v. Hixton*, 4 Leigh 520, opinion of Carr, J.

Expunging Items Barred.—Where an action of assumpsit is brought against an executor or administrator on an account, items of which bear date more than five years before the death of the testator or intestate, it is not necessary that the court should actually expunge those items; but, if they decide that it shall be done, and direct the jury to disregard them, it is sufficient. *Hoskins v. Wright*, 1 Hen. & M. 378.

Time of Pleading.—In assumpsit defendant pleads the general issue at September term, 1818; his death is suggested in October, 1823, and the cause is revived at March term, 1824,

against his administrator, who obtains leave at October term, 1825, to plead the statute of limitations, but (by inadvertence as it seemed) the plea is not then filed; at March term, 1826, the cause is called for trial, and the administrator asks leave to put in the plea; held, it can not now be received. *Clopton v. Clarke*, 7 Leigh 325. See the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 2.

Stay Law Period.—The time excluded by law from the operation of the statute of limitations in assumpsit, is from April 17, 1861, to March 1, 1865. *Baltimore, etc., Co. v. Faulkner*, 4 W. Va. 180; *Gore v. McLaughlin*, 3 W. Va. 489.

VIII. Venue.

See generally, the title **VENUE**.

Laying the Venue.—In an action of assumpsit in the superior court of the county, the declaration laying the venue in a different county, and omitting to state that the cause of action arose within the jurisdiction of the court, is not error sufficient in arrest of judgment. *Buster v. Ruffner*, 5 Munf. 27. See *Turberville v. Long*, 3 Hen. & M. 309.

IX. Damages.

See generally, the title **DAMAGES**.

A. AMOUNT OF DEMAND MUST BE PROVEN.

The plaintiff in a declaration in assumpsit must prove the amount of his demand, although the defendant admits that he owed a debt. This admission is not sufficient to charge the defendant with the whole demand of the plaintiff. *Quarles v. Littlepage*, 2 Hen. & M. 401.

B. THE AD DAMNUM CLAUSE.

1. Laying the Damages.

As the object of an action of assumpsit is to recover the damages for the breach of the contract, it is essential for a plaintiff to allege in his declara-

tion in such action, that the breach of the contract has resulted in his damage. *James v. Adams*, 16 W. Va. 245, citing *Stephens v. White*, 2 Wash. 203.

But it is not necessary to allege at the end of each count in a declaration in an action of assumpsit to recover damages for the breach of a contract, that damages have been incurred by the failure of the plaintiff to perform his promise named in the count. A general allegation at the end of the declaration, that the plaintiffs have sustained damages by the failure of the defendant to perform his several promises named in the declaration to the certain amount, is sufficient. *James v. Adams*, 16 W. Va. 245.

Damages need not be claimed at the end of each count of a declaration in assumpsit, but may be claimed at the conclusion of the declaration for all the causes of action in the several counts. *American, etc., Trust Co. v. Milstead*, 102 Va. 683, 47 S. E. 853.

2. Omission to Lay Damages.

It appears from numerous authorities that it is unimportant that the damages are left blank in the declaration in an action of assumpsit, but if the gist of the action be blank, it is a fatal omission. *Blane v. Sansum*, 2 Call 495; *Stephens v. White*, 2 Wash. 203; *Taylor v. M'Clean*, 3 Call 557; *Craghill v. Page*, 2 Hen. & M. 446; *Digges v. Norris*, 3 Hen. & M. 268; *Winston v. Francisco*, 2 Wash. 187.

Cure by Verdict.—See the title AMENDMENTS, vol. 1, p. 359.

The omission to lay damages in the declaration in an action of assumpsit, though it is an action sounding in damages, is cured after verdict by the statute of jeofails. *Stephens v. White*, 2 Wash. 203.

A count for money had and received in an action of assumpsit was held good after verdict, although the sum received was left blank. *Hall v. Smith*, 3 Munf. 550.

3. Verdict in Excess of Ad Damnum.

In an action of assumpsit greater damages can not be recovered than are declared for and are laid in the conclusion in the declaration, but this restriction is confined to the amount of damages, the principal recovery, and does not affect the interest that may be allowed thereon by the jury. *Georgia, etc., Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Cahill v. Pintony*, 4 Munf. 371; *Tennant v. Gray*, 5 Munf. 494.

Remittitur.—See the title REMITTITUR.

Since the Va. act of January 20, 1804, as explained and amended by the act of January 29, 1805, if the jury in an action of assumpsit find for the plaintiff a larger sum than the amount of damages laid in the declaration, with interest from a day fixed in their verdict, the plaintiff may release the surplus beyond that amount, and take judgment for the balance, with interest as aforesaid. *Cahill v. Pintony*, 4 Munf. 371.

C. WRIT OF INQUIRY OF DAMAGES.

If an action of assumpsit be brought against two defendants jointly, and a writ of inquiry of damages be awarded against them at rules, and one of the defendants only appears and sets aside the office judgment against him and pleads nonassumpsit, and issue is joined, and on this issue the jury find a verdict for both the defendants, and the court without having the writ of inquiry of damages executed against the other defendant overrules a motion for a new trial, and on this verdict enters up a judgment in favor of both defendants, this judgment and verdict will be set aside by the appellate court. *Enos v. Stansbury*, 18 W. Va. 477. See the title INQUESTS AND INQUIRIES.

X. Verdict.

See generally, the title VERDICT.

A. IN GENERAL.

A general verdict in assumpsit, which assesses entire damages on several counts, none of which are defective, is not erroneous. *Buster v. Ruffner*, 5 Munf. 27.

Objections.—Where a good cause of action is set out by a declaration in assumpsit, and no objection is made to the form or substance of the verdict, a motion in arrest of judgment by the defendant will be overruled. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

B. RESPONSIVENESS.

In an action of assumpsit where the pleas are nonassumpsit and the statute of limitations, a general verdict for the plaintiff fixing the amount of his damage is responsive to all the issues made by the pleadings. *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.

After the plea of nonassumpsit, the verdict of the jury that the defendant has not paid the debt and assessing damages occasioned by the nonperformance of that assumpsit, substantially pursues the issue. *Barnett v. Watson*, 1 Wash. 372; *First Nat. Bank v. Kimberlands*, 16 W. Va. 572.

Improper Evidence Admitted.—In an action of assumpsit for various sums of money lent to or paid for the defendant's intestate the issues being on nonassumpsit, and the statute of limitations, and the verdict being for the defendant alone on the latter plea, the admission of improper evidence having reference to the issue on the first plea only, and which could have no influence on the issue on the last plea, is not ground for reversing the judgment. *Johnson v. Jennings*, 10 Gratt. 1.

C. CURE BY VERDICT.

See the title AMENDMENTS, vol. 1, p. 359.

Omission of Facts Necessary to Plaintiff's Recovery.—Where matters which are collateral to the fact in issue, and necessary to the right of the plain-

tiff, are omitted in the pleadings, they can not be presumed to have been proven, and therefore their omission could not be cured by verdict at common law. *Bailey v. Clay*, 4 Rand. 346.

Money Counts Presumed Proved.

If in an action of assumpsit on an inland bill of exchange, there be two money counts in the declaration, and the court gives an improper instruction to the jury with regard to the bill of exchange, after verdict it will be presumed that the money counts were proved, where the bill of exceptions to the instruction does not state there was other evidence. *Willock v. Riddle*, 5 Call 358.

Misjoinder of Issue Cured.—It being stated in the record that issue was joined, the fact that there was a misjoinder of the issue is cured after verdict in an action of assumpsit by the statute of jeofails. *Moore v. Mauro*, 4 Rand. 488.

A misjoinder of issue upon a plea of payment in an action of assumpsit, where the plaintiff could not reply anything to this plea, except what had been alleged in his declaration, the blunder in the making of the issue, would have been cured after verdict by the statute of jeofails. *Douglass v. Central Land Co.*, 12 W. Va. 502. See *Moore v. Mauro*, 4 Rand. 488; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Simmons v. Trumbo*, 9 W. Va. 363.

Failure to Allege Performance of Condition Cured.—In the declaration in an action of assumpsit founded on an agreement for sale and conveyance of property, the failure to allege the performance of a precedent condition will be cured by verdict. *Bailey v. Clay*, 4 Rand. 346. See ante, "Performance of Conditions Precedent," IV, A, 6.

Omission of Gist of Action Not Cured.—Only that which must have been necessarily proved from the matter stated in the declaration will be presumed after verdict, and therefore

the total want of an averment of a fact, which constitutes the gist of the action, will not be cured after verdict by the statute of jeofails. *Chichester v. Vass*, 1 Call 83, 1 Am. Dec. 509.

Omission of Names of Partners Cured.—On the authority of *Murdock v. Herndon*, 4 Hen. & M. 200; *Totty v. Donald*, 4 Munf. 430, it seems that a verdict will cure the defect in a declaration in assumpsit on behalf of a mercantile company, brought by the name of the firm and omitting to mention the names of the partners.

When Omissions of Averments Cured.—The declaration in an action of assumpsit upon a marriage promise, by which the defendant agreed to give the plaintiff, if he should marry his granddaughter, as much of his estate as he should give to any of his own children, should state the quantity and quality of the estate given by the defendant to his own children, and when the gifts were made. A verdict, if rendered, might cure the omission of such averments, but it will not do so where all the pleadings are defective. *Smith v. Walker*, 1 Wash. 135.

XI. Judgment.

See generally, the title JUDGMENTS AND DECREES.

Actions against Executors.—See the title EXECUTORS AND ADMINISTRATORS.

In an action of assumpsit by a legatee against an executor for a legacy, one count in the declaration alleges a promise made by the defendant, as executor, to pay the legacy. This is a count against the executor in his representative capacity, upon which the judgment can only be *de bonis testatoris*. *Kayser v. Disher*, 9 Leigh 357.

In an action of assumpsit against executors for money had and received by them to the plaintiff's use, it seems that the judgment should be *de bonis propriis*, and not *de bonis testatoris*. *Martin v. Stover*, 2 Call 514.

Joint Actions and Joint Judgments.

—The common-law rule that in a joint action against several parties there can be but one final judgment, and it must be for or against all the defendants, is the same whether the contract be joint, or joint and several, or whether it is founded on several and distinct contracts. *Stephoe v. Read*, 19 Gratt. 1; *Gibson v. Beveridge*, 90 Va. 697, 19 S. E. 785; *Taylor v. Beck*, 3 Rand. 316; *Moffett v. Bickle*, 21 Gratt. 280; *Muse v. Farmers' Bank*, 27 Gratt. 252.

For statutory provision for the recovery of money by motion from any number of those liable in a joint contract, see § 3212, Va. Code, 1887.

The common-law rule above mentioned has been modified by statute, which provides that in such an action the plaintiff may have judgment against any other or others from whom he would have been entitled to recover had he sued them only, although he may be barred as to one or more of them. Va. Code, 1887, § 3295. But in an action of assumpsit where the only plea was a joint one of nonassumpsit, and the plaintiff dismissed the suit as to one of the defendants, and there is nothing on the record which shows that the defense was merely personal to the defendant as to whom suit was dismissed and did not concern his co-defendant, the statute has no application and it is not an error to refuse to allow an amendment to the declaration. *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785.

Bill of Particulars Must Be Account against Both.

—If a declaration in assumpsit be filed against two defendants jointly containing the common counts, and a bill of particulars be filed purporting to be an account against both defendants jointly, but on the trial of the case on the plea of nonassumpsit the evidence shows, that only a part of the items in the bill of particulars are charges against the two defendants jointly, and that the other items are

charges against one of the defendants individually, the jury can only find a verdict on the items in the account, which are charges against the two defendants jointly, and can render no verdict against one of the defendants severally on the items of the account, which are charges against him severally; such a case not being within § 19, ch. 131, W. Va. Code, permitting in certain cases a judgment against one defendant in an action against two jointly. *Enos v. Stansbury*, 18 W. Va. 477.

Judgment for Joint Defendant Not Appearing.—An action of assumpsit is brought against two defendants jointly, and a writ of inquiry of damages was awarded against them. Only one appeared and set aside the office judgment and pleaded nonassumpsit. Issue was joined and a verdict was found for both of the defendants. The court overruling a motion for a new trial, entered up judgment in favor of both defendants without executing a writ of inquiry against the other defendant. It was clearly erroneous to give a verdict in favor of a defendant who had not appeared, and the verdict of the lower court was set aside. *Enos v. Stansbury*, 18 W. Va. 477.

Action against Intermediate Number of Obligors in a Bond.—The action of assumpsit on a joint and several bond must be brought either against all the obligors generally, or one of them singly, and not against any intermediate number. If an error in this respect appears on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement. *Leftwich v. Berkeley*, 1 Hen. & M. 61.

When One Proves Defense to Foundation of Entire Action.—In an action of assumpsit against two defendants on a contract, although one of them confesses judgment, yet if the other proves a defense, which goes to the foundation of the entire action, there must be a final judgment in favor of both

defendants. *Stephoe v. Read*, 19 Gratt. 1.

Actions against Partnership.—An action of assumpsit was instituted against a firm, one member of which appeared and plead nonassumpsit. Afterwards another member of the firm, against whom the suit had been entered abated, entered himself a defendant, and without filing a plea, united in defending the action. A judgment entered against the two is proper, as they did not discover by plea in abatement who the other partners were. *Barnett v. Watson*, 1 Wash. 372. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 2, p. 7.

In an action on the case in assumpsit brought against two partners to recover a partnership debt, the writ was executed on only one, and as to the other it was returned "no inhabitant of the city," and the suit was entered abated as to him. Though the declaration charges that the defendant assumed with another, a fact which as to that other is not tried, yet this does not vitiate the defendant's assumpsit which found against him, and the judgment against one partner on the joint contract is not erroneous. If the defendant wishes to take advantage of the omission to sue both, he should have pleaded in abatement and pointed out the other partner. *Brown v. Belches*, 1 Wash. 9.

Sickness of Defendant and Attorney.—In an action of assumpsit upon a negotiable note, several parties are sued. Process is only served upon one, and the suit is allowed to abate as to the others. The plaintiff files with its declaration an affidavit, under § 46, ch. 125, W. Va. Code, stating the amount he verily believes is due and unpaid from the defendant to him upon the demand, etc. At the next term of the court said defendant is dangerously sick, and unable to attend court. The attorney he relies on is deterred from going to the courthouse on account

of the prevalence of smallpox in the town where the courthouse is situated. During the term, however, after judgment has been entered up against the defendant, an attorney appeared for him, and presented the affidavit of the defendant, in pursuance of the provisions of said § 46, and also presented the affidavit of said defendant's physician, showing his inability to attend court, on account of sickness, and also the affidavit of another party as to defendant's attorney's being deterred from attending court by smallpox, and moved the court to set aside the judgment and allow the defendant to plead. Said motion should have prevailed. *Johnston v. Bank of Princeton*, 41 W. Va. 550, 23 S. E. 517.

Where such a motion is made by a defendant during the term at which the judgment is entered, and good cause is shown why such judgment should be set aside and the defendant allowed to plead, the court should act on said motion during the term, and not continue the motion until the next term, and then hold that it can not then set it aside, on the ground that no plea was filed or offered with the affidavit of defendant at the former term, and that the court has no jurisdiction over said judgment, or authority to set it aside, after the end of the former term. *Johnston v. Bank of Princeton*, 41 W. Va. 550, 23 S. E. 517.

Where, under the circumstances of this case, a motion was pending to permit the defendant to plead, and said motion is continued, and the consideration thereof deferred, until the next term, the motion having been docketed, such judgment will not become final at the last day of the first term. *Johnston v. Bank of Princeton*, 41 W. Va. 550, 23 S. E. 517.

Demurrer to the Evidence.—When the defendant to an action of assumpsit demurs to the evidence, and by demurrer shows that the plaintiff ought not to recover, the court can not set

it aside and award a new trial, but ought to enter judgment for the defendant. *Knox v. Garland*, 2 Call 241. See the title **DEMURRER TO THE EVIDENCE**.

On Demurrer without Trial of Issue.—Where issue was joined in an action of assumpsit on the plea of the general issue, two special pleas were filed by the defendant, to which the plaintiff demurred. It was an error for the court to overrule the demurrer and give final judgment for the defendant, as no final judgment should have been given without the issue on the plea of nonassumpsit having been tried, or otherwise disposed of. *Morgantown Bk. v. Foster*, 35 W. Va. 357, 13 S. E. 996, citing *Wilson v. Davisson*, 5 Munf. 178.

XII. Evidence.

A. RELEVANCY.

See the title **EVIDENCE**.

To Prove Wages of Customary Slave Hire for Farm Labor.—In an action of assumpsit brought for recovery of damages for the loss of a slave who was drowned, it was held relevant and admissible evidence to show that the amount of his hire was the usual and customary price for farm labor, and not for voyages down the Ohio river, where the bailee had wrongfully taken him. *Spencer v. Pilcher*, 8 Leigh 565.

Statement by Third Person Not Evidence in Action on Collateral Promise.—In an action of assumpsit on a collateral promise, a statement or account in writing by a third person showing the amount for which the defendant is liable, is not evidence, although that person was the agent employed by the defendant in performance of the contract. *Pasteur v. Parker*, 3 Rand. 458.

B. ADMISSIONS.

See the title **DECLARATIONS AND ADMISSIONS**.

Admissions of Cocontractor.—Admissions by a cocontractor as to the

correctness of an itemized account presented to him by plaintiffs, relating to the subject matter of the contract are binding on the defendant, and are admissible against him in an action of assumpsit. *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976.

Admissions against Interest.—The bailee of a slave, who was hired for farm work, without the permission of the bailor carried him on a voyage down the Ohio river where he was drowned. The admissions of the bailee to third persons that he had no authority to take him on the voyage, and that he would be liable in case the slave be lost, are competent evidence against him in an action of assumpsit for damages for the loss of the slave. *Spencer v. Pilcher*, 8 Leigh 565.

C. PAROL EVIDENCE.

See the title PAROL EVIDENCE.

Admissible to Show Contract a Guaranty.—In an action of assumpsit on assigned bonds, given as security for the payment of the purchased price of a tract of land, the defendant was declared against in one of the counts as an assignor, and in the others as a guarantor. In this case parol testimony is admissible to show the contract to be a guaranty, if such was the understanding, and recovery may be had upon it when so proved. *Welsh v. Ebersole*, 75 Va. 651.

Admissible to Show Agency.—Where the paper sued on in an action of assumpsit is of doubtful meaning, being

signed by the defendant, parol testimony is admissible to show that the defendant was the agent of a chief commissary in the Confederate army, and that the plaintiff knew that the defendant only bought as his agent. *Walker v. Christian*, 21 Gratt. 291.

D. WITNESSES.

See the title WITNESSES.

In an action of assumpsit for goods furnished to a third person, such person is a competent witness for the plaintiff. *Ware v. Stephenson*, 10 Leigh 155.

Joint Defendants.—In an action of assumpsit on a joint, or a joint and several contract against two defendants, one of them is not a competent witness to prove that he was the only party to the contract, and alone bound by it. *Steptoe v. Read*, 19 Gratt. 1.

Examination of Same Witness in Prior Suit between Same Parties No Ground for Exclusion.—In an action of assumpsit the testimony of witnesses offered to prove the items in the plaintiff's account, ought not to be excluded from the jury on the ground that, in an action of debt between the same parties, the record of which action is not exhibited, determined during the pendency of the action of assumpsit, one of those witnesses was examined touching the same items claimed by the plaintiff, to repel or set off the credits then claimed by the defendant. *Robertson v. Depriest*, 6 Munf. 469.

Assumption of Risk.

See the title MASTER AND SERVANT.

Asylums.

See the title HOSPITALS AND ASYLUMS.

AT.—The word *at* in a testamentary gift of personalty is a word of condition denoting, unless qualified by the context, the time when the gift is to take effect in substance, so that if the legatee die before the period specified, the legacy lapses. *Major v. Major*, 32 Gratt. 819; *Sellers v. Reed*, 88 Va. 379, 13 S. E. 754. See also, the title **WILLS**.

At Their Death.—In *Robinson v. Robinson*, 89 Va. 918, 14 S. E. 916, it is said: "The words '*at their death*' are, as restraining words, fully equivalent to the words '*for life*,' and they show clearly the intention of the testator to limit the estate given to the infants to an estate for life. Any other construction would render the words '*at their death*' inoperative, insensible, and unmeaning."

At a First Session.—For *at* the first session in the sense during the first session, see *Dew v. Judges*, 3 Hen. & M. 11.

At Once.—In *Ford v. Friedman*, 40 W. Va. 177, 20 S. E. 932, it is said: "They were to be made and shipped *at once*, '*for the spring trade*.' The term '*at once*' is not to be taken literally, for that would be unreasonable, seeing that the goods had to be manufactured before they could be sent; but the term indicates that a prompt making and sending of the shoes was expected on the part of the buyer, and promised on the part of the maker and seller."

At the Owner's Risk.—See the titles **CARRIERS; SHIPS AND SHIPPING**.

In *B. & O. R. R. v. Rathbone*, 1 W. Va. 107, it is said: "And the court is further of opinion that the words '*at the owner's risk*,' contained in the bills of lading, or contracts, taken in connection with the other stipulations therein contained, were understood and intended by the parties in this case to limit the plaintiff in error to such loss or damage only as might result from ordinary neglect by which is meant the want of that care and diligence which prudent men usually bestow on their own concerns, which is defined in the books to be ordinary neglect."

At Any Time.—A debt payable *at any time* is payable immediately. *Bowman v. McChesney*, 22 Gratt. 612. See generally, the titles **BILLS, NOTES AND CHECKS; PAYMENT**.

At or Near.—A presentment for playing *at cards at or near* a place is objectionable for uncertainty. *Bishop v. Com.*, 13 Gratt. 785, 787. See also, **NEAR**.

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CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; AFFIDAVITS, vol. 1, p. 227; AGENCY, vol. 1, p. 240; APPEAL AND ERROR, vol. 1, p. 418; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; BANKRUPTCY AND INSOLVENCY; COSTS; EVIDENCE; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; FOREIGN CORPORATIONS; INJUNCTIONS; INTERVENTION; JUDGMENTS AND DECREES; JURISDICTION; JUSTICES OF THE PEACE; LANDLORD AND TENANT; LIENS; MALICIOUS PROSECUTION; MORTGAGES; PARTNERSHIP; PLEADING; PLEDGE AND COLLATERAL SECURITY.

As to attachment against the person, see the titles ARREST, vol. 1, p. 719; BAIL AND RECOGNIZANCE; CONTEMPT; EXECUTIONS AGAINST BODY; IMPRISONMENT FOR DEBT. As to exemption from attachment, see the title EXEMPTIONS FROM EXECUTION AND ATTACHMENT.

I. Nature, Object and Construction.

A. NATURE.

Definition.—"This summary remedy," says Mr. Daniel in the preface of his works on attachments, "may be fitly termed the light cavalry of the law. To seize swiftly upon the effects of a nonresident or flying adversary and to hold him and them amenable to the issue of the proceeding are its chief functions in Virginia."

Ancillary Proceeding.—"An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. The claim may be entirely unfounded, and even when the demand is just the order may issue and be levied before it has become due and payable. The proceeding is to some extent the reverse of the ordinary course of judicial proceedings. The latter subjects the demand of the plaintiff to judicial investigation and permits the seizure of the debtor's property only after judgment obtained, while the former commences with the seizure of the debtor's property and afterwards subjects the plaintiff's claim to such investigation." Snyder, J., in *Delaplain v. Armstrong*, 21 W. Va. 211;

Ballard v. Great Western Mining, etc., Co., 39 W. Va. 394, 19 S. E. 510.

The proceeding by way of attachment is ancillary in its character. *Roberts v. Burns*, 48 W. Va. 96, 35 S. E. 922; W. Va. Code, ch. 106, § 1.

In Rem Proceeding.—Attachment is in the nature of a proceeding in rem. There is an actual seizure of property, except where it is in the form of garnishment. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 454, 44 S. E. 300. See post, "Seizure of Property," XVII, B, 2.

Harsh Remedy.—The proceeding by way of attachment has always been regarded as a harsh remedy. *Ballard v. Great Western Min., etc., Co.*, 39 W. Va. 394, 19 S. E. 512; *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 457.

An attachment is a harsh proceeding, governed by strict tests and not treated with liberality. *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528. See post, "Construction," I, C.

B. OBJECT.

To Obtain a Lien.—"The prime object in levying the attachment," says the court, in *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927, "is to obtain, pendente lite, a lien; or, in other words, to put the property in the custody of the law until by the judgment of the proper tribunal the plaintiff's claim is estab-

lished, when the lien becomes effective as of the date of the levy, but must be enforced, not by virtue of the writ of attachment, but by the judgment of the court ordering a sale of the property which the attachment has simply held in waiting." *Gutman v. Virginia Iron Co.*, 5 W. Va. 24. See post, "Lien," XI; "When Lien Commences," XI, A; "Disposition of Attached Property," XII.

An attachment goes at the opening of the suit, and is only a means to compel the appearance of the defendant. Such was the object of the ancient process of foreign attachment according to the custom of London; but the modern doctrine is that attachment is not for the purpose of bringing the defendant into court, and that its object is to give the plaintiff execution against the thing attached, to seize it, and create a lien upon it conditional upon the rendition of judgment. *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 490, 44 S. E. 294.

In the absence of fraud and statutory regulations, a creditor proceeding by attachment only obtains such rights in the property seized as his debtor had at the time of the seizure. *Lipscomb v. Condon (W. Va.)*, 49 S. E. 392; *Neill v. Rogers, etc., Co.*, 41 W. Va. 37, 23 S. E. 702.

C. CONSTRUCTION.

Must Follow Statute Strictly.—The remedy by attachment is in derogation of the common law and exists only by virtue of statutes, and being summary in its effects and liable to be abused and used oppressively, its application must be carefully guarded and confined strictly within the limits prescribed by statute. *Delaplain v. Armstrong*, 21 W. Va. 211; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977; *Ballard v. Great Western, etc., Co.*, 39 W. Va. 394, 19 S. E. 510; *Roberts v. Burns*, 48 W. Va. 96, 35 S. E. 922; *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414; *Goodman v. Henry*, 42 W. Va. 526, 26

S. E. 528; *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475.

"This extraordinary remedy," says *Joynes, J.*, in *Claffin v. Steenbock*, 18 Gratt. 842, "is not only harsh towards the defendant himself, but its operation is harsh towards the other creditors of the defendant, over whom the attachment creditor obtains priority. It is susceptible of great abuse and has often been greatly abused. It is, therefore, closely watched, and will never be sustained unless all the requirements of the law have been complied with."

As to the strict construction of the statute in attachment proceedings, see also, *Barnett v. Darnielle*, 3 Call 415; *Mantz v. Hendley*, 2 Hen. & M. 308; *Kelso v. Blackburn*, 3 Leigh 299; *Brien v. Pittman*, 12 Leigh 379; *Barksdale v. Hendree*, 2 Pat. & H. 47; *Lambert v. Jones*, 2 Pat. & H. 163; *Ballard v. Great Western, etc., Co.*, 39 W. Va. 394, 19 S. E. 513; *Goodman v. Henry*, 42 W. Va. 526, 29 S. E. 529.

Must Be Rational.—While attachment, "being a summary process, and liable to abuse, ought to be carefully watched by the courts, and kept within the bounds prescribed by statute, I do not mean that the party must be held to the very letter, and that the slightest departure from it is to be caught at, to set aside the proceeding; but that there should be, at least, strictness and certainty to what my Lord Coke calls 'a common intent in general.'" *Carr, J.*, in *Jones v. Anderson*, 7 Leigh 308.

"It is true, the attachment proceeding is a summary and harsh remedy, and is doubtless often much abused, and while it should be strictly, it should at the same time be rationally, construed. It must be borne in mind, however, that it was the will of the legislature that made it summary and necessarily harsh, and that the rule of construction was made for the protection of the debtor defendant." *Rich-*

ardson, J., in *Dorrier v. Masters*, 63 Va. 459, 2 S. E. 927.

II. When Proper.

A. GROUNDS.

1. Same in Equity as in Law.

It will be observed that as Va. Code, 1887, § 2964, authorizes attachments in equity whether the claim be legal or equitable, the grounds which justify attachments at law under Va. Code, § 2959, as amended by Acts 1891-'92, p. 520, also authorize attachments in equity. The section of the W. Va. Code corresponding to § 2959 of the Va. Code expressly provides that the attachment may be either at law or in equity. W. Va. Code 1899, ch. 106, § 1.

For review of the statutes of West Virginia in regard to attachment in equity, see *Peyton v. Cabell*, 25 W. Va. 541. See the following cases as to attachment in equity in Virginia: *Bank of U. S. v. Merchants' Bank*, 1 Rob. 573; *Peay v. Morrison*, 10 Gratt. 149; *Williamson v. Bowie*, 6 Munf. 176; *Peter v. Butler*, 1 Leigh 285.

2. Foreign Corporations and Nonresident Debtors.

a. In General.

The Virginia and West Virginia statutes authorize attachments against foreign corporations and nonresident debtors. Va. Code, 1887, § 2959, subd. 1 (see Acts, 1891-92, p. 520); W. Va. Code, 1899, ch. 106, § 1, subd. 1.

b. Foreign Corporations.

See generally, the title FOREIGN CORPORATIONS.

In November, 1864, during the Civil War, the plaintiffs issued an attachment in a chancery suit against the Bank of Virginia as a nonresident on notes of that bank owned by them, some of which were payable at branches of that bank in Virginia and had not been presented at such branch banks for payment. Held, that the attachment was properly issued against the

Bank of Virginia as a nonresident. *Hall v. Bank of Va.*, 14 W. Va. 584.

Corporation Doing Business in This State.—A statute merely enabling a foreign corporation to hold property or do business in this state does not make it a domestic corporation, and it may be proceeded against by attachment as a foreign corporation. *Savage v. People's B. & L. Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Quesenberry v. People's B. & L. Ass'n*, 44 W. Va. 512, 30 S. E. 73; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1009.

An insurance company, incorporated by the laws of New York, having its principal place of business in that state, which had complied with the laws of Virginia in relation to foreign insurance companies doing business in this state, by making the deposit, and appointing a citizen of Virginia an agent, by power of attorney, etc., as required by the statute of Virginia (Code of 1873, ch. 36, § 19), is not a resident of this state, within the meaning of the foreign attachment laws of Virginia, and the property of said insurance company is liable to such attachment as a nonresident. *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445.

In *Balt. & O. R. Co. v. Koontz*, 104 U. S. 5, reversing *Balt. & O. R. Co. v. Noell*, 32 Gratt. 394, it was held that a Maryland corporation, by leasing a railroad in Virginia from a Virginia corporation, with the assent of that state, did not thereby make itself a corporation of Virginia, Mr. Justice Waite, saying that corporations "by doing business away from their legal residence do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."

Prior to Statute Authorizing Attachments against Foreign Corporation.—Prior to the statute authorizing attachments against foreign corporations in express terms, it was held that such corporation could be proceeded against

in equity as an absent debtor under 1 Rev. Va. Code, 1819, p. 474, ch. 123. *Kyle v. Connelly*, 3 Leigh 719.

Under the act in the Revised Code, 1819, p. 474, ch. 123, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another state may maintain a suit in equity against such corporation, as a defendant out of this commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenants within the commonwealth. *Bank v. Merchants' Bank*, 1 Rob. 573.

c. Nonresident Debtors.

(1) In General.

The remedy by attachment against the estate of a nonresident is wholly statutory, harsh in its operations towards the debtor and his creditors, and the proceeding must show on its face that the requirements of the statute have been substantially complied with. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475. See ante, "Nature," I, A; "Construction," I, C.

A creditor residing in Maryland may sue out an attachment in chancery against the debtor, residing also in Maryland, and others residing in Virginia, indebted to, or having in their hands effects of such debtor. *Williamson v. Bowie*, 6 Munf. 176.

Fraudulent Conveyance.—A creditor at large may maintain an attachment suit in equity to set aside as fraudulent a deed conveying real estate, made by his debtor, where both the debtor and his grantee are living out of the commonwealth. *Peay v. Morrison*, 10 Gratt. 149.

Bailment.—A claim against a nonresident of Virginia arising out of a contract of bailment made out of Virginia, by which flour was deposited in a warehouse in Georgetown, D. C., and

there destroyed by fire is a claim for debt for which a foreign attachment in chancery lies. *Peter v. Butler*, 1 Leigh 285. See post, "Demands Arising Ex Contractu," II, B, 2.

Principal and Surety.—Where the surety to a bond has removed from the country leaving the principal within it, the obligee may proceed against him as an absent defendant and attach any effects or debts he may have in the state. *Loop v. Summers*, 3 Rand. 511.

Administrators' Suits against Distributees.—Where an administrator, having no notice of a debt against his intestate, makes distribution of the estate, and afterwards is compelled to pay the debt, he may, in equity, compel the distributees to refund to him the amount of the debt, the interest and costs which he has been compelled to pay and his expenses in defense of the suit. In such a case, if all the distributees are nonresidents and any of them have property within the state, it may be subjected by attachment in a suit in equity. *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210. See the title EXECUTORS AND ADMINISTRATORS.

Nonresidence of Cocontractor.—"The nonresidence of a codebtor is no ground for attaching the resident debtor's property, nor that of a cocontractor for attaching both contractors' property; but the residence of one contractor within the state will not shield the property or interests of his cocontractor living out of the state from attachment." *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

Nonresidence of Codebtor.—The nonresidence of a codebtor is no ground for attaching the resident debtor's property. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

Nonresidence of One Partner.—The nonresidence of one partner will not be ground for attachment against the firm, to the prejudice of social creditors. *Goodman v. Henry*, 42 W. Va.

526, 26 S. E. 528. See also, *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414. See the title PARTNERSHIP.

(3) Who Are Nonresident Debtors.

Distinction between Domicile and Residence.—Where a person domiciled in Washington obtained a contract to construct certain sections of a railroad in Virginia, rented his house in Washington, and removed with his family to a place on the route of the railroad, where he kept house, it was held, that he was a resident of Virginia, within the statutes relating to foreign attachments, the court saying that in the statutes relating to attachments, "actual residence is contemplated, as distinguished from legal residence. The word is to be construed in its popular sense * * * as the act of abiding or dwelling in a place for some continuance of time." *Long v. Ryan*, 30 Gratt. 718. "See the comments on this case in the note on page 427, 32 Am. Dec., to the case of *Frost v. Brisbin*, 19 Wend. 11; attention being called to the fact that the case of *Long v. Ryan* illustrates the difference between residence and domicile, in that while Ryan was a resident, within the meaning of the attachment statute, yet 'there could have been no pretense that Ryan was domiciled in Virginia.'" See also, *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444, where the definition of "residence" given in *Long v. Ryan*, 30 Gratt. 718, is quoted with approval. See generally, the title CONFLICT OF LAWS.

Party Dwelling in State for Indefinite Period of Time.—In *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661, 2 Va. Law Reg. 615, following *Long v. Ryan*, 30 Gratt. 718, it was held that one who is dwelling in Virginia with no intention of leaving, being engaged in constructing public improvements under a contract that will occupy him for an indefinite period, is not a nonresident within the meaning of the attachment laws, although his family lives out of the state.

If a man's family has been removed to West Virginia, and his business, means and property have been carried there, and he is engaged in business there, and dwells there, and his business engagements are such as to render his stay wholly uncertain and indefinite as to duration, he is not a nonresident of that state within the purview of the attachment law. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

Presumption as to Continuance of Residence.—Residence once established is presumed to continue until proved to have been changed; and the burden of proving the change is on him that asserts it. *Starke v. Scott*, 78 Va. 180.

When a Person Becomes a Nonresident.—Where a person conveys away his property, abandons his residence, and commences to remove to another state with the purpose of residing there, he is a nonresident, in the sense of the attachment law, before he has actually left the state. *Clark v. Ward*, 12 Gratt. 440.

A person becomes a nonresident, subject to attachment, the moment he leaves the state without the animus revertendi; and with the fixed purpose of taking up his future residence elsewhere. *Moore v. Holt*, 10 Gratt. 284.

If a resident of this state, with fixed, set intention to remove to another state, and there reside, in pursuance of such intention goes out of this state, he is, within the meaning of the attachment law, a nonresident of this state directly he begins the removal of his person from the place of his residence, even before he gets outside the state, and, to constitute him a nonresident, he need not acquire either a domicile or residence in another state. *State v. Allen*, 48 W. Va. 154, 35 S. E. 990.

Where a person entirely abandons his former residence in one state, with no intention of resuming it, and goes with his family to another residence,

which he has rented in another state, with the intention of making the latter his residence for an indefinite time, the latter state is his domicile, notwithstanding that after he and his family arrive at the new residence, which is only about a half a mile from the state line, they go on the same day on a visit to spend the night with a neighbor in the former state, intending to return in the morning of the next day, but he is detained there by sickness until he dies, and never does in fact return to his new home. *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596.

Persons Temporarily Absent.—Instead of the present term "not a resident," the Va. Code of 1819, ch. 123, § 1, contained the expressions "absent defendants" and "parties who are out of this country." In *Kelso v. Blackburn*, 3 Leigh 299, it was held, that these expressions did not include residents and citizens of the state, absent temporarily for pleasure or business, but that "nonresidence" was the ground of attachment which the legislature had in view. All ambiguity, however, was removed by the provisions which the revisers of 1849 recommended, and the legislature adopted.

Fugitive from Justice.—The property of a fugitive from justice, who suddenly departs from the state, leaving his family, can not be attached as that of a nonresident, since he, as a wanderer and fugitive, though outside of the state, can acquire no residence which would make him a nonresident under the attachment laws. *Starke v. Scott*, 78 Va. 180.

Volunteer Soldiers.—A resident of West Virginia, who enters the volunteer service of the United States, and with his regiment goes beyond the limits of the state, and remains for some time in such service, does not thereby become a nonresident of the state, within the meaning of the attachment law; and a valid attachment can not, on that ground alone, be sued out against his

property. In order that a person may become a nonresident of the state, it is necessary that he should leave the state with the intention of remaining absent therefrom. *Lyon v. Vance*, 46 W. Va. 781, 34 S. E. 761.

3. Debtor Removing or About to Remove.

It will be noted that, in order to warrant an attachment, the Virginia Code provides that the debtor shall be removing or about to remove out of the state with intent to change his domicile (Va. Code, 1887, § 2959, subd. 2), while the corresponding statute of West Virginia provides for attachment where the debtor has left, or is about to leave the state, with intent to defraud his creditors, or so conceals himself that a summons can not be served upon him. (W. Va. Code, 1883, ch. 106, § 1, subds. 2, 3.)

The grounds here set out by the Virginia and West Virginia statute refer to cases only when the debt is due, but both states now allow attachment whether debt is due or not. See post, "Right to Relief Regardless of Maturity of Debt," II, B, 4.

4. Removal of Property.

The shipment of the products of an enterprise out of the state in due course of trade, where the removal is not permanent and the proceeds are brought back within the state, is not sufficient ground for an attachment. *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660; Va. Code, § 2959, subd. 2; W. Va. Code, ch. 106, § 1, subd. 4.

Contra in attachment for rent, see post, "Removal of Goods in Course of Trade," II, C, 4.

5. Fraudulent Conversion, Assignment or Disposition of Property.

See Va. Code, 1887, § 2959, subds. 4, 5; W. Va. Code, 1899, ch. 106, § 1, subds. 5, 6.

Threats to Assign.—A bona fide request for an extension of time of pay-

ment and a declaration of a purpose, if necessary, to make a general assignment for the benefit of all creditors can not be held to be evidence of an intent to dispose of property to defraud creditors, especially where such debtor shows his intention to surrender all his property if required for the purpose of paying his indebtedness. *Wingo, Ellett & Crump v. Purdy & Co.*, 87 Va. 472, 12 S. E. 970. See generally, the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799.

Failure to Pay Proceeds to Creditors.

—Just before leaving the state, the defendant, at a large discount, assigned an obligation given him for the purchase money of a steamboat and carried the proceeds away, without leaving any adequate means to satisfy the claims of the plaintiff and other creditors, having mortgaged nearly all his real estate before leaving. Held, that these facts did not justify an attachment on the ground that he had fraudulently disposed of his property. *Capehart v. Dowery*, 10 W. Va. 130.

Failure to Record Deed of Trust.

The mere failure of a bank to record a deed of trust given to secure a note, in the absence of evidence of a request or desire on the part of the defendants that it should not be recorded, can not be construed as an attempt on the part of the defendants to hinder or defraud their creditors and is no ground for an attachment against them. *Burruss v. Trant*, 88 Va. 980, 14 S. E. 845.

Fraudulent Intent Must Be Shown.

It is not enough that creditors believe and allege the existence of fraudulent intent. They must prove its existence. *Wingo v. Purdy & Co.*, 87 Va. 472, 12 S. E. 970; *Burruss v. Trant*, 88 Va. 984, 14 S. E. 845.

Burden of Proof.—The burden of proving that an attachment was issued on sufficient cause rests on the plaintiff, and he should introduce his evidence first when the defendant moves

an abatement. *Wright v. Rambo*, 31 Gratt. 158; *Sublett v. Wood*, 76 Va. 318; *Burruss v. Trant*, 88 Va. 980, 14 S. E. 845.

B. TO WHAT ACTIONS REMEDY EXTENDS.

1. In General.

Debt on Which Action Based Must Be within Statute.—In a suit by foreign attachment to subject property of a nonresident, it must be shown that the debt on which the proceeding is based is such an one as comes within the meaning of the statute authorizing attachments, and not merely such an one as might be established, by a suit for the specific performance of a contract, out of which, if enforced, the debt would arise. *Barksdale v. Hendree*, 2 Pat. & H. 43.

2. Demands Arising Ex Contractu.

Contract of Bailment.—A claim, arising on contract of bailment made out of Virginia, against a nonresident of Virginia, is a claim for debt, for which a foreign attachment in chancery lies. *Peter v. Butler*, 1 Leigh 285. See ante, "In General," II, A, 2, c, (1).

Breach of Promise of Marriage.—An attachment in equity may, under W. Va. Code, ch. 106, § 1, be maintained to recover damages for a breach of a marriage contract. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55. See generally, the titles BREACH OF PROMISE OF MARRIAGE; DAMAGES.

3. Demands Arising Ex Delicto.

Claim Arising Out of Official Negligence of Clerk.—Where the plaintiff had sustained heavy loss, by the official negligence of the clerk of a county court, such clerk never having given any official bond for the faithful discharge of his duties, and the clerk is now a nonresident of the state, the plaintiff proceeded by way of foreign attachment against him as a nonresident; the court held that this is not a claim for debt for which a foreign at-

tachment in chancery lies. *Dunlop v. Keith*, 1 Leigh 430. See generally, the title CLERKS OF COURT.

Neither is the nonresident officer, in such case, amenable to the jurisdiction of the court of chancery as an absent defendant. *Dunlop v. Keith*, 1 Leigh 430.

4. Right to Relief Regardless of Maturity of Debt.

a. In General.

The five grounds of attachment named in § 2959, Va. Code, 1887, require an affidavit "at the time of, or after the institution of an action at law," and the attachment is issued by the clerk of the "court in which the action is." Since an action will not lie for a debt before it is due, no attachment can be maintained for such debt under this section. See *Bart. Law Pr.* (2d Ed.) 932. But §§ 2961, 2962, Va. Code, 1887, provide for attachment before the maturity of the debt claimed, and of course before the institution of any suit, against a debtor removing his effects out of this state, whether the claim is payable or not, and against a tenant removing his effects from the leased premises. Va. Code, 1873, ch. 148, § 3, provides "On complaint of any person * * * whether his claim is payable or not, that his debtor intends to remove, or is removing, or has removed his effects out of this state."

An attachment against an absconding debtor must be regular on its face, and a defect appearing thereon can not be supplied by averment. *Jones v. Anderson*, 7 Leigh 308.

b. At Law.

Where the defendant has removed a portion of his property out of the state and is about to remove the remainder, and it appears from the evidence that there are numerous pending suits and judgments against him, these facts warrant an attachment under Va. Code, 1873, ch. 148, § 3. *Weiss v. Hobbs*, 84 Va. 489, 5 S. E. 367.

D, who had just been detected in forgeries, on March 11, 1880, fled the state, leaving and not providing to remove his family. A few days before he obtained by forgery or otherwise \$1,050, and the morning of his flight borrowed \$100. This last sum was all he was known to have taken with him. On March 15, Scott, a creditor with an undue debt, attached under § 3, Va. Code, the property in this state of D as an absconding debtor. On April 16, Starke, a creditor with a due debt, attached same property under § 1 as that of a nonresident debtor. Starke then under § 25 filed his petition disputing the validity of Scott's attachment, and claiming a lien thereon under his own. It was held, that the proper remedy was to proceed against him under Va. Code, 1873, ch. 148, § 3, as a removing or absconding debtor and not under § 1, as a nonresident debtor. *Starke v. Scott*, 78 Va. 180.

Upon a settlement of an account, the creditor takes a negotiable note from the debtor, for the amount found due; and the note is discounted at bank for the creditor. Whilst the note is held by the bank, and before it is due, the debtor absconds. The creditor can not sue out an attachment against the debtor for the debt due upon the account. *M'Cluney v. Jackson*, 6 Gratt. 96.

One member of a mercantile house, to which a debt has been contracted but which has not yet fallen due, is competent to make complaint on oath and to sue out an attachment against the debtor under the provisions of the statute. 1 Rev. Va. Code, 1819, ch. 123, § 14; *Kyle v. Connelly*, 3 Leigh 719.

In the act of 1792, § 6, it is provided "that if any person shall make complaint to a justice of the peace that his debtor is removing out of the county, or privately conceals himself, so that the ordinary process of law can not be served upon him, such justice shall grant an attachment against the estate

of such debtor. * * * Under this act an original attachment ought not to have been granted to a creditor on the ground that the debtor intended to remove his effects, or would elude ordinary legal process, but only on the ground that he was actually removing out of the county or corporation privately, or absconded or concealed himself so that the ordinary process of law could not be served upon him. *Mantz v. Hendley*, 2 Hen. & M. 308.

c. In Equity.

Prior to the Va. Code, 1887, attachment in equity lay in Virginia only where the claim was actually due and payable. *Batchelder v. White*, 80 Va. 103; *Cirode v. Buchanan*, 22 Gratt. 205; *O'Brien v. Stephens*, 11 Gratt. 610. But the present statute, Va. Code, 1887, § 2964, declares that "when a person has a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, or to damages for the breach of any contract, express or implied, if such claim exceed \$20, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim," etc. But "this section (2964) shall not be construed as giving to a court of equity jurisdiction to enforce by attachment a claim to a debt not payable, when the only ground for the attachment is that the defendant, or one of the defendants, against whom the claim is, is a foreign corporation, or is not a resident of this state, and has estate or debts owing to the said defendant within the county or corporation in which the suit is, or is sued with a defendant residing therein." Hence, in *Wingo v. Purdy*, 87 Va. 472, 12 S. E. 970, where the suit was by attachment in equity against a firm of nonresident merchants for debts which were not yet due, on the ground that the defendants were about to make an assignment to hinder, delay or defraud their cred-

itors, it was held that proof of the fraudulent intent was essential to the jurisdiction of the court; and that, as the plaintiffs had failed to prove such fraudulent intent, the attachment should be abated, notwithstanding the fact that the debtors were nonresidents. Nor is it enough that the attaching creditor believes and alleges the fraudulent intent; he must prove reasonable and rational grounds for his allegations and belief as the basis of his attachment proceedings. See *Burruss v. Trant*, 88 Va. 980, 14 S. E. 845. See, as to burden of proof, post, "Evidence—Burden of Proof," XV, B, 1, f.

Where a demand was not mature, attachment without a statute can not be had until maturity of the demand, but § 1, ch. 106, W. Va. Code, 1891, allows an attachment in equity for a debt before maturity. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981.

It is held in *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409, that "an attachment can be sued out in equity against an absconding debtor by the accommodation maker of a negotiable note not yet due, although such maker has not yet paid such note, as he is absolutely bound to do so when it becomes due." *Roberts v. Burns*, 48 W. Va. 96, 35 S. E. 922.

C. ATTACHMENT FOR RENT.

1. For What Rent Attachment Will Issue.

Prior to the present provisions (Va. Code, 1887, § 2962) allowing attachment for rent which is yet to become due and which will be payable within one year, attachment could not issue for more than the installment of rent next due, whether that was for a month, quarter, year, etc. *Redford v. Winston*, 3 Rand. 148. See also, *Glassell v. Thomas*, 3 Leigh 113. See generally, the title LANDLORD AND TENANT.

2. Will Not Issue before Commencement of Term.

An attachment for rent which is to

become due at a future time can not be issued before the commencement of the term for which it is to be paid, for until that time the relation of landlord and tenant does not exist. If such attachment be issued and levied, the lessee, although he has entered into a recognizance to pay the rent, may have the attachment and recognizance quashed upon motion. *Johnson v. Garland*, 9 Leigh 149.

3. When Preferred to Distress.

Since distress for rent will not lie where the property has been removed from the demised premises, the claim of an attaching creditor to such property should be preferred to that of a landlord who has distrained. This is true although the attaching creditor, on account of some alleged defect in the attachment bond, has entered into a compromise giving the landlord the preference, such agreement being without consideration and void. *Mosby v. Leeds*, 3 Call 439.

4. Removal of Goods in Course of Trade.

The statute which authorizes a landlord to sue out an attachment against the goods of his tenant for rent not due, when the tenant intends to remove or is removing his effects from the leased premises, so that there will probably not be left on the leased premises property liable to distress sufficient to satisfy the rent when due, applies as well to removals in the regular course of business as to other removals. No exception is made in the statute. *Offtenderinger v. Ford*, 92 Va. 636, 24 S. E. 246, 2 Va. Law Reg. 377. See also, *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660. See ante, "Removal of Property," II, A, 4.

5. Intention to Remove.

The trustee in a deed of trust given by the lessor on property after it has been carried on leased premises can not remove the property from the

leased premises without securing to the lessor one year's rent. He can stand on no higher ground than the lessee. And the intention of the trustee to remove said property by sale or otherwise, without securing a year's rent, is of itself sufficient cause for suing out an attachment by the landlord. *Offtenderinger v. Ford*, 92 Va. 636, 24 S. E. 246.

6. Defenses.

Where an attachment is issued against the estate of a tenant for rent to become due at a future day, on the oath of the landlord that he has sufficient grounds to suspect that his tenant will remove his effects out of the county or corporation before the expiration of his term, it is not competent for the tenant, on the return of the attachment, to plead that his landlord had not sufficient grounds to suspect that the tenant was about to remove. *Redford v. Winston*, 3 Rand. 148.

7. Interpleader Not Allowed.

Section 12, ch. 123, 1 Rev. Va. Code, 1819, allowing any person to interplead in attachments without bail applies only to attachments for debt, and not for rent. *Hallam v. Jones*, Gilmer 142.

III. Property Subject.

A. IN GENERAL.

Attachment may be levied on any visible and tangible effects of nonresident debtor in his actual or constructive possession, in the common-law mode, as in the case of an execution. *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927. See post, "Levy," IX.

Attachment may be against specific property when the suit is to recover such property (Va. Code, p. 601, § 2). *Davis v. Com.*, 13 Gratt. 146.

An attaching creditor can acquire no greater right in attached property than the defendant had at the time of attachment and if the property be in such a situation that the defendant has

lost his power over it, or has not yet acquired such an interest in or power over it as to permit him to dispose of it adversely to others, it can not be attached. *Neill v. Rogers, etc., Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

B. REAL PROPERTY.

Interest of Heirs.—A creditor of a deceased debtor may proceed by foreign attachment against the heirs residing abroad to subject land or its proceeds, in the state, descended to them from the debtor. *Carrington v. Didier*, 8 Gratt. 260. See also, *Harrison v. Halley*, Jeff. 58, which was an attachment on land.

Interest of Tenants in Common.—The undivided interest of a tenant in common may be levied upon and sold under an attachment. The cotenants of the debtor are not proper parties to a suit for such purpose. *Curry v. Hale*, 15 W. Va. 867.

Contingent Remainder.—A contingent remainder which is a mere possibility is not within Va. Code, 1873, ch. 148, § 1, allowing an attachment against "estates or debts" in certain cases. *Young v. Young*, 89 Va. 675, 17 S. E. 470.

Fixtures.—If railroad spike machines have been brought by the owner of a rolling mill and placed upon the mill lot with the bona fide intention of attaching them to the mill, although not yet actually attached thereto, and they are necessary for the purpose for which they are to be used, they must be regarded as part of the realty, and not liable to be levied upon and sold as personality under an attachment. *McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408.

C. PERSONAL PROPERTY.

1. Trust Funds.

An attachment was served upon trustees in a deed of trust for the payment of certain debts, and among them the debts due to the plaintiff in the attachment. Held, that there could be no

surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there could be no surplus in their hands liable to his attachment. *Clark v. Ward*, 12 Gratt. 440.

2. Money on Special Deposit.

Money is left with a person, who is a member of a firm, on a special deposit, and in his absence it is entered on the books of the firm to the credit of the depositor, and paid out by the firm for their own uses, they paying the depositor's checks upon it, by checks in their name upon the bank, and then an attachment is served upon the firm as garnishees in a suit against the depositor; the summons being served on the other member of the firm. The attachment binds the money in the hands of the firm. *Pulliam v. Aler*, 15 Gratt. 54.

3. Choses in Action.

Under Va. Code, 1873, ch. 148, § 11, debts due to a nonresident debtor by open account may be attached in the hands of resident garnishees. *Porter v. Young*, 85 Va. 49, 6 S. E. 803.

Shares of Stock.—The shares of a stockholder in a railroad corporation are liable to attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *C. & O. R. Co. v. Paine*, 29 Gratt. 502. See post, "Shares of Corporate Stock," XVII, E, 5.

By the common law, shares of stock in a corporation, being in the nature of choses in action, intangible property incapable of manual seizure, are not subject to execution or attachment. They are by statute. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392.

4. Movables and Rolling Stock of Railroad Corporation.

Under § 8, art. 11, West Virginia constitution, rolling stock and all other movable property of a railroad company or corporation are subject to process of attachment where the attachment is applicable, as well as to ordi-

nary execution. *Wall v. Norfolk, etc.*, R. Co., 52 W. Va. 485, 44 S. E. 294.

5: Steamboats.

A process issued against the owners of steamboats navigating the waters of the state can be levied on such boats. *Com. v. Fry*, 4 W. Va. 721; *Davis v. Com.*, 13 Gratt. 146.

6. Chattels Pawned.

A chattel pawned or mortgaged is not attachable in an action against the pawnor or mortgagor. *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

7. Where Vendor Has Parted with Legal Title.

A house sold by parol contract to a purchaser, who has paid the purchase money and taken possession of the property can not be taken by an attachment against the vendor as an absent debtor and subjected to the payment of his debt. *Hicks v. Riddick*, 28 Gratt. 418.

Where a bill of sale is executed from one party to another, for a steamboat navigating the Ohio river, and delivery accompanies the act, thereby rendering the sale complete, there is no such right of ownership or title in the vendor as would authorize a creditor of the vendor to attach the boat under Va. Code, 1860, ch. 151, § 5, for money due on an account of materials furnished in building and equipping said boat. *Hobbs v. Interchange*, 1 W. Va. 57.

8. Legacies and Distributive Shares.

A legatee's interest in the hands of an executor may be attached in equity. *Vance v. McLaughlin*, 8 Gratt. 289; *Anderson v. De Soer*, 6 Gratt. 363; *Bickle v. Chrisman*, 76 Va. 678; *Sandidge v. Graves*, 1 Pat. & H. 101.

Wife's Interest as Legatee.—A wife's interest as legatee in her father's estate, in the hands of the executor, may be subjected by the creditor of her husband, by a proceeding by foreign attachment when the husband resides

out of the state. *Vance v. McLaughlin*, 8 Gratt. 289.

Distributive Shares in Decedent's Estate.—A creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate in Virginia, may go into a court of equity, for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt, out of the share of the absent debtor, in the said estate. *Moore v. White*, 3 Gratt. 139.

Not Allowed by Law.—In an attachment at law by W.'s administrator against J., the executors of C. are summoned as garnishees, and the plaintiff in the attachment seeks to subject a legacy left by C. to J. to the payment of his debt. A common-law court has not jurisdiction to compel the executors to pay the legacy. *Whitehead v. Coleman*, 31 Gratt. 784.

9. Funds in the Hands of Public Officers.

Funds in the hands of the state treasurer, which he holds by law in pursuance of a trust, are not liable to attachment at the suit of an individual. *Rollo v. Andes Ins. Co.*, 23 Gratt. 509, 14 Am. Rep. 147; *Buck v. Guarantors' Co.*, 97 Va. 719, 34 S. E. 950, 5 Va. Law Reg. 854; *Foley v. Shriver*, 81 Va. 568. See post, "Public Officers," XVII, F, 2.

10. Salary of Attorney General.

The salary of the attorney general is of constitutional grant, and of public official right, and the doctrine of offset can not be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of public policy, it has absolute immunity from detention for debt or counterclaims. *Blair v. Marye*, 80 Va. 485.

11. Municipal Corporations.

A municipal corporation may be garnished or attached for a debt due to one of its creditors just as a natural

person may be. Such a proceeding is not contrary to the public policy of this state. *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 33 S. E. 516, 5 Va. Law Reg. 172.

12. Partnership Effects.

"Whether partnership effects are attachable in a suit against one member of a firm who is a nonresident upon a debt contracted by the partnership depends upon the character of the obligation, whether it is joint, or joint and several. If the obligation sued upon is joint, partnership effects are not attachable in such suit; but if it is joint and several, the rule is otherwise. It is joint by the law of partnership without statutory modifications; so all the partners must be sued in order to attach property of the firm." *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414. See generally, the title PARTNERSHIP.

"The interest of a resident partner can not be levied on, even for a partnership debt, in an attachment on account of the nonresidence of his copartners. Nevertheless the interest of the nonresident may be so levied upon, whether the debt be against the firm or against the individual member." *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

D. PROPERTY IN CUSTODIA LEGIS.

Property in custodia legis can not be attached. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

E. PROPERTY EXEMPT FROM ATTACHMENT.

See the title EXEMPTIONS FROM EXECUTION AND ATTACHMENT.

IV. Commencement of Action.

When Attachment May Issue—In General.—An attachment may be issued under § 1, W. Va. Code, ch. 151, p. 600, after the action has been commenced, if it be done before the

abatement of the suit by the return of the officer. *Pulliam v. Aler*, 15 Gratt. 54; *Gutman v. Virginia Iron Co.*, 5 W. Va. 24.

After Debtor's Appearance.—The plaintiff may, after the debtor's appearance, make the affidavit, sue out an attachment, and have it levied. *O'Brien v. Stephens*, 11 Gratt. 610. See post, "Time of Making," VI, B.

Attachment May Be Issued after Summons Issued in Action at Law.—A common-law action is commenced when the summons is issued for the purpose of having it executed, and the issuing of the summons is sufficient, under § 2959 of the Va. Code, to authorize the clerk to issue an attachment at that time or afterwards before the abatement of the action. *Furst v. Banks*, 101 Va. 208, 43 S. E. 728.

But a proceeding under § 3211 of the Va. Code can not be regarded as the institution of an action so as to warrant an attachment under § 2959, until the notice has been served and filed in the clerk's office. *Furst v. Banks*, 101 Va. 208, 43 S. E. 728.

Before Guarantor Pays Debt.—It has been held that a guarantor of a debt may maintain a foreign attachment against his principal, before he has paid the debt. *Moore v. Holt*, 10 Gratt. 284. See also, *Williamson v. Bowie*, 6 Munf. 176.

Before a Justice—Necessity for Affidavit.—An attachment may be sued out before a justice, if the plaintiff files his affidavit at the commencement of his action, or at some time during its pendency. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556. See post, "Necessity," VI, A. See generally, the title JUSTICES OF THE PEACE.

After Making Affidavit Attachment Should Issue in Reasonable Time.—The ground for an attachment should exist when it is sued out, and for this reason the time between the making of the affidavit and the issue of the attachment should not be unreasonable.

The two acts need not be simultaneous, but done within a reasonable time; and what is a reasonable time is to be judged of by the situation of the parties. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

V. Jurisdiction and Venue.

A. JURISDICTION.

In General.—When a case, purely legal, is the subject of a foreign attachment, it will be considered substantially a legal proceeding, and conducted on legal principles. But where, in its nature, the case properly belongs to a court of equity, all the equitable rules and principles will attach to and govern it. *Templeman v. Fauntleroy*, 3 Rand. 441. But such attachment in equity is now allowed by statute. Va. Code, 1887, § 2964; W. Va. Code, ch. 106, § 1.

Attachment in Equity in Purely Legal Claim.—In September, 1883, there was no statute in this state authorizing an attachment in equity for a purely legal demand, and therefore a bill filed to enforce an attachment lien for a demand purely legal was dismissed, because the court had not jurisdiction. *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451.

Under § 1, ch. 106, acts of 1882, a court of equity has no jurisdiction of a purely legal claim, and no attachment can issue in such a case; and the court having no jurisdiction, the decree entered in such case will be reversed by the appellate court and the bill dismissed. *Peyton & Co. v. Cabell*, 25 W. Va. 540.

Attachment in Equity over Equitable Claim.—Equity has jurisdiction over an attachment to subject a legacy in the hands of an executor as garnishee, to the payment of the plaintiff's debt; for the proceeding involves the settlement of accounts which could not be done at law. *Whitehead v. Coleman*, 31 Gratt. 784.

Levy Is Foundation of Jurisdiction.

—The levy of the attachment, as shown by the officer's return on the nonresident defendant's property, is the foundation of the suit. If the property attached be not the defendant's property, the court is without jurisdiction. *Culbertson v. Stevens*, 82 Va. 406. See post, "Levy," IX.

Right to Trial by Jury.—A nonresident or foreign corporation defendant by the proceeding in equity by attachment against such defendant, may in all cases be deprived of his right of trial by jury, under our decisions, notwithstanding the constitutions of the state and of the United States, simply because of nonresidence. *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1010. See the titles CONSTITUTIONAL LAW; JURY.

Jurisdiction of Justice of the Peace.

—It is provided in § 193, ch. 50, of the W. Va. Code; that "if the plaintiff at the commencement of his action or at any time during its pendency, and before judgment, show to the satisfaction of the justice by his own affidavit, * * * such justice, having jurisdiction of the action, may, subject to the provisions contained in the following section, issue an order of attachment," etc. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556. See generally, the title JUSTICES OF THE PEACE.

How Conferred.—In order that jurisdiction may be conferred upon a justice of the peace the summons must be properly issued and served upon the defendants, or an attachment properly issued must be levied upon the property of the defendants in such case. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556. See post, "Levy," IX. See the title SERVICE OF PROCESS.

Objection to Jurisdiction May Be Raised in Appellate Court for First Time.—If it appears upon the face of the record that the trial court had no jurisdiction to issue an attachment, the objection may be raised in the appel-

late court for the first time. *Furst v. Banks*, 101 Va. 208, 43 S. E. 728. See generally, the title **APPEAL AND ERROR**, vol. 1, p. 418.

B. VENUE.

Where Defendant Is a Nonresident.

—Where principal defendant is a nonresident, suit may be brought in a county where one or more of the other defendants reside, though the attached real estate of nonresident lies in another county. *Porter v. Young*, 85 Va. 49, 6 S. E. 803; *Pendleton v. Smith*, 1 W. Va. 16. See post, "To What Officers Directed," VIII, A.

Service of summons on a nonresident in the county in which the same is issued does not abate an attachment nor furnish good grounds for a demurrer to a bill in equity, founded on the fact of such nonresidence. *Hall v. Packard*, 51 W. Va. 264, 41 S. E. 142. See the title **SERVICE OF PROCESS**.

Against Absconding Debtor.—A magistrate's attachment against an absconding debtor, can only issue from the county where he resided, or is actually found, at the time of issuing it. *Barnett v. Darnielle*, 3 Call 413.

VI. Affidavit.

A. NECESSITY.

In a proceeding by foreign attachment in chancery where there has been no affidavit, as required by 1 Rev. Va. Code, 1819, ch. 123, § 1, that the defendants are absent from the country so that they can not be served with process, it is error to decree a sale of their property, although one of the defendants answer admitting his nonresidence. *Brien v. Pittman*, 12 Leigh 379.

If the suit is before a justice an affidavit is necessary. *Colburn v. Booth*, 41 W. Va. 289, 23 S. E. 556. See generally, the title **AFFIDAVITS**, vol. 1, p. 227.

B. TIME OF MAKING.

Affidavit of Nonresidence.—It is not

necessary for the plaintiff in a foreign attachment to file with the clerk an affidavit of the nonresidence of his debtor before the process is issued, in order to constitute it, with the endorsement thereon in the nature of an attachment, a valid lien when served. *Moore v. Holt*, 10 Gratt. 284. See post, "Lien," XI.

When the bill states a good case for a foreign attachment suit, the affidavit of nonresidence required by the statute may be made at any time, before third persons have acquired rights; and the endorsement on the subpoena is not necessary to render the attachment valid. *Cirode v. Buchanan*, 22 Gratt. 205; *Bruff v. Thompson*, 31 W. Va. 16, 6 S. E. 354.

The affidavit in an attachment suit against a nonresident, under Va. Code, 1849, ch. 151, § 1, may be made at any time before the abatement of the suit by the return of the officer. *Pulliam v. Aler*, 15 Gratt. 54.

After a suit has abated it is not competent to sue out an attachment in that cause, because such affidavit and attachment must be sued out in a pending cause. *Steele v. Harkness*, 9 W. Va. 13.

Absent Debtor.—The affidavit required by the statutes (Va. Code, 1849, ch. 151, § 2; Acts, 1852, ch. 95, § 1) to authorize a creditor to sue out an attachment against the effects of an absent debtor may be made either before or after the bill is filed. *O'Brien v. Stephens*, 11 Gratt. 610.

C. WHO MAY MAKE.

The affidavit may be made by "any credible person," and the affidavit need not state that the affiant is a "credible person," as that will be presumed until the contrary appears. *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. 798; *Delaplain v. Rogers*, 29 W. Va. 783, 2 S. E. 800.

In Behalf of Firm.—One member of an attaching firm may make the affi-

davit in behalf of the firm. *Kyle v. Connelly*, 3 Leigh 719. See generally, the title PARTNERSHIP.

Agents and Attorneys.—Under 1 Rev. Va. Code, 1803, ch. 78, § 6, the affidavit on which an attachment was issued, and the bond and security for its due prosecution, ought to be made and given by the creditor himself, and not by his attorney at law. *Mantz v. Hendley*, 2 Hen. & M. 308. See the titles AGENCY, vol. 1, p. 240; ATTORNEY AND CLIENT.

The affidavit may now be made by the plaintiff, his agent or attorney. Va. Code, 1887, §§ 2954, 2962, 2964, 2988.

In a foreign attachment in chancery, the affidavit required by the statute, Va. Code, 1860, pp. 645, 648, may be made by the agent of the plaintiff. *Fisher v. March*, 26 Gratt. 765.

Under Va. Code, 1873, ch. 148, § 2 (see Code 1887, § 2959), which provides that "on affidavit, at the time of or after the institution of any suit * * * the clerk shall issue an attachment," etc., the affidavit may be made by any person who knows the facts. It is not necessary that it be made by the plaintiff or his authorized agent. *Benn v. Hatcher*, 81 Va. 25.

D. WHO MAY TAKE.

Affidavit for attachment may be made before an officer of any county, though to be used in a suit in another county. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

E. FORMAL REQUISITES.

It is not a sufficient ground to quash an attachment that the affidavit does not technically allege that the affiant is entitled to recover the amount of his claim "in the suit" at bar as that sufficiently appears from the filing of the affidavit in the suit, and stating therein that the affiant is justly entitled to recover a certain sum by virtue of a note, describing it, and that the same is due and unpaid, and that affiant has instituted a suit in chancery for the

purpose, and is about to issue an attachment in such suit, it further appearing that the attachment was issued in said chancery suit, and the debt was one that could properly be recovered therein. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409.

Where the objection to the affidavit for the order of attachment is that it fails to recite that "the action at law is about to be or is instituted;" neither does it show where the action is pending; neither of these things is required to be set out in the affidavit. Its heading gives the style and character of the suit, and shows in what clerk's office it is made and filed, and therefore in what suit. *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409; *Waldron v. Hughes*, 44 W. Va. 126, 29 S. E. 505.

A venue is not necessary to be stated—that is, its absence will not vitiate an affidavit for attachment—if it appear that the affidavit was made before an officer of a certain county. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

F. JURAT OR CERTIFICATE OF OFFICER.

Although the statute requires that the complaint to sue out an attachment against a debtor shall be made on oath as the foundation of the process, it does not require that the fact of the complaint having been verified by oath shall be certified by the justices and made a part of the record. *Kyle v. Connelly*, 3 Leigh 719.

Where a paper purporting to be an affidavit contains no jurat and does not show on its face that the party seeking the attachment was sworn, it is not a sufficient paper on which to base an order of attachment. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

But where such an affidavit as the law requires has been made in an attachment proceeding the accidental omission of the jurat when the affidavit was signed by the officer who admin-

istered the oath, was held not to vitiate the attachment. *Farmers' Bank of Va. v. Gettinger*, 4 W. Va. 305.

If an affidavit be made before an officer of a certain county shown in the venue or otherwise, it will be presumed that it was sworn to in that county. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

G. AVERMENTS.

1. In General.

"To every valid affidavit for attachment, there must be two distinct and essential averments: (1) There must be an averment of a cause of action between certain named parties, based upon a money demand; and (2) there must be a further averment of a ground of attachment; that is, a statement of facts because of which the statute will permit an attachment to issue. * * * These two conditions are always essential, and their averment absolutely necessary. * * * The ownership of the debt is a material part of the description." *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 788.

2. Ownership.

In a suit in equity against an absent defendant where it appears from the bill that the court has jurisdiction of the case, it is not necessary for the affidavit to state that the defendant has property in the county where the suit is brought, but it is sufficient to state that he has property and effects in any county of the state. *Anderson v. Johnson*, 32 Gratt. 558.

3. Knowledge or Belief.

Under Va. Code, 1873, ch. 148, § 1 (see, however, Va. Code, 1887, § 2959), every averment in an affidavit to support an attachment had to be stated as a fact, and upon affiant's own knowledge and not upon belief, or information and belief. *Clowser v. Hall*, 80 Va. 864.

Affidavits as to the ground of attachment are always to be strictly construed, and any omission of the re-

quirements of the statute is fatal to the attachment, but if the language of the affidavit necessarily implies the fact, it is sufficient. Hence, an affidavit "that the claim is just" and "that the defendant is converting, etc.," is a sufficient compliance with the statute, Va. Code, 1887, § 2959, which requires an affidavit "that the claim is believed to be just," and "that to the best of affiant's belief defendant is converting," etc. *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660, 1 Va. Law Reg. 37.

An affidavit for an attachment from a justice which says that "affiant believes that plaintiff ought to recover thereon" a certain sum, is not bad, as not sufficiently positive. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

Under the statute, W. Va. Code, ch. 106, § 1, requiring the affidavit to state the material facts relied on, where the attachment is sought on the ground that the defendant so conceals himself that a summons can not be served on him an affidavit that "affiant and her friends have been informed by his friends that the defendant has left the state so that a summons can not be served upon him personally," is insufficient because it does not allege the facts positively. *Hudkins v. Haskins*, 22 W. Va. 645.

Under W. Va. Act of 1867, an affidavit that the affiant "thinks" the plaintiff ought to recover the sum named is not equivalent to an affidavit that he "believes" he ought to recover such sum, and is not sufficient to authorize an attachment. *Rittenhouse v. Harman*, 7 W. Va. 380.

If an attachment affidavit says that affiant believes that the plaintiff "should recover," instead of "entitled" to recover, it is bad, and ought to be quashed on motion. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787.

4. Nature of Claim.

An affidavit for an attachment not stating the nature of the plaintiff's de-

mand, so as to show a title or right in the plaintiff to such demand, is bad, and should be quashed on motion. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787.

Under W. Va. Code, ch. 106, § 1, providing that the affidavit must state the nature of the claim, an averment "that his claim is founded upon a written contract for the delivery of certain timber by the plaintiff to the defendant," without stating in what respect the defendant failed to comply with such contract, is insufficient. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

An affidavit in an attachment case stating that the claim "is for transcript of foreign judgment" sufficiently sets forth the nature of the claim. *Todd v. Gates*, 20 W. Va. 464.

In a case where the plaintiff's affidavit is defective in that it does not state the nature of the claim, the court said: "It states the nature of the claim, by stating that it is for amount due and payable on stock in the association in the name of J. Speed Thompson, subject to withdrawal, and payable under the rules and by-laws of said defendant association; that said claim is just, and due and payable, and is for the sum of \$200. It describes Frank Lively as assignee, and this affidavit is made in a pending suit in which Frank Lively, assignee of J. Speed Thompson, is plaintiff, and is part of the proceeding in that suit; and the affidavit commences by saying: 'In the case of Frank Lively, assignee v. Southern Building & Loan Association of Knoxville, Tenn., a corporation, pending in the court of L. M. Dunn, a justice of the peace,' so that the nature of the claim appears to be sufficiently shown, and the ground for the attachment was stated to be that the defendant was a foreign corporation, and a nonresident of the state of West Virginia." *Lively v. Southern B. & L. Ass'n*, 46 W. Va. 180, 33 S. E. 94.

But it is not necessary in Virginia to state the character of the claim, whether due by bond, note, account, or otherwise. *M'Cluny v. Jackson*, 6 Gratt. 96.

5. Indebtedness.

a. Justice of Demand.

Under the W. Va. Statute of 1867, ch. 118, § 1, requiring that the affidavit for an attachment shall state that the plaintiff's claim is just, it is sufficient if the affidavit state that "the plaintiffs are justly entitled to recover." *Gutman v. Va. Iron Co.*, 5 W. Va. 22.

Attachment proceedings are not void because an affidavit fails to say that the claim is "just." *Miller v. White*, 46 W. Va. 67, 33 S. E. 333.

An affidavit for an attachment omitting the word "justly" from the clause "justly entitled to recover" is bad, and should be quashed on motion. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787.

West Virginia Code, ch. 106, § 1, prescribes that the affidavit for an attachment shall state the nature of the plaintiff's claim, and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover. Held, the term "justly" is not superfluous or insignificant, but is a material qualification of the rest of the phrase, "entitled to recover," and it, or its equivalent, must be used in order to constitute a substantial compliance with the statute. *Reed v. McCloud*, 38 W. Va. 701, 18 S. E. 924. See also, *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753.

b. Amount of Debt.

The affidavit for an attachment is not sufficient if it does not show the amount the plaintiff is entitled to recover in the action, as well as the nature of the plaintiff's claim. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

Under West Virginia Statute.—Where the affidavit for an attachment in designating the amount which the

affiant believed the plaintiffs were entitled to recover, omits the words "at the least" contained in the statute, W. Va. Code, ch. 106, § 1, and uses no words equivalent thereto, such defect is fatal and the attachment should be quashed. *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. 702; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409.

"At least," used in an affidavit for an attachment, is synonymous with, and fairly equivalent to, the phrase "at the least," as used in the statute relating to such affidavits. *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583.

c. Maturity of Debt.

Under W. Va. Acts, 1885, ch. 38, it is not necessary that the affidavit for an attachment shall in express terms state that the "debt is due," but it is sufficient if it states "the amount at the least which the affiant believes the plaintiff is justly entitled to recover in the action." *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. 798; *Delaplain v. Rogers*, 29 W. Va. 783, 2 S. E. 800.

Our statute (§ 1, ch. 106, W. Va. Code) provides that an attachment may be sued out in a court of equity for a debt or claim, legal or equitable, whether the same be due or not, upon any of the grounds aforesaid, but the affidavit, in case the claim or debt be not due, must show when it will become due. *Roberts v. Burns*, 48 W. Va. 95, 35 S. E. 922.

6. Nonresidence.

In an attachment suit against an absent debtor under 1 Rev. Va. Code, 1819, to subject lands fraudulently conveyed by him in the hands of home defendants, the affidavit must distinctly aver the nonresidence; and if this be denied by the answer, it must be proved, or the chancery court is without jurisdiction. *Kelso v. Blackburn*, 3 Leigh 299.

7. Sufficiency.

a. In General.

Failure to Specify Defendant.—An affidavit for attachment which says, "The claim of said plaintiff against the defendant is for professional services rendered by plaintiff," there being two defendants and the one indebted not being specified, is bad. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

b. Following Language of Statute.

In an attachment proceeding against a corporation on the ground that it has failed to comply with the requirements of § 37, ch. 54, Code of W. Va., in reference to the appointment of a person to accept service of process, the affidavit must show that the requirements of said section have not been complied with before an order of attachment can issue by reason of such noncompliance. *U. S. Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. 382.

c. Stating Specific Facts.

"An affidavit is sufficient if it alleges all the material issuable facts necessary to entitle the plaintiff to recover." *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 788.

An affidavit for an attachment not stating material facts to show the existence of the ground of attachment (except in case of a nonresidence) is bad, and should be quashed on motion. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787.

Material Facts Relied on Must Be Certain and Definite.—A statement of material facts in an affidavit for attachment must be certain and definite, in a legal point of view, so as to inform those entitled to defend the attachment what particular facts they must repel, and the facts thus stated must be such as to show the grounds of attachment to which they relate. *Hale v. Donahue*, 25 W. Va. 414; *Roberts v. Burns*, 48 W. Va. 92, 35 S. E. 922.

"Generality can not be allowed in proceedings by attachment. The mode

and manner of the act and the attendant facts must be stated, in order that the court may determine the purpose and character of the act and be able to decide for itself upon the propriety or impropriety of the act and to say whether it was fraudulent or innocent." *Sandheger v. Hosey*, 26 W. Va. 221, 224.

Grounds Should Appear from Facts Stated.—The grounds for attachment are conclusions of law and an affidavit is not sufficient which states that the debtor did certain acts, which of themselves are not necessarily fraudulent, with an intent to defraud his creditors. This, being a conclusion of law, should appear from the facts themselves, not by averment. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203; *Hale v. Donahue*, 25 W. Va. 414; *Delaplain v. Armstrong*, 21 W. Va. 211; *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528; *Roberts v. Burns*, 48 W. Va. 98, 35 S. E. 922; *Capehart v. Dowery*, 10 W. Va. 130.

"The 'material facts,' required by the statute, are the allegations which must produce in the mind of the court the conclusion that the ground for the attachment exists. This requirement is intended to protect the alleged debtor against an abuse of the attachment law. The facts stated must be capable of denial and disproof, and they must of themselves show an improper, illegal or fraudulent act; and they must exclude every reasonable conclusion that the act was proper and innocent. If they leave it doubtful whether the act alleged was fraudulent or innocent, the affidavit will be insufficient. An affidavit that the defendant did an act which, of itself, does not show a fraudulent intent, can not certainly establish such intent. It is the fraudulent act and intent of the defendant to withdraw his effects from the reach of the plaintiff, his creditor, that gives the right to pursue him by attachment; and consequently, unless both such act

and intent are deducible from the material facts stated, the affidavit is insufficient. *Delaplain v. Armstrong*, 21 W. Va. 211." *Sandheger v. Hosey*, 26 W. Va. 221, 224.

The material facts stated in an affidavit must be such as to show the ground of attachment to which they relate. A mere statement that a debtor has conveyed or attempted to convey his property with intent to defraud is not enough. There must be facts and circumstances given to sustain the charge of fraud. *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528.

Where the affidavit upon which an attachment is issued charges that the grantors made the assignment with intent to hinder, delay or defraud creditors, and in "material facts" sets out the provisions of the deed in which said intent is claimed to appear, showing that the deed is fraudulent upon its face, the affidavit is supported by such "material facts." *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203.

But an affidavit alleging the "material facts" for an attachment to be "that the defendant is hiding and concealing a large part of the stock of liquors and wines which the plaintiff sold and delivered to him is not sufficiently definite to sustain the order of attachment. *Sandheger v. Hosey*, 26 W. Va. 221.

Where a party who is engaged in the mercantile business owns several lots of land, and executes his negotiable note, payable in thirty days, for \$360, to a party to whom he is indebted before said note falls due; sells all of his stock in trade to a third party, and executes two deeds of trust for a considerable amount upon his real estate, when he was in fact insolvent; makes conflicting statements as to the terms of said sale, saying to one that he owed his vendee \$400, to be credited on the purchase money, and the residue paid to him in \$50 monthly installments; to another that his vendee had paid him

part cash, and the residue was to be paid in installments; while to another he said the purchase money was to be paid in \$50 monthly installments, not claiming that his vendees owed him anything; and, when asked to give his order on the vendees in payment of said note, declined, saying he would pay it in his own way and time; these facts strongly indicate that said merchant had disposed of his property with intent to defraud his creditors, and, if set forth in an affidavit filed by the party to whom said note was made payable, are sufficient to authorize an order of attachment. *Lewis v. Bragg*, 47 W. Va. 707, 35 S. E. 943.

d. Grounds Stated Disjunctively.

While the affidavit may state as many grounds of attachment as the statute allows, it will be defective if it states two or more of them disjunctively. *Roberts v. Burns*, 48 W. Va. 97, 35 S. E. 922; *Sandheger v. Hosey*, 26 W. Va. 221, 223.

"The several distinct statutory grounds, of facts of different natures, if two or more of such grounds or facts are stated, must be stated in the affidavit conjunctively and not disjunctively." *Sandheger v. Hosey*, 26 W. Va. 221, 223.

"An averment that the debtor is about removing or is so concealing his effects as to defeat the creditor, or that the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of creditors, is not sufficient; being in the alternative." *Roberts v. Burns*, 48 W. Va. 97, 35 S. E. 922.

An affidavit for an attachment which contains the following clause: "Affiant further says that he believes that some one or more of the following grounds exist for an attachment against the property of defendant B.," and then proceeds to state five different grounds, is too indefinite and insufficient. *Rob-*

erts v. Burns, 48 W. Va. 92, 35 S. E. 922.

So, in the case of *Sandheger v. Hosey*, 26 W. Va. 223, Snyder, Judge, speaking for the court, said: "An affidavit alleging one or the other of two or more distinct grounds would be bad, because of the impossibility of determining which is relied on to sustain the attachment." Nothing could be more indefinite than the expression used in this case: "Affiant further says that he believes that some one or more of the following grounds exists," etc. *Roberts v. Burns*, 48 W. Va. 97, 35 S. E. 922.

An affidavit for an order of attachment, which states as the ground for the order, "that the defendant has property or rights of action which he conceals," is sufficient, notwithstanding the disjunctive or is used, it being apparent that but one ground for the attachment is alleged under the statute. *Sandheger v. Hosey*, 26 W. Va. 221.

e. Inconsistent Grounds Stated.

"Usually the plaintiff may allege as many distinct and separate grounds of attachment, within the terms of the statute, as he may deem expedient. But in doing so care must be taken that there be no inconsistency between any two of the grounds stated, for that would introduce an element of uncertainty and indefiniteness in the affidavit which might vitiate the attachment." *Sandheger v. Hosey*, 26 W. Va. 221, 223.

"But if the affidavit states two or more phases of the same fact, or even different facts of the same nature, which constitute together but a single statutory ground for an attachment, and do not unite two or more such grounds, they may be stated disjunctively and the affidavit will not be bad for that reason. Thus when the language of the statute was, 'so absconds or conceals himself that the ordinary process of law can not be served on him,' and the affidavit used the precise language

of the statute, the court held it was sufficient." *Sandheger v. Hosey*, 26 W. Va. 221, 223.

"Or, when the affidavit, using the words of the statute, alleged that the defendant 'has assigned, disposed of or concealed, or is about to assign, dispose of, or conceal his property, with intent to defraud his creditors,' the court held it was sufficient." *Sandheger v. Hosey*, 26 W. Va. 221, 223.

f. Stating Good and Bad Grounds.

Where the affidavit for an attachment contains two grounds for the attachment, the one good and the other bad, it is sufficient. *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. 798; *Delaplain v. Rogers*, 29 W. Va. 783, 2 S. E. 800.

H. SUPPLEMENTAL AFFIDAVIT.

In General.—A defective affidavit for an order of attachment can not be supplemented by a subsequent affidavit or proofs. *U. S. Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. 382. See post, "Effect of Defective Affidavit," VI, I.

Although the affidavit does not state the "nature of the plaintiff's claim" as required by the statute, the attachment suits will not be quashed where a second affidavit has been filed before the rights of other parties have intervened. *Chapman v. Railway Co.*, 26 W. Va. 299.

Who May Make.—While a supplemental affidavit for an order of attachment should be filed by the party who makes the original affidavit, such affidavit may be made by a third party, who is a credible person. *Lewis v. Bragg*, 47 W. Va. 707, 35 S. E. 943.

Time to File.—The provision of § 1, ch. 106, W. Va. Code, allowing time to file supplemental affidavit of other material facts to show ground of attachment, is remedial, and should be liberally construed. It would be applied with the same liberality as the law of amendment of pleadings. *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528.

Formal Requisites.—A supplemental affidavit in an attachment need not state expressly that the additional facts came to affiant's knowledge since the first affidavit. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981.

I. EFFECT OF DEFECTIVE AFFIDAVIT.

Defective or irregular affidavits, although a ground for reversing a judgment or decree in attachment proceedings for error in departing from the directions of the statute, do not render such a judgment or decree or the subsequent proceedings void. *Hall v. Hall*, 12 W. Va. 1.

Where there is no service of process or appearance, and the seizure of property of defendant is the foundation of jurisdiction, defective or irregular affidavits for attachment, though they might reverse a judgment in the case for error in departing from the statute, do not make the suit one without jurisdiction, if the court have jurisdiction in cases of this class. A total want of affidavit for attachment in such cases would show there was no jurisdiction, but a mere insufficient averment in the affidavit would not. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

Curing Defects in Original Affidavit.

—Section 1, ch. 106, allows a supplemental affidavit to state additional facts to show the grounds of attachment, but allows no other amendment. The omission of the word "justly" relates to the plaintiff's right to recover; in other words, to his cause of action, not to the grounds for attachment. So the second affidavit can not cure this defect. Nor could it cure the defective statement of the cause of action above referred to, but it does not attempt to do so. Therefore the court below ought at once to have quashed the first affidavit, because it contained incurable defects. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 788.

As to amendment of affidavit in at-

attachment, see generally, the title **AMENDMENTS**, vol. 1, p. 316.

Remedy for Defective Affidavit Is Motion to Quash Attachment.—If an affidavit is defective, the remedy is by motion to quash the attachment. *Anderson v. Johnson*, 32 Gratt. 558. See post, "Motion to Quash," XV, B, 1.

Objections in Appellate Court for First Time.—Objection to an attachment because not supported by an affidavit, or because the affidavit is defective, is ground for a motion to abate the attachment, but the objection must be made in the court below, and can not be made for the first time in the appellate court. If, however, the bill upon which the attachment issues contains all necessary averments, is sworn to and filed before the attachment issued, and the affidavit adopts the bill, this is all that is required. *Sims v. Tyrer*, 96 Va. 5, 26 S. E. 508, 4 Va. Law Reg. 530. See generally, the title **APPEAL AND ERROR**, vol. 1, p. 418.

VII. Bond.

See generally, the title **BONDS**.

A. NECESSITY.

Where the sheriff is not directed to take possession of the attached property, no bond is required under Va. Code, 1887, § 2968. *Kenefick v. Caulfield*, 88 Va. 122, 13 S. E. 348. See post, "Levy," IX.

Property can not be seized and taken possession of unless the creditor has given a bond with security in a penalty at least double the amount sued for, the giving of which is optional with the creditor. Va. Code, 1873, ch. 148, §§ 7, 8; *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927; Va. Code, 1887, § 2968. See post, "Levy," IX.

The statute requires the plaintiff in an attachment, if he wishes the officer to take possession of the property against which the attachment issues, to

give bond with security conditioned to pay all costs and damages which may be awarded against him or sustained by any person by reason of his suing out the attachment. Va. Code, p. 602, ch. 151, § 8 (Va. Code, 1887, § 2968). If he does not wish the officer to take possession of the property, but is content with a mere lien upon it, he is not required to give any bond, and his liability remains as at common law; that is, he is not liable for damages arising from suing out the writ, unless it be sued out maliciously and without probable cause. *Davis v. Com.*, 13 Gratt. 143.

An order of attachment should not be issued requiring the officer to whom it is directed to take into his possession the property upon which it is levied until bond has been given as required by W. Va. Code, ch. 106, § 6. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977.

B. FORMAL REQUISITES.

Following Statute.—Where it is claimed that the bond is insufficient in that it does not describe the defendant at all, and that the conditions of the bond are not equivalent to those prescribed by statute, it appears that the defendant corporation is described by its initials, and it is provided that, "if the above-bound Frank Lively shall well and truly pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the attachment," etc.; while the statute provides that the bond shall be "with condition that the plaintiff will pay to such defendant all damages he may sustain by reason of the attachment," etc.; which bond, while not in the exact language of the statute, I regard as substantially the same, and therefore sufficient. *Lively v. Southern, etc., Ass'n*, 46 W. Va. 180, 33 S. E. 93.

Amount Stated to Be Due.—Judgment on attachment will not be quashed

because the bond given on suing it out recites only the sum due, without interest. *Smith v. Pearce*, Gilmer 34.

Variance.—Where the claim of the plaintiff in an attachment against an absconding debtor is stated as for a certain sum due by negotiable note, with interest from the day when such note should have been paid, and the attachment bond describes it as sued out for the sum of money mentioned therein, saying nothing of interest, the variance is not material. *Smith v. Pearce*, 6 Munf. 585. See the title **VARIANCE**.

C. BY WHOM GIVEN.

Under Act of 1792.—Under the act of 1792, the attachment bond had to be given by the creditor himself, and not by his attorney. *Mantz v. Hendley*, 2 Hen. & M. 308.

Virginia Code, 1887, § 2990, provides: "Any bond authorized or required by any section of this chapter may be given either by the party himself or by any other person." See also, Code, 1849, p. 608, ch. 151, § 32.

Bond on Behalf of Firm.—The attachment bond of one partner of a mercantile house suing out an attachment, conditioned that the partner shall pay all costs in case the house shall be cast in the suit, and all damages that shall be adjudged against him for suing out the attachment, is a good bond. *Kyle v. Connelly*, 3 Leigh 719. See generally, the title **PARTNERSHIP**.

But where an attachment is sued out in the name of a firm and one of the partners gives bond conditioned that if "he" shall be cast in the suit, "he" shall pay all costs and damages which shall be recovered against "him," the bond can not be considered as that of the firm and is not good. *Jones v. Anderson*, 7 Leigh 308.

An attachment being sued out by one member of a firm for a debt due to the firm and in the name of the firm, it is proper that the bond executed by

the partner who sues out the attachment, and his surety, should bind the obligors to be answerable for the failure of the firm to prosecute their attachment with success. *M'Cluny v. Jackson*, 6 Gratt. 96.

D. AMENDMENT.

The failure of the clerk to endorse on an attachment bond that it has been acknowledged and approved may be cured at any time with the permission of the court. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526. See generally, the title **AMENDMENTS**, vol. 1, p. 316.

E. ACTION ON.

1. Who May Sue.

Defendant.—The bond authorized by Va. Code, 1849, ch. 151, § 8, in relation to attachment, is not a general indemnifying bond, but where the attachment issues against the effects of the defendant generally, he alone can sue upon the bond. *Davis v. Com.*, 13 Gratt. 139.

Upon an attachment bond with condition to pay all costs and damages which may be awarded against the plaintiff in attachment, or sustained by any person by reason of plaintiff having sued it out, the defendant may maintain an action for damages. The words "any person" used in the statute include the defendant in the attachment. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246.

Defendant or Owner of Property.—

Where an attachment is issued against specific property only, the defendant or owner of such property can sue upon the bond. *Davis v. Com.*, 13 Gratt. 139.

Third Person on Whose Property

Attachment Levied.—When an attachment is issued against the effects of the defendant generally, and is levied on a third person, such third person has no remedy upon the attachment bond. *Davis v. Com.*, 13 Gratt. 139.

Sheriff Who Levied Attachment.—

The provision in an attachment bond,

under Va. Code, 1871, ch. 136, § 6, to pay all damages "sustained by any persons by reason of their suing out said order of attachment," does not enure to the benefit of the sheriff, who levied the attachment and took the attached property into his possession and custody. *Mitchell v. Chancellor*, 14 W. Va. 22.

2. Damages.

Defendant May Maintain Action.—

Upon an attachment bond with condition to pay all costs and damages which may be awarded against the plaintiff in the attachment, or sustained by any person by reason of the plaintiff having sued it out, the defendant may maintain an action not only to recover damages awarded against the plaintiff in the attachment, but also other damages sustained by the defendant by reason of the attachment having been sued out without sufficient cause. The words "any person" include the defendant in the attachment. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246, 2 Va. Law Reg. 377. See generally, the title DAMAGES.

Damages Need Not Be Assessed in Some Prior Action.—The defendant in attachment may have his action on the attachment bond, to recover damages sustained in consequence of suing out the attachment, without previously ascertaining his damages in some other action. *Dickinson v. M'Craw*, 4 Rand. 158.

A claimant of property seized or sold under an attachment may recover damages in an action upon the attachment bond without having in the first instance recovered damages in an independent suit against the plaintiff in the attachment. *Totten v. Henry*, 46 W. Va. 232, 33 S. E. 119.

Evidence.—Where a party is engaged in the performance of a contract on a railroad, using his teams and utensils in removing dirt at so much per cubic yard, and his teams and utensils are seized and sold under an attach-

ment wrongfully sued out against him, whereby he is prevented from the performance of his contract, the profit of the contract, which he has thus been prevented from realizing, is a proper element of damage in an action upon the attachment bond, where such profit can be readily ascertained. *State v. Andrews*, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884. See generally, the title EVIDENCE.

3. Liability of Sureties.

When Attachment Sued Out with Good Cause.—In an action upon an attachment bond with condition to pay all costs and damages which may be awarded against the plaintiff in the attachment, or sustained by any person by reason of the plaintiff having sued it out, it is necessary for the plaintiff to prove that the attachment was sued out without sufficient cause. The sureties in the attachment bond, when the attachment has been sued out with good cause, are not responsible for the failure of the officer to discharge his duty, or for a trespass committed by him. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246, 2 Va. Law Reg. 377. See generally, the title SURETYSHIP.

4. Pleading.

Necessary Averments.—In an action on an attachment bond, it is not sufficient to allege in the declaration, that the defendant "did not pay all such costs and damages as have accrued, etc.," but it must be expressly averred that costs and damages have been actually sustained. *Dickinson v. M'Craw*, 4 Rand. 158. See generally, the title PLEADING.

Plea.—Either non damnificatus or de injuria is a good plea to a suit on an attachment bond where the condition is that the plaintiff in the attachment "shall pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out said attachment." *Hoadley v. Roush*, 3 W. Va. 280.

VIII. Writ or Warrant.

See generally, the title SHERIFFS AND CONSTABLES. See post, "Levy," IX.

A. TO WHAT OFFICER DIRECTED.

Where the writ is not directed to the sheriff of the county where the attached property lies and does not require him to make the attachment, the attachment is invalid. *Sims v. Bank of Charleston*, 3 W. Va. 415.

An attachment against a nonresident defendant may be directed to the sheriff of another county where he has effects. *Pendleton v. Smith*, 1 W. Va. 16; *Porter v. Young*, 85 Va. 49, 6 S. E. 803. See ante, "Venue," V, B.

B. FORMAL REQUISITES.

1. The Indorsement.

In General.—The order of attachment provided for by the W. Va. act of 1867, ch. 118, § 1, is not a writ and need not run in the name of the commonwealth. *Gutman v. Va. Iron Co.*, 5 W. Va. 22. But it was held in *Sims v. Bank of Charleston*, 3 W. Va. 415, that an indorsement for attachment was insufficient which was not directed to the sheriff or any one else, did not require the sheriff to attach the property of the defendant, and did not run in the name of the commonwealth.

It is not necessary to state in the indorsement on the subpoena the character or amount of the claims for which the attachment is issued. *Moore v. Holt*, 10 Gratt. 284.

It is not necessary that an attachment against an absconding debtor shall state the character of the debt, whether due by bond, note, account or otherwise. *M'Cluny v. Jackson*, 6 Gratt. 96.

By Whom Made.—A subpoena sued out in chancery was endorsed as follows: "Memorandum, to stay the effects and debts in the hands of the defendants, Josiah and Jonah, belonging and due to the defendant Joseph,

to satisfy a debt due from him to the complainants;" court held that this endorsement, not made by order of court, or by the officer thereof, but by the complainants' attorney, could not operate as an attachment, under the act of assembly to stay the effects of one of the defendants in the hands of any other. *Hadfield v. Jameson*, 2 Munf. 53.

When Necessary.—The bill, stating a good case for an attachment suit, the affidavit required by the statute may be made at any time before another person obtains a right, and the endorsement on the subpoena is not necessary to render his attachment valid. *Cirode v. Buchanan*, 22 Gratt. 205.

Lack of.—An attachment is not defective because it does not designate any person in whose possession property or effects of the absent debtor may be found. *Pulliam v. Aler*, 15 Gratt. 54.

Effect of.—The endorsement on the subpoena by the clerk of the court of chancery that the suit is brought to attach the effects of the absent defendant is sufficient to restrain the application of them to any other use, until the plaintiff's demand is satisfied. *M'Kim v. Fulton*, 6 Call 106.

The endorsement in the nature of an attachment does not authorize the officer serving it, to take the effects out of the hands of the garnishee. *Moore v. Holt*, 10 Gratt. 284.

Nor does the endorsement operate as an injunction so as to subject a party to the penalty of a contempt for disobedience. *Moore v. Holt*, 10 Gratt. 284. See generally, the title INJUNCTIONS.

2. Recitals.

Names of Parties—Sum Demanded.—A writ is fatally defective which does not specify the sum demanded, or the names of the plaintiffs or defendants, or to whom the property levied on belongs. *Clay v. Neilson*, 5 Rand. 596.

Recital of Proceedings.—An order of attachment otherwise sufficient is good

although it does not recite that an affidavit has been filed or refer to any affidavit on its face, where it appears by the record that a sufficient affidavit was filed by the plaintiff with the clerk when the order of attachment was issued. *King v. Board*, 7 W. Va. 701.

3. Variance.

The mistake of the clerk in issuing the order of attachment for a greater amount than that named in the affidavit is not such a clerical error as may be corrected on motion, and such attachment should be quashed on motion of the defendant. *Ballard v. Great Western Mining & Mfg. Co.*, 39 W. Va. 394, 19 S. E. 510. See generally, the title VARIANCE.

IX. Levy.

A. IN GENERAL.

The levy of the attachment, is the foundation of the suit. If the property attached be not the defendant's property, the court is without jurisdiction. *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. 607. See ante, "Property Subject," III; "Jurisdiction," V, A; post, "Lien," XI.

Section 7, ch. 151, of the Va. Code of 1849 reads as follows: "Every such attachment (except where it is sued out specially against specified property) may be levied upon any estate, real or personal, of the defendant, or so much thereof as is sufficient to pay the amount for which it issues. It shall be sufficiently levied in every case by a service of a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer, to be in possession of effects, or be indebted to the defendant, and, as to real estate, by such estate being mentioned and described by indorsement on such attachment." *McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408.

B. UPON REAL PROPERTY.

Va. Code, 1860, ch. 151, § 7, provides

that every foreign attachment, except when it is sued out specially against specified property, shall be sufficiently levied in every case by serving a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by endorsement on such attachment or on the subpoena. Held, that the endorsement on the subpoena is not necessary to render the attachment valid in such foreign attachment suit, where the bill particularly describes the real estate. *Cirode v. Buchanan*, 22 Gratt. 205; *McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408.

C. UPON PERSONAL PROPERTY.

Under Va. Code, 1873, ch. 148, §§ 7, 8, the attachment may be levied on any visible and tangible effects of a nonresident debtor in his actual or constructive possession, in the common-law mode, as in the case of an execution. If those effects, whether visible and tangible or not, are in a third person's possession, they may be sufficiently levied on by delivering a copy of the attachment to such person. But they can not be seized and taken possession of, unless the creditor has given a bond with security in a penalty at least double the amount sued for; the giving of which bond is optional with the creditor who requires a lien by the levy without the seizure. *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927.

To constitute an effectual levy, it is not essential that the officer make an actual seizure. If he have the goods in his view and power, and note on the writ the fact of his levy thereon, this will in general suffice. *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927, affirming *Bullitt v. Winstons*, 1 Munf. 269.

To make a valid levy of an attachment upon chattels, the officer, though

he need not physically seize or even touch them, must have them in his view and power, and do some act indicative of an intent to levy and of the act of levying, and, if the chattels are of a nature to admit of it, must take them into his custody and control. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

X. Return.

A. TIME FOR MAKING.

Prior to the Virginia statute, acts of 1893-94, p. 495, allowing attachments to be made returnable to a rule day, all attachments, whether by regular writ or by endorsement on the summons, had to be made returnable to a term of the court in which the suit was pending, and not to a rule day of such court. Va. Code, 1887, § 2965; *Craig v. Williams*, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934; *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660, 1 Va. Law Reg. 37; *Grinberg v. Singerman*, 90 Va. 645, 19 S. E. 161; *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475. See ante, "Writ or Warrant," VIII; "Levy," IX.

B. REQUISITES.

Levy upon Property.—The return must show that the attachment was levied on the property of the defendant in order to make it valid. *Offtender v. Ford*, 86 Va. 917, 12 S. E. 1; *Robertson v. Hoge*, 83 Va. 124, 1 S. E. 667. See ante, "Levy," IX.

The return must show that the attachment was levied upon the property as the property of the defendant in order to make a valid levy on real estate under Va. Code, 1873, ch. 148, §§ 7, 9. And in attachment proceedings in equity against a nonresident, under § 11, the officer's return that he "served the summons on — by delivering a copy to him," and that "he resided on the premises within described," does not show a valid levy. *Robertson v. Hoge*, 83 Va. 124, 1 S. E. 667.

Nonresident.—In a proceeding by way of attachment against a nonresident, where the process in the suit in which the attachment was issued is returned "not found," and a second summons is issued, the return upon which reads as follows: "Executed the within summons this 15th day of February, 1897, by posting in three public places in Summers county, as required by law;" and signed properly by the officer, said service and return are sufficient. *Lively v. Southern B. & L. Ass'n*, 46 W. Va. 180, 33 S. E. 93.

Presumption as to Legality.—A sheriff has no power to execute an attachment outside of his bailiwick. Hence, if the return is regular on its face, it will be presumed, in the absence of evidence to the contrary, that the attachment was legally executed, and the return need not show that it was executed in his bailiwick. *Guarantee Co. v. Nat. Bank*, 95 Va. 480, 28 S. E. 909, 3 Va. Law Reg. 873.

C. DESCRIPTION OF LAND.

The levy of an attachment in equity on real estate must contain such general description of the real estate, and describe it with such substantial accuracy, that it may be easily identified when conveyed, by looking alone to the levy, without the aid of extrinsic evidence. *Raub v. Otterback*, 92 Va. 517, 23 S. E. 883, 1 Va. Law Reg. 841.

Where the return of the sheriff was: "Executed upon the tract of land within mentioned," this levy is too vague and uncertain. *Raub v. Otterback*, 92 Va. 517, 520, 23 S. E. 883.

D. AMENDMENT OF DEFECTIVE RETURN.

For amendment of defective return by officer, see the title AMENDMENTS, vol. 1, p. 316. See also, *Puliam v. Aler*, 15 Gratt. 54, 62.

XI. Lien.

See ante, "Property Subject," III; "Levy," IX.

A. WHEN LIEN COMMENCES.

The lien of an attachment commences at the time of the levy. *Williamson v. Bowie*, 6 Munf. 176; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685; *Allan v. Hoffman*, 83 Va. 137, 2 S. E. 602.

In *Bowlby v. DeWitt*, 47 W. Va. 323, 34 S. E. 919, it is held: "An attachment is a lien on personal estate from levy, though no bond be given to authorize the officer to take possession, and one purchasing of the debtor with notice of the levy takes subject to it." *Smith v. Parkersburg Co-Operative Ass'n*, 48 W. Va. 247, 37 S. E. 645; *Mason v. Warthens*, 7 W. Va. 532.

Agreeably to the practice in this state, a subpœna in chancery with an endorsement thereon "to stop the debts and effects of the absent defendants in the hands of the defendants within the state" (mentioning their names) "to satisfy a debt due from the absent defendants to the plaintiff," operates from the time of the service of that process on the defendants within the state, as an attachment to stop the payment by them of monies due from them to the absent defendants, and to inhibit a transfer thereof from the said absent defendants to other persons. *Williamson v. Bowie*, 6 Munf. 176; *McKim v. Fulton*, 6 Call 106; *Smith v. Jenny*, 4 Hen. & M. 440. See post, "Process and Service," XIII, B.

Attempt to Defeat Lien by Purchase of Property Levied on.—The title of one who purchases of an attachment debtor property levied under it with intent to defeat such levy is void as to it. *Bowlby v. DeWitt*, 47 W. Va. 323, 34 S. E. 919.

Where One of Two Attachments Quashed.—Under § 2, ch. 106, W. Va. Code, more than one attachment may be issued upon the same affidavit and bond, and, if the second order of attachment is regular in all respects, and properly levied, it will create a valid and binding lien upon the prop-

erty levied upon under it, although the first attachment may be quashed for irregularity. *Ballard v. Great Western Min., etc., Co.*, 39 W. Va. 394, 19 S. E. 510.

Subsequent Attachment Does Not Relate Back to the Lien of the First.—

There may be in the same suit more than one affidavit and attachment, based on different grounds, but the lien of such other attachment does not relate back to the first. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

B. EXTENT OF LIEN.**1. In General.**

The attachment operates as a lien only upon the debts and effects of the absent debtor, in the hands of the home defendants against whom, and upon whom, it is served. *Farmers' Bank v. Day*, 6 Gratt. 360. See ante, "Property Subject," III; "Levy," IX.

2. Upon Legacy.

Before Qualification of Executor.—Service of process of foreign attachment, on an executor before qualification, creates a lien on a legacy to an absent debtor, in favor of the attaching creditor. *Sandidge v. Graves*, 1 Pat. & H. 101.

How Lien on Wife's Interest as Legatee Defeated.—Though the service of the process upon the executor, in a proceeding by foreign attachment, creates a lien upon the wife's interest as legatee in her father's estate in favor of the creditor, yet if the husband dies pending the proceedings, leaving his wife surviving him, the lien of the creditor is defeated, and the property belongs to the wife. *Vance v. McLaughlin*, 8 Gratt. 289.

3. On Funds Subject to Forfeiture.

The estimates of work done by a contractor for a railroad company, are made up to the 20th of each month, when they are considered due, though not paid for some days afterwards. As the price of the work done by the contractor after the 20th may be for-

feited to the company for several causes, before the 20th of the next month, no debt is due from the company to the contractor until the 20th arrives; and therefore an attachment being served on the company on the 14th of the month creates no lien as there is nothing then in his hands due to the contractor which may be attached, though in fact no forfeiture occurs. *Baltimore, etc., R. Co. v. Galahue*, 14 Gratt. 563. .

4. Upon Real Property.

The endorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate. *Clark v. Ward*, 12 Gratt. 440.

No Endorsement on Summons.—

Where the bill positively avers that the debtor is a nonresident of the state, and has real estate within it, and in the jurisdiction of the court, fully sets out the demand, particularly describes the estate sought to be subjected to the payment of the debt, and contains all other necessary and proper allegations, there is no necessity and no occasion for any endorsement on the subpoena, or any process of attachment in the case, to give to the plaintiff a lien upon the estate for the payment of the debt. *Cirode v. Buchanan*, 22 Gratt. 205, 218.

Upon Rents.—In a foreign attachment the home defendant holds lands of the absent debtor, upon a lease. Held, the service of the attachment upon the home defendant (lessee), only binds the rents due to the absent defendant (lessor) at the time the attachment was served; and does not bind the rents accruing subsequently. *Haffey v. Miller*, 6 Gratt. 454.

C. PRIORITIES.

1. In General.

Amendment of Irregular Attachment.

—“Amendment for mere irregularity in attachment proceedings relates back to the beginning, and preserves the

priority of the attachment over other liens which took effect before amendment, but after original attachment.” *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528.

Effect of Judgment Is to Merge Attachment.—On the rendition of judgment on an attachment the lien of the attachment is merged in the judgment, and the priority of the lien thereby preserved. *Smith v. Parkersburg Co-Operative Ass'n*, 48 W. Va. 233, 37 S. E. 645.

2. Between Vendor of Goods and Other Creditors.

Where vendor of goods, by unrecorded bill of sale, delivers possession, but retains title to and control over them, and requires proceeds of sales paid daily to him on the price, and fails to keep up the stock according to his contract, whilst the vendees faithfully perform their part; and at length he sues out an attachment, and seizes upon the goods for an alleged balance; held, vendor has no claim to priority over other creditors of the vendees. *Hash v. Lore*, 88 Va. 716, 14 S. E. 365. See generally, the title SALES.

3. Between Partnership Creditors.

Where Partners Are Declared Bankrupts.—Where partners have been declared bankrupts, one creditor of the partnership can not attach the partnership effects so as to obtain a preference over the other partnership creditors. *Lindsey v. Corkery*, 29 Gratt. 650. See generally, the title PARTNERSHIP.

Where One Partner Is a Nonresident.—Where a partnership consists of two members, one of whom is a nonresident, but the other is found by the verdict of a jury to be a resident of this state. A firm creditor issues an attachment against the firm, and levies it upon the social assets. It was held, the attaching creditor does not thereby gain any priority over the other firm creditors, except as to the individual

interest of the nonresident partner. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

Where Fraudulent Conveyance Is Made by Due Partner.—An attachment issued under par. 6, § 1, ch. 106, W. Va. Code, by a firm creditor who seeks to set aside a fraudulent deed made by one partner, if directed against the trustee or one partner only, will be ineffectual to create a lien upon the firm property, and will give no priority to such attaching creditor. *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. 1.

Where Deed of Trust Has Been Executed for the Benefit of Creditors.—Where a deed of trust has been executed on personal property of a partnership by a member of a firm for the benefit of its creditors generally, and two of the firm creditors without notice of such deed have attachments sued out and levied on the interest of one member of the firm in the partnership property, such levy does not give such creditors priority over the other partnership creditors secured in the deed. *Scruggs v. Bur-russ*, 25 W. Va. 670.

4. Between Attachments.

Among attaching creditors proceeding by foreign attachment, the creditor whose subpœna is first sued out and served is entitled to priority of satisfaction. *Farmers' Bank v. Day*, 6 Gratt. 360.

Under 1 Rev. Va. Code, 1819, ch. 123, creditors of an absent defendant who have proceeded by foreign attachment in equity have priority over creditors seeking, by a subsequent attachment on the same property issued after the service of the subpœna in chancery on the home defendant, to enforce an appearance in an action at law. *Erskine v. Staley*, 12 Leigh 406.

Two attachments against an absconding debtor are levied on the same property. The first levied is quashed by the county court, but upon appeal this judgment is reversed. Pending

the appeal an order is made in the second attachment case for a sale of the property, and it is sold and the proceeds are paid over to the creditor in the second attachment. Held, an action for money had and received will lie by the first attaching creditor against the creditor in the second attachment for the proceeds of the sale. *Caperton v. M'Corkle*, 5 Gratt. 177.

5. Between Attachment and Verbal Lien on Land.

A recital that the attachment issued in the cause was returned served on personal property and real estate is not evidence of the issue and levy of such attachment that will constitute a lien on the real estate mentioned as against third persons seeking to enforce a prior verbal lien upon such real estate. *Houston v. McCluney*, 8 W. Va. 135. See generally, the title LIENS.

6. Between Attachment and Execution Lien.

A fieri facias placed in the hands of an officer for execution is a legal lien under Va. Code, 1860, ch. 188, § 3, and continues in effect after the return day. Such lien has priority over an attachment subsequently levied, or execution lien under the same law, even though there has been a proceeding by suggestion under the junior, prior to that under the senior execution. *Charron v. Boswell*, 18 Gratt. 216; *Pur-year v. Taylor*, 12 Gratt. 401. See generally, the title EXECUTIONS.

7. Between Attachment and Lien on Property Pledged.

An attachment levied upon pledged property is subject to the lien of the pledge. *First Nat. Bank of Parkersburg v. Harkness*, 42 W. Va. 156, 24 S. E. 548. See generally, the title PLEDGE AND COLLATERAL SECURITY.

8. Between Attachment and Lien of Wife in Pending Divorce Suit.

An attachment against the effects of the husband as an absconding debtor,

levied before the institution of a suit by the wife for a divorce, entitles the attaching creditor to be satisfied out of the attached effects, in preference to the claim of the wife. *Jennings v. Montague*, 2 Gratt. 350.

9. Between Attachment and Bankruptcy Lien.

See generally, the title **BANKRUPTCY AND INSOLVENCY**.

In *Mason v. Warthens*, 7 W. Va. 532, the court said: "The Bankrupt Act of 1867 does not destroy, but preserves liens acquired prior to the filing of the petition in bankruptcy," and again "The thirty-fifth section of the bankrupt act applies to attachment liens," and held that an attachment lien, acquired regularly, without the procurement or sufferance of an insolvent debtor, to give preference to the attaching creditor over the other creditors, will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after the levy of the attachment.

10. Between Attachment and Deed for Land.

See generally, the title **DEEDS**.

Deed of Trust.—A subpoena in chancery was sued out against an absent debtor and home defendants. The subpoena was returned executed on the home defendants, but the date of its service upon them was not stated. After the issue of the subpoena, but before the return day thereof, the debtor executed a deed to secure certain creditors, which was duly filed. Held, that the attachment was postponed to the deed. *Richeson v. Richeson*, 2 Gratt. 497.

Failure to Record Deed.—A purchaser of land without notice of an attachment which had been previously levied upon it, but which had not been recorded or docketed as required by Va. Code, 1873, ch. 182, § 5, is entitled to hold the land free from the lien of the attachment. *Cammack v. Soran*, 30

Gratt. 292. See generally, the title **RECORDING ACTS**.

11. Between Attachment and Deed to Chattels.

Deed of Trust—Failure to Record.—

Under the Virginia Registration Laws (1866-67, p. 538; Va. Code, 1897, § 2465), an attachment has priority over a deed of trust, conveying goods and chattels, recorded in another state but not in Virginia. *Smith v. Smith*, 19 Gratt. 545. See generally, the title **RECORDING ACTS**.

A valid lien by way of attachment created by levying a proper order of attachment upon personal property will take priority over a claimant under a deed of trust executed and recorded in the state of Kentucky, but which has never been recorded in this state in the county where the property is located. *Ballard v. Great Western Mining, etc., Co.*, 39 W. Va. 394, 19 S. E. 510.

Mortgage.—Prior to the Va. statute, acts, 1893-94, p. 545, requiring foreign mortgages to be recorded, the lien of a mortgage creditor upon a chattel, subject to a mortgage in another state duly recorded according to the law of that state, though not recorded in Virginia, had priority over the lien of an attaching creditor in this state. *Craig v. Williams*, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934. See generally, the title **MORTGAGES**.

12. Between Attachment and Assignment of Chose.

Since the Virginia statute of registry does not embrace choses in action, an assignment of such chose in action to a trustee to pay the debts of the assignor is valid against a subsequent attaching creditor of the assignor. *Kirkland v. Brune*, 31 Gratt. 126; *Gregg v. Sloan*, 76 Va. 497. See also, *Tazewell v. Barrett*, 4 Hen. & M. 259; *Wilson v. Davisson*, 5 Munf. 178; *Schofield v. Cox*, 8 Gratt. 533.

Debtors in North Carolina grant all

their property, including choses in action, due from their debtors in Virginia, and secured on land here. After recordation of deed in North Carolina, but before its recordation in Virginia, a creditor of grantors, living in Virginia, attached the choses and the land securing them. In contest for priority it was held: The deed, though unrecorded in Virginia, being prior to the attachment, prevails over it. *Gregg v. Sloan*, 76 Va. 497.

Voluntary Assignment.—A voluntary assignment, made in another state, of a debt due from a citizen and resident of this state, to a resident of such other state, passes the debt to the assignee at the time of the assignment so as to defeat a subsequent attaching creditor of the assignor in this state, whose attachment was issued and served on the debtor of the assignor after the assignment and before such debtor had notice of it. But otherwise as to involuntary or coercive assignments. *Bank v. Gettinger*, 3 W. Va. 309.

Assignment of Legacy.—A creditor, at whose suit process of foreign attachment against an absent debtor is served on one of two executors, is entitled to priority of satisfaction, out of a legacy to the absent debtor, over an assignee of the legacy who claims under an assignment dated the day after the service of the attachment on the executor. *Sandidge v. Graves*, 1 Pat. & H. 101.

But not as to creditors who have attached the legacy in the hands of the executors subsequent to the date of the assignment, although it is not shown that the assignment had been delivered to the assignee prior to the service of the process of foreign attachment. *Sandidge v. Graves*, 1 Pat. & H. 101.

Sale of Shares of Stock.—A creditor attaching the shares of a stockholder in a railroad company acquires a claim

superior to that of a subsequent bona fide purchaser of such shares for value without notice of the attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502.

An unregistered transfer of shares of corporation stock for which no certificate has been issued, if made for a valuable consideration and without fraud, vests in the transferee a title to the shares superior to the claim of a subsequent attaching creditor of the transferor. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392. See generally, the title CORPORATIONS.

Sale of Negotiable Note.—S, the owner of the negotiable note of M, endorses the same and deposits it with a bank as collateral security for a loan obtained upon the discount by the bank of the note of B. S sells the note to O, and gives O an order on the bank to deliver the note to O. On the same day O presents the order at the bank, and is told the president of the bank is absent from town. Some days thereafter O has an interview with the president at the bank, and is then informed, that the debt of S is nearly paid, and that he would deliver to O the note but for the service of attachment upon the bank. The debt of S is afterwards paid in full. Before the sale by S to O, an attachment had been served upon M at the suit of a creditor of S; but of this O had no notice when he purchased the note. After the sale and notice to the bank by O, an attachment was served on the bank by another creditor of S. Held, that the sale by S to O is valid, and he is entitled to the note as against the attaching creditors of S. *Howe v. Ould*, 28 Gratt. 1.

13. Between Attachment and Rent.

Distress for rent can not be made off the demised premises; and, therefore, an attachment served upon property found off the premises, was preferred

to it. *Mosby v. Leeds*, 3 Call 439. See generally, the title LANDLORD AND TENANT.

XII. Disposition of Attached Property.

See generally, the title SHERIFFS AND CONSTABLES.

A. DELIVERY TO SHERIFF.

The court's order for the defendant's delivery of the attached and replevied property to the sheriff, should be reasonable as to the time and place of such delivery. *Dunlap v. Dillard*, 77 Va. 847.

B. SALE.

The statute places the attachment on the same ground with the execution. It directs that when judgment is rendered in behalf of the creditor on the attachment, "all goods and effects attached shall be sold and disposed of, for and towards satisfaction of the plaintiff's judgment, in the same manner as goods taken in execution upon a writ of fieri facias." *Ashby v. Smith*, 4 Leigh 173.

Plaintiff Must Give Bond before Sale Where Defendant Has Not Appeared.—A sale in a foreign attachment suit under W. Va. Code, ch. 106, without the bond required by § 22 of said chapter conditioned that the plaintiff will "perform such future order as may be made upon the appearance of said defendant, and his making defense," will be set aside. *Hall v. Lowther*, 22 W. Va. 570. See post, "Appearance," XIII, D.

If it appears that a copy of the attachment was served on the defendant sixty days before a decree for the sale of the land attached, the decree for the sale may be made without requiring the bond provided for in the statute. Va. Code, 1873, ch. 148, § 24, p. 1015. *Anderson v. Johnson*, 32 Gratt. 558.

The time allowed by a decree against an absent defendant, within which he

might show cause against it, having expired, the plaintiff is entitled to the benefit of the decree without giving the security originally required by it. *Ross v. Austin*, 4 Hen. & M. 502.

Personal Property Must First Be Exhausted.

Real Property.—No sale of real estate which has been attached can be ordered until all the personal property attached has been sold. *Camden v. Haymond*, 9 W. Va. 680.

Debt Payable by Installments.—Upon a foreign attachment in chancery, to subject lands of an absent debtor to a debt claimed by the attaching creditor, payable in installments, some of which have, and others have not, fallen due at the time of the decree; held, that the court ought not to direct the sale of the subject to satisfy more than the installments already due, but should order a sale to satisfy what is due, and hold the creditor's attachment a lien on the subject, for the installments afterwards to fall due. *Watts v. Kinney*, 3 Leigh 272.

Priorities.—Funds arising from the sale of land under an attachment suit will be applied according to the priorities of the incumbrances upon the land sold. *Schofield v. Cox*, 8 Gratt. 533.

Title Acquired by Purchaser.—In proceedings by attachment against M. judgment is rendered against him, and there is an order for a sale, and a sale and conveyance to the purchasers, of the real estate attached. It was held, the judgment and conveyance made under the judgment and order, by the sheriff, divested M. of his legal title to the property; unless the said sale was fraudulently made, and the confirmation thereof was procured by fraud; and that the purchaser was privy to such fraud, or had notice of the same, or of such circumstances as would put a prudent bona fide purchaser upon inquiry in respect thereto. *Underwood v. McVeigh*, 23 Gratt. 409.

In proceedings by attachment against M. judgment is rendered against him, and there is an order for a sale, and a sale and conveyance to the purchasers, of the real estate attached. Held, but if the purchaser combined with others to purchase the property at the attachment sale, at a sacrifice; and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent the said property realizing a fair value, then such combination and action was fraudulent; and the deed of the sheriff passes no title to the purchaser. *Underwood v. McVeigh*, 23 Gratt. 409.

Deed by Commissioners as Evidence of Title.—Where there is a valid attachment and levy of the same, a decree of a court of competent jurisdiction, an order or decree of sale, and a sale by a commissioner appointed by the court, and confirmation thereof with direction to make a deed to the purchaser, a deed made by the commissioner, by direction of the purchaser, to his assignee is admissible in another suit in connection with the record, etc., to show title in the assignee. *Hall v. Hall*, 12 W. Va. 1.

C. DELIVERY ON FORTHCOMING OR DELIVERY BONDS.

See generally, the title FORTHCOMING OR DELIVERY BOND.

In General.—By § 13, ch. 151, Va. Code, 1860, the defendant might release from the attachment the estate attached by giving bond with condition to perform the judgment or decree of the court. *Bell v. Bell*, 3 W. Va. 191; *Magill v. Sauer*, 20 Gratt. 540. But an appeal bond given by the defendant does not release the attachment. The above section refers to forthcoming or delivery bond. *Magill v. Sauer*, 20 Gratt. 540.

Upon a decree in favor of an attaching creditor, and an appeal therefrom, the appellant gives an appeal bond. The giving of this bond does not re-

lease the attachment. *Magill v. Sauer*, 20 Gratt. 540.

Formal Requisites—Name of Obligeo Not Clearly Set Out.—It is error to quash a forthcoming bond on motion, simply because the name of the obligee therein has been misspelled, or so written as to make it doubtful as to the person intended. *Ambach v. Armstrong*, 29 W. Va. 744, 3 S. E. 44.

Where Defendant Did Not Appear.—Special bail to replevy the attached effects and a plea to the action ought to be received, in behalf of the defendant upon an attachment issued against him as an absconding debtor; notwithstanding he did not appear in person or by attorney, such bail and plea being offered at the term to which the attachment is returned executed, and before the judgment upon it is pronounced. *Smith v. Pearce*, 6 Munf. 585.

Effect of Bond on Jurisdiction of Court.—The execution by a defendant in an attachment of a forthcoming bond, with condition to perform the judgment of the court, does not give the court in which the attachment was sued out jurisdiction to enter a personal judgment against the defendant; and, if the attachment be abated, the bond falls with it, and becomes of no effect. If the attachment is sustained, the bond stands as a security in lieu of the property upon which the attachment was levied. *Hilton v. Consumers Can Co.*, 103 Va. 255, 48 S. E. 899.

XIII. Proceedings to Support or Enforce Attachment.

A. IN GENERAL.

In an attachment suit in equity, it is not necessary or proper to direct an inquiry whether the rents and profits of the real estate will pay the debt within a reasonable time. *Curry v. Hale*, 15 W. Va. 867.

Several creditors having distinct demands can not unite in one suit in

equity to attach the property of an absent debtor. *Corrothers v. Sargent*, 20 W. Va. 351.

B. PROCESS AND SERVICE.

See generally, the title SERVICE OF PROCESS.

1. Necessity.

Notice Must Be Given Nonresident Debtor.—Attachment being a summary remedy, a seizure of the estate of a nonresident defendant, and the levy of an attachment upon it, may precede the giving of notice. But by the express provisions of the statute, now contained in § 20, ch. 148, Va. Code, 1873, notice is required to be given to the debtor; and if under such circumstances as existed during the late war it becomes legally impossible to give notice, the jurisdiction as to him comes to an end. It is the same in legal effect as if under ordinary circumstances no attempts were made to give notice at all, or as if jurisdiction having been acquired and notice given, a hearing were denied. *Dorr v. Rohr*, 82 Va. 364; *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184. See ante, "Nature," I, A; "Levy," IX.

In an attachment in equity against property alleged to belong to nonresident debtors, complainants, who asked for no order of publication against such nonresident debtors, who failed to serve them personally with process, and who consented to the hearing of a motion by the claimant of the property to abate the attachment, can not object to a decree abating the attachment, on the ground that no process, personal or by publication, had been executed against the defendants. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549.

The court may, of its own motion, dismiss an irregular attachment and ought to do so where there has been no personal service on the nonresident debtor. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475; *Mantz v. Hendley*, 2 Hen. & M. 308.

Nor could jurisdiction be acquired of the fund attached by service of process on the garnishee only, no legal service of notice being had on the nonresident defendant. Va. Code, 1873, ch. 148, § 20; *Dorr v. Rohr*, 82 Va. 359. See post, "Service on Individual," XVII, B, 3.

In Attachment against Partnership.

—In an attachment suit in equity against a partnership where the attachment is levied on the social assets, it is necessary that the partners should both be before the court either by actual or constructive notice before any decree be made in relation to such property. *Brown v. Gorsuch*, 50 W. Va. 514, 40 S. E. 376.

2. Sufficiency.

The suing out of an attachment against the property of an absent defendant who was then in the military service of the confederate states, the service of the process on the wife of the defendant, she being within the union lines, will not confer jurisdiction or render the proceedings valid for any purpose. *Sturm v. Fleming*, 22 W. Va. 404.

Va. Code, 1873, ch. 148, § 27, providing on what conditions the defendant, after a decree, may petition for a rehearing, but exempting from its operation one who has been served with a copy of the attachment or with process in the suit, issued more than sixty days before the date of the decree, only refers to such a service in the proceedings in the suit, and not to a service out of the suit and out of the state. *Anderson v. Johnson*, 32 Gratt. 558.

Under Va. Code, 1873, ch. 148, § 27, defendants in foreign attachment may appear pending the suit, tender security for costs and have it reheard. The exception of a defendant served with a copy of the attachment, or with process in the suit, does not refer to a service thereof outside the proceedings in the suit or outside the state. And

such service can have no greater effect than an order of publication duly posted and published. *Smith v. Chilton*, 77 Va. 535, approving *Anderson v. Johnson*, 32 Gratt. 558.

C. ORDER OF PUBLICATION.

Necessity for.—By § 17 of the attachment law it is provided: "When any attachment, except under § 3, is returned executed, an order of publication, as prescribed in ch. 124, shall be made against the defendant against whom the claim is, unless he has been served with a copy of the attachment, or with process in the suit in which the attachment issued." *Steele v. Harkness*, 9 W. Va. 13; *Haymond v. Camden*, 22 W. Va. 182; *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184.

Time Given in Which to Perfect Suit by Order of Publication.—Where the affidavit for attachment and other papers in the cause show that the defendants are nonresidents, and no order of publication has been taken on return day of the process, the plaintiff is entitled to a reasonable time in which to perfect his suit by order of publication, and the suit does not abate immediately upon the return of the process and failure to take the order of publication. *McClung v. Sieg*, 54 W. Va. 468, 46 S. E. 210.

It is error for the court to abate an attachment and dismiss the suit when one of the partners has been served with summons because an order of publication has not been taken against the other, but the court should require the plaintiff to mature his suit within a reasonable time fixed as to such absent partner, or suffer the abatement of the attachment and dismissal of the suit. *Brown v. Gorsuch*, 50 W. Va. 514, 40 S. E. 376.

Where Defendant Is Served with Process.—Where a defendant in an attachment suit has been served with process, although he has not been served with a copy of the order of attachment, he need not be proceeded

against by order of publication, and has no time given him by W. Va. Code, ch. 106, in which to appear in the suit after the term at which judgment is rendered against him on the claim and an order made to sell the attached effects or estate; nor is any bond required to be given as provided for in § 23 of said chapter. *Capehart v. Dowery*, 10 W. Va. 130.

Appearance Dispenses with Order of Publication.—A general appearance by any of the nonresident defendants renders an order of publication unnecessary as to such of them as appear. *McClung v. Sieg*, 54 W. Va. 468, 46 S. E. 210.

Where an attachment proceeding is instituted against a firm consisting of two members and service of the writ is had upon only one partner, order of publication, as prescribed by the statute, should be had against the other partner; but if both partners appear by attorney, and submit motions or file a plea, this is an appearance to the suit, and the court may proceed as if both parties had been served. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

A joint judgment was rendered against several of the defendants in a suit in which an attachment had issued against all the defendants as nonresidents. One of them, who had plead, took an appeal, and the court of appeals affirmed the judgment. Another of the defendants against whom the joint judgment was rendered, a nonresident, who had not plead, after due notice, moved the circuit court which had rendered the judgment to reverse and annul the same, because there had been a personal judgment against him, though he had never been served with process. Held, that the circuit court properly overruled his motion, it being conclusively presumed that he was notified of the appeal and that all questions raised by his motion had been considered and decided adversely by the court of appeals when it affirmed

the joint judgment, summons of the nonappearing defendants being necessary to vest the court of appeals with jurisdiction. *Newman v. Molloyhan*, 10 W. Va. 488.

Necessity of Posting Notice.—

Where, before an attachment is returned "executed," an order of publication is made, but the order is not posted by the clerk at the front door of the courthouse on the first day of the court next after it is entered, the attachment should be abated. Va. Code, 1887, §§ 2979, 3231; *Petty v. Frick Co.*, 86 Va. 501, 10 S. E. 886.

D. APPEARANCE.

See generally, the title APPEARANCES, vol. 1, p. 667.

Necessity for.—The court may, of its own motion, dismiss an irregular attachment, and ought to do so when there has been no appearance by a non-resident debtor. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475; *Mantz v. Hendley*, 2 Hen. & M. 308; *Haymond v. Camden*, 22 W. Va. 182.

Entering Bail and Plea.—The defendant in an attachment may enter bail and plea without appearing in person. *Smith v. Pearce*, Gilmer 34.

Special bail to replevy the attached effects and a plea to the action ought to be received in behalf of the defendant upon an attachment issued against him as an absconding debtor, notwithstanding he did not appear in person or by attorney, where such bail and plea is offered at the term to which the attachment is returned executed and before the judgment upon it is rendered. *Smith v. Pearce*, 6 Munf. 585.

Appearance by Attorney.—In an attachment proceeding instituted against a firm consisting of two partners, only one of whom is a resident, if both partners appear by attorney, and submit motions or file a plea, this is an appearance to the suit, and the court may proceed as if both parties had been served. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414.

E. SUFFICIENCY OF PLEADING.

See generally, the title PLEADING.

A demurrer will not lie to a bill in equity for the failure of the plaintiff in an attachment suit to aver that an attachment has issued. *O'Brien v. Stephens*, 11 Gratt. 610.

Answer or Plea.—Complainants sued out an attachment under Va. Code, 1873, ch. 148, § 11, and filed their bill averring a breach of warranty in a sale of phosphate to them. Defendants demurred to the bill, moved to abate the attachment, and filed their answer denying every material allegation of the bill. No testimony was taken. Held, that though the demurrer should be properly overruled and the motion to abate might not be properly sustainable, yet the bill being denied as to all its material averments, should be dismissed with costs to the defendant. *Boyce v. M'Caw*, 76 Va. 740.

In a proceeding by foreign attachment to collect the price of personal property, it is competent for the defendant to plead and rely on a breach of warranty in reduction or abatement of the price, and when such defense is plead and relied on in the answer, it is unnecessary to file a cross bill for that purpose. *Baker v. Oil Tract Co.*, 7 W. Va. 454.

F. JUDGMENT.

See generally, the title JUDGMENTS AND DECREES.

1. In General.

In an attachment suit under the act of April 3, 1852, giving a remedy in equity to a creditor against his absent debtor where the debtor has estate or debts due to him in the county or corporation where the suit is brought, when the court has properly taken jurisdiction, it must proceed to give relief according to the principles of equity. *O'Brien v. Stephens*, 11 Gratt. 610.

In an attachment against an absconding debtor, judgment should first be entered against the debtor, and then the garnishee should be ordered to

pay it. *Gebrge v. Blue*, 3 Call 455; *Gibson v. White*, 3 Munf. 94; *Withers v. Fuller*, 30 Gratt. 547. See post, "Judgment," XVII, I, 5.

2. In Personam or in Rem.

In General.—The attaching creditor, having established his debt, is entitled to a personal decree against the absent debtor, though the whole property attached is exhausted in paying the debt of the home defendant. *Williamson v. Gayle*, 7 Gratt. 152. See also, *Schofield v. Cox*, 8 Gratt. 533; *Hairston v. Medley*, 1 Gratt. 96.

In an attachment proceeding under the act of April 3, 1852, if an absent defendant does not appear in the cause there can not be a personal decree against him; but the attached effects alone can be subjected. But if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects. *O'Brien v. Stephens*, 11 Gratt. 610; *Coleman v. Waters*, 13 W. Va. 278; *Mahany v. Kephart*, 15 W. Va. 609; *Wetherill v. McCloskey*, 28 W. Va. 198.

In an action at law against a non-resident, in which an attachment has been sued out, if the absent defendant appears generally to the action, there may be a personal judgment only against him, or a personal judgment and an order and judgment subjecting the attached property, although there is no order of publication in the case. *Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 128.

Where an attachment has been sued out against a nonresident corporation which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such nonresident corporation, which appears in the cause; but the attached property will not be sold in the absence of the trustees who hold the legal title; they must either be served with process, or, if nonresidents, an order of publication must issue against them and be duly

published. *Chapman v. P. & S. R. Co.*, 18 W. Va. 184.

3. Validity.

In General.—A decree for the plaintiff in a proceeding by foreign attachment in chancery was erroneous, where it was without affidavit of the defendant's nonresidence; was for a sale of lands, without requiring bond with surety from the plaintiff with condition for performing future orders or decrees; and was for a sale of land for cash, with directions for payment of money to the creditor and conveyance of land to the purchaser, before the sale was reported and confirmed. *Brien v. Pittman*, 12 Leigh 380. See ante, "Affidavit," VI; "Sale," XII, B.

Stock of a corporation, attached as in the hands of a garnishee, should be sold under an order of court made for that purpose; but it is error for the court to render a judgment against the garnished corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation. *C. & O. R. Co. v. Paine*, 29 Gratt. 502. See post, "Order for Payment or Delivery into Court," XVII, D.

In an attachment suit in equity, to which the debtors of a nonresident defendant are made parties, and charged to be such debtors, it is not error to decree that the latter shall pay the amount found to be due from them to the nonresident, simply because the order of attachment had not been served upon them. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

Judgment for Interest.—If the attachment demands only principal and costs, the court can not give judgment for interest. *George v. Blue*, 3 Call 455.

Decree Must Require Plaintiff to Give Security.—The decree should have been so entered as to have made the plaintiff give security for abiding such future order as the court might make upon the appearance of the ab-

sent defendant at any time within seven years, as prescribed by law. *Watts v. Robertson*, 4 Hen. & M. 442.

Presumption.—In a suit by attachment the record may show upon its face that the debtor did or did not appear; and if it does, the judgment will have effect accordingly. If the record does not show whether he did or did not appear, the presumption is in favor of the validity of the judgment. *Fisher v. March*, 26 Gratt. 765. See the title **PRESUMPTIONS AND BURDEN OF PROOF**.

G. RIGHT TO REHEAR.

See generally, the title **APPEAL AND ERROR**, vol. 1, p. 418.

In General.—Under Va. Code, 1873, ch. 148, § 27; Code, 1887, § 2986, defendants in foreign attachment may appear pending the suit, tender security for costs and have it reheard. The exception of a defendant served with a copy of the attachment, or with process in the suit, does not refer to a service thereof outside the proceedings in the suit or outside the state. And such service can have no greater effect than an order of publication duly posted and published. This rule applies to acknowledgments of such services made outside the state. *Smith v. Chilton*, 77 Va. 535; *Anderson v. Johnson*, 32 Gratt. 558.

As to reopening case by nonresident defendant, see *Smith v. Life Ass'n of America*, 76 Va. 380.

Right of Absent Defendant.—An absent defendant, against whom a decree has been made, can not appeal from the decree. His only remedy is that provided by the statute. *Platt v. Howland*, 10 Leigh 507; *Barbee v. Pannill*, etc., 6 Gratt. 443.

A proceeding by foreign attachment is instituted against two persons, as jointly indebted to the plaintiff. One of them appears and answers the bill, but the other is regularly proceeded against as an absent debtor, and there

is a joint decree against both defendants. Held, that the absent defendant who did not appear, can not appeal, but the decree being a joint decree, and being erroneous, the appellate court will, upon the appeal of the absent defendant who did not appear and answer, reverse the decree as to both. *Lenows v. Lenow*, 8 Gratt. 349.

Time to Make Appeal—Proceedings.—Under the statute, Va. Code, 1873, ch. 148, § 27, a defendant in a foreign attachment suit may appear at any time pending the suit, and have the cause reheard, tendering security for the costs. *Anderson v. Johnson*, 32 Gratt. 558.

Upon the absent defendant's giving security for payment of costs, he will be admitted to answer the bill; but the court will not set aside the decree so soon as the answer is filed. After issue is joined, the parties on both sides will have an opportunity of examining their witnesses, the cause will be matured for rehearing; and, upon a rehearing, such decree will be made as may be just and right. *Platt v. Howland*, 10 Leigh 507.

Failure to Give Security.—Where, on the motion of the defendant in an attachment case, the plaintiff, who is a nonresident of the state, is ordered to give security for the costs of the suits within sixty days, and fails to do so, his bill should be dismissed; and it is error to proceed to hear and decide the cause. *Anderson v. Johnson*, 32 Gratt. 558.

On reversing the decree and remanding the cause, the appellate court will not direct the suit to be dismissed at once for the failure of the plaintiff to give security for costs, but will direct that he be allowed a reasonable time to comply with the order. *Anderson v. Johnson*, 32 Gratt. 558.

XIV. Claims by Third Persons.

See generally, the title **INTERVENTION**.

A. RIGHT TO QUESTION VALIDITY OF ATTACHMENT.

In General.—Any person interested in the property attached, who was not originally a party to the suit, may intervene to have his rights adjudicated by the court in which the attachment suit is pending. *Capehart v. Dowery*, 10 W. Va. 130.

The statute gives the right to any person to set up against an attachment any interest in, or lien upon, the property attached which he may have, without regard to notice. W. Va. Code, 1899, ch. 106, § 23; *First National Bank v. Harkness*, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753; *Lipscomb v. Condon* (W. Va.), 49 S. E. 397.

Section 2984, Va. Code, 1887, was intended to give any third person, before the attached property is sold, or before the proceeds of sale have been paid to the plaintiff, the opportunity to come in by petition, and dispute the plaintiff's right to the property, or its proceeds. *Littell v. Lansburg Co.*, 96 Va. 540, 32 S. E. 63.

Under W. Va. Code, 1891, ch. 106, § 23, any one having claim to, or an interest in, or lien on property attached by other attachment or otherwise (but not a general creditor), may by petition intervene in the case, and contest the validity of the attachment in any lawful mode, and may file a plea in abatement, denying the grounds of attachment. In such case the plaintiff has the correlative right of denying the validity of, or otherwise contesting, the intervener's attachment or other claim. *Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

The Code of West Virginia authorizes a claimant of the property attached to file a petition in an attachment suit claiming the property. *Hatch v. Calvert*, 15 W. Va. 96.

Claimant Must Show His Interest before He Will Be Allowed to File Petition.—Before a third party claim-

ing an interest in the property attached can be permitted to file his petition under § 23, ch. 106, W. Va. Code, and defend the attachment on its merits, he must show by his petition that he had an interest in the controversy. *Smith v. Hunt*, 2 Rob. 206; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753; *Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 299; *Smith v. Parkersburg Co-Operative Ass'n*, 48 W. Va. 250, 37 S. E. 645.

Petition Must Show Claimant's Interest.—Where under § 24, ch. 106, W. Va. Code, a claimant of the property files a petition, unless the petition and the accompanying exhibits show a legal or equitable claim to the property, the court does not err in refusing to impanel a jury to inquire into the claim. *Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 324; *Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 299.

Claimant Must Appear and Give Security for Costs.—To entitle a person, who claims to have a mortgage lien on land attached by a creditor in a suit in equity in which an attachment is sued out against a nonresident debtor under W. Va. Code, ch. 106, § 24, to dispute the validity of the attachment, such person must appear in the court in which the proceeding is had and file his petition and give security for costs. *Tappan v. Pease*, 7 W. Va. 682. See generally, the title COSTS.

Claimant Can Not Intervene after Judgment Affirmed on Appeal.—When there has been in a foreign attachment suit in equity an ascertainment of the amount of the indebtedness due from the defendant to the plaintiff, and the debtor appeals from the decree so ascertaining the amount, which is affirmed, and the court below is proceeding to execute the decree by selling the attached property, it is too late for a claimant of the property to dispute the debt. *Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 299.

Creditor at Large of Absconding Debtor.—A mere creditor at large of the absconding debtor is not a person interested in disputing the attaching plaintiff's claim within the meaning of W. Va. Code, ch. 106, § 23. *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753.

Claimant's Right to Injunction.—An injunction will not lie against the sale of goods and chattels attached, claimed by a third party, unless they are of peculiar value to the owner, and it is clearly shown and manifestly appears that great injury would result to the owner from consequential damages from the sale, because the owner has complete and adequate remedy at law. *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4. See generally, the title INJUNCTIONS.

The fact that attachments by four distinct creditors are levied on goods of a common debtor, they having no connection, will not give a third party, claiming the goods, an injunction on the ground of preventing multiplicity of suits. *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

B. RIGHT OF SUBSEQUENT ATTACHING CREDITORS.

A subsequent attaching creditor may appear to the first attachment and, either in his own name or in the name of the absconding debtor, contest the right of the first attaching creditor to recover. *M'Cluny v. Jackson*, 6 Gratt. 96.

A subsequent attaching creditor, whose attachment was issued in another county but levied in the county where the effects or property of the debtor are, may appear by petition and move to quash the preceding attachment for good grounds. *Pendleton v. Smith*, 1 W. Va. 16.

Parties who claim to be subsequent attaching creditors can not come into court and dispute the validity of a prior attachment on mere motion. They must file their petition in accordance with Va. Code, 1860, ch. 151, § 25.

The same provision is found in W. Va. Code, 1869, ch. 106, § 24. *Ludington v. Hull*, 4 W. Va. 130.

Prior Attaching Creditor May Enjoin Sale under Subsequent Attachment.—Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands; and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee; and before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale. *Moore v. Holt*, 10 Gratt. 284.

C. PROCEEDINGS TO DETERMINE CLAIMS TO PROPERTY.

Hearing by Consent.—The complainant in an attachment against property of a nonresident debtor, who had not been served with process personally or by publication, consented to the hearing of a motion by a claimant of the property to abate the attachment. Held, that a decree abating the attachment and declaring the estate not to belong to said debtors was not premature or erroneous. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549.

Trial on Petition without Other Pleadings.—When, under the provisions of § 23, ch. 106, W. Va. Code, 1899, a petition is filed in a suit in equity founded upon an attachment, setting up title by purchase, and the plaintiff in the cause relies upon fraud in the alleged purchase to defeat the claim of title so set up, the trial of the issue must be upon the petition without any other pleading, and by jury, unless trial by jury is waived. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392.

Retention of Cause.—Where, in such case as the above, the court

abated the attachment because the property was not owned by the non-resident firm, the decree ends the cause and it will not be retained to inquire whether one of said firm had an attachable interest in the property. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549.

Where Claims Sustained.—The attaching creditor, proving his debt, is entitled to a personal decree against his absent debtor, though the property may be adjudged to the assignee. *Schofield v. Cox*, 8 Gratt. 533.

Appearance.—Where an affidavit is filed, along with the answer of a corporation whose stock has been attached, alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same. *C. & O. R. Co. v. Paine*, 29 Gratt. 502.

Petitions.—A plaintiff in attachment, who has a deed of trust on the property attached, can not unite with the trustees in the deed and come into the attachment suit by petition and ask to have the attached property delivered to the trustees. Section 2984 of the Virginia Code of 1887 was intended for the protection of the rights of third parties, and not of the plaintiff in the attachment. In this case the plaintiff, though united with the trustees, was the real petitioner, and, the attachment having been quashed because issued without sufficient cause and upon false suggestion, the property was rightly restored to the defendant. *Littell v. Lansburg*, 96 Va. 540, 32 S. E. 63, 4 Va. Law Reg. 843.

Proper Issue.—Where the petitioner claims the attached property under Va. Code, 1873, ch. 148, § 25, the proper issue to be tried is, "whether or not petitioner has any title to, lien on or interest in the attached property or its

proceeds." See Va. Code, 1887, § 2984; *Starke v. Scott*, 78 Va. 180.

Right to a Jury.—Prior to Va. Code, 1887, § 2984, where persons claiming the property attached, or some interest therein, were admitted as parties in the cause, it was error for the court to pass upon the claim without the intervention of a jury. *Anderson v. Johnson*, 32 Gratt. 558.

Now in such case trial by jury may be waived. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392.

Bill of Interpleader.—In attachment in equity, bill of interpleader was filed by trustee claiming what was due from garnishee to defendant. Decree dismissing the bill will not be disturbed on appeal, when there is no bill of exceptions, no certificate of evidence, no authenticated copy of trustee's appointment, and no intimation of what documents were read or rejected; but it appears that depositions were inserted in the record after the decree was rendered, the decree not alluding to them, yet stating that the evidence was heard. *Joslyn v. State Bank*, 86 Va. 287, 10 S. E. 166.

XV. Dissolution.

A. WHAT WILL EFFECT DISSOLUTION.

1. Bankruptcy.

Under the federal bankruptcy act of 1867, the bankruptcy of the defendant in an attachment proceeding, and the assignment of his effects to a commissioner in bankruptcy dissolved any attachment not issued four months prior to the commencement of the proceedings in bankruptcy. *Weisenfeld v. Mispelhorn*, 5 W. Va. 46; *Gibbs v. Logan*, 22 W. Va. 208. See *Mason v. Warthens*, 7 W. Va. 532. See generally, the title BANKRUPTCY AND INSOLVENCY.

2. Death of Defendant No Dissolution.

The death of a debtor whose real property has been attached in a suit in

equity, and proceeding therein by attachment against him and his estate as a nonresident, does not dissolve the attachment or lien thereon, where the death occurs after the attachment is levied. *White v. Heayner*, 7 W. Va. 324.

3. Failure to Require Security.

Where the plaintiff in an attachment suit waives the statutory right to require security from the defendant upon his appearance, the attached property is held to be thereby discharged. *Tiernans v. Schley*, 2 Leigh 25.

B. PROCEDURE FOR.

1. Motion to Quash.

a. In General.

Jurisdiction of Court.—Where an attachment has been sued out under § 2, ch. 151, Va. Code, 1860, in a suit pending in a county or corporation court, though the defendant has given a forthcoming bond, the court has jurisdiction at a monthly term of the court to abate the attachment. *Clafin v. Steenbock*, 18 Gratt. 842.

Irregular Attachment Quashed Ex Officio by Court.—An attachment irregularly issued ought to be quashed ex officio by the court to which it is returned, though bail be not given, nor any plea filed by the defendant. *Mantz v. Hendley*, 2 Hen. & M. 308.

Objections to the regularity of attachment proceedings may be taken advantage of, not only in the trial court, but in an appellate court, although not raised in the trial court; and the court may, of its own motion, dismiss an irregular attachment, and ought to do so when there has been no appearance by the nonresident debtor, and no personal service upon him. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. 475.

Sufficient Cause Must Be Shown.—Upon a motion under Va. Code, 1860, ch. 151, § 22, to abate an attachment on the ground that it has been issued on false suggestions or without suffi-

cient cause, the question is whether, upon all the evidence, there was probable cause to believe the defendant was doing the act which would authorize the attachment; and not whether the facts as they appeared to the affiant, though only a small part perhaps of the facts of the case, afforded him reasonable grounds for such a belief. *Clafin v. Steenbock*, 18 Gratt. 842.

The remedy is justified, not by the belief of the affiant, however honestly entertained upon reasonable grounds that the fact sworn to in the affidavit exists, but by the existence of that fact. *Sublett v. Wood*, 76 Va. 318. See *Clafin v. Steenbock*, 18 Gratt. 853.

b. Who May Make Motion to Quash.

Any party interested may move the court to quash an affidavit and attachment. *Capehart v. Dowery*, 10 W. Va. 130.

A defendant in an action on contract who fails or declines to make the counter affidavit prescribed by § 46, ch. 125, W. Va. Code, that there is not, as he verily believes, any sum due from him to the plaintiff, etc., is not thereby debarred from moving to quash the attachment sued out thereon by plaintiff. *Miller v. Fewsmith Lumber Co.*, 42 W. Va. 323, 26 S. E. 175.

c. Waiver of Right to Move to Quash.

The right to move to quash an attachment on the ground of an insufficient affidavit is not, under W. Va. Code, ch. 106, § 19, waived by appearance and filing an answer. *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Quesenberry v. People's B. & L. Ass'n*, 44 W. Va. 512, 30 S. E. 75.

d. Orders in Vacation.

The power given to circuit judges to quash or dismiss attachments in vacation is not final, and does not supersede the defendant's right to make defense at the trial in term under the Virginia statutes. *Dunlap v. Dillard*, 77 Va. 847.

The power given any circuit judge in

vacation, under the act of February 28, 1866, amending Va. Code, 1860, ch. 151, § 6 (See Code, 1873, ch. 148, § 6), to quash or dismiss an attachment, does not conflict with or repeal any other provision of that chapter, and was intended to give the defendant a speedy and summary remedy where he has a clear defense; and to have the attachment quashed or dismissed if, in the opinion of the judge, it was sued out without sufficient cause. *Dunlap v. Dillard*, 77 Va. 847.

c. Province of Court and Jury.

Where the plaintiff, on a motion to abate an attachment, declines to express any wish for a jury, and the defendant expresses a wish that a jury may be dispensed with, the court should hear and decide the cause without a jury. *Claffin v. Steenbock*, 18 Gratt. 842.

f. Evidence—Burden of Proof.

Upon a motion to abate an attachment the burden of proof is on the plaintiff to show that the attachment was issued on sufficient cause, and he may, therefore, be required to introduce his evidence first. *Wright v. Rambo*, 21 Gratt. 158; *Burruss v. Trant*, 88 Va. 980, 14 S. E. 845. See generally, the titles PRESUMPTIONS AND BURDEN OF PROOF; EVIDENCE.

The burden of proving that an attachment was issued on sufficient cause rests on the plaintiff, and he should introduce his evidence first, when the defendant moves an abatement. *Sublett v. Wood*, 76 Va. 318.

Fraud.—Where an attachment is sued out on the ground that the plaintiff has executed a deed with intent to defraud creditors, the burden of proving such fraud rests on the attaching creditors. *Burruss v. Trant*, 88 Va. 980, 14 S. E. 845.

2. Plea in Abatement.

a. In General.

See generally, the titles ABATE-

MENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; PLEADING.

A plea that the sum for which an attachment issued was not due at the date of the affidavit on which it was based should not be received as a plea in abatement of the attachment. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

A defendant in an action on contract, who fails or declines to make the counter affidavit prescribed by § 46, ch. 125, W. Va. Code, that there is not, as he verily believes, any sum due from him to the plaintiff, etc., is not thereby debarred from moving to quash the attachment sued out thereon by plaintiff, or from filing a plea in abatement denying the existence of the grounds for the attachment stated by plaintiff in his affidavit. Section 46, ch. 125, and § 19, ch. 106, are not inconsistent. The one relates to what is due on the debt, and for what amount, if any, judgment shall be rendered, the other relates to the method of enforcing payment. *Miller v. Fewsmith Lumber Co.*, 42 W. Va. 323, 26 S. E. 175.

Where the bill shows on its face proper matter for the jurisdiction of the court, no exceptions for want of such jurisdiction can be taken except by plea in abatement. *Middleton v. White*, 5 W. Va. 572.

The fact that an attachment bond is signed by the plaintiff's attorney, without authority, can not be taken advantage of by a motion to quash. The proper remedy, if any, is by a plea in abatement. *Tingle v. Brison*, 14 W. Va. 295.

b. How Plea Should Conclude.

A plea in abatement to an attachment ought not to conclude with praying judgment if the plaintiff ought to have, and maintain his action, but only that the attachment be quashed. *Mantz v. Hendley*, 2 Hen. & M. 308.

3. Voluntary Dismissal of Attachment.

Where the plaintiff has sued out an

attachment both at law and in equity, he may dismiss his attachment at law and proceed on his attachment in equity. *Magill v. Manson*, 20 Gratt. 527.

4. Effect of Dismissal.

Attachment in equity can not be maintained on undue debts on the ground that the debtors are nonresidents unless they have disposed of their effects fraudulently, or are about to do so; and upon abatement the court can not retain the suit and grant relief, but must dismiss the bill. Va. Code, 1887, § 2964; *Wingo v. Purdy*, 87 Va. 472, 12 S. E. 970.

Where an attachment is ancillary only the suit may proceed though the attachment is dismissed. *Devries v. Johnston*, 27 Gratt. 805.

XVI. Action for Wrongful Attachment.

A. GROUNDS OF ACTION.

Both malice and want of probable cause are necessary to sustain an action for wrongfully suing out a foreign attachment. *Marshall v. Bussard*, Gilmer 9. See generally, the title MALICIOUS PROSECUTION.

In an action for damages for suing out a writ of attachment, it is necessary to allege in the declaration that it was sued out maliciously and without probable cause. *Burkhart v. Jennings*, 2 W. Va. 242.

Probable Cause.—Probable cause for suing out an attachment is a belief by the attaching creditor in the existence of the facts essential to the prosecution of his attachment, founded upon facts which might induce such a belief on the part of a man of ordinary caution, prudence and judgment. *Burkhart v. Jennings*, 2 W. Va. 242; *Spengler v. Davy*, 15 Gratt. 381. See also, *Clafin v. Steenbock*, 18 Gratt. 842.

B. FORM OF ACTION.

Trespass on the case is the proper action against a person who maliciously

and without probable cause sues out an attachment and causes it to be levied on the property of another. *Shaver v. White*, 6 Munf. 110; *Olinger v. McChesney*, 7 Leigh 670. See generally, the title TRESPASS.

C. PERSONS LIABLE.

A firm assigned its goods and two stores on premises of which they held leases to F. in trust to pay certain debts, with authority to take possession, sell the goods, and collect the debts. W. attached said goods. On the same day, two hours later, a bank sued out an attachment against the goods and leased premises. The same officer made both levies. F. interpleaded and there was a judgment in his favor; and afterwards the suit of W. was dismissed. F. then sued the bank for the damages he had sustained by the levy of their attachment. Held, that F. had a right to recover from the bank all the damages he had sustained by the levy of the bank upon the two storehouses held under lease and the withholding the possession from him. *Fechheimer v. Nat. Exch. Bank*, 31 Gratt. 651.

Several Liability.—Where attaching creditors wrongfully levy successive attachments on the same property, they are severally liable for the damages. *Fechheimer v. Nat. Exch. Bank*, 31 Gratt. 651.

D. EVIDENCE.

Where several attachments have been wrongfully levied upon the same property, it is not admissible to introduce parol evidence, in an action for damages therefor, to show that the property was exclusively held under the first attachment levied. *Fechheimer v. Nat. Exch. Bank*, 31 Gratt. 651. See generally, the title EVIDENCE.

XVII. Garnishment.

A. NATURE.

"Garnishment is in the nature of a

proceeding in rem, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant." *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 455, 14 S. E. 300; *Stewart v. Northern, etc., Co.*, 45 W. Va. 734, 32 S. E. 218.

Garnishment is a dual proceeding, moving against the garnishee in personam to compel him to answer and disclose what property and estate of the defendant he has in his hands and to hold the same subject to the order of the court, and against the property and estate itself, to extinguish the right of the defendant in it by condemnation and appropriation of it to the satisfaction of the plaintiff's claim. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300.

Garnishee Is a Mere Stakeholder.—

The garnishee, in the eye of the law, is a mere stakeholder, a custodian of property or estate attached in his hands, and has no right to do any voluntary act to the prejudice of either the plaintiff or defendant in the action. He must let the law take its course, except that he may protect himself from jeopardy or injury by unauthorized acts and proceedings. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 451, 44 S. E. 300; *Bickle v. Chrisman*, 76 Va. 691.

Of Statutory Origin.—Garnishment is purely a creature of statute, and we can only follow the procedure pointed out by the statute, and it is not within the rules of construction governing common-law actions. It can not be resorted to except where the statute expressly authorizes it; and when the statutory limits have been reached without accomplishing the purposes for which it was invoked, we can not extend its operations into new fields or contrive new means of applying it to the exigencies of the particular case.

Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

"Garnishment is purely a statutory proceeding, and can not be enforced beyond the statutory authority under which it is resorted to. And, as has been said, it can have no aid from the volunteered acts of the garnishee. Such acts will be regarded as void, so far as they interfere with the rights of third parties." *Bickle v. Chrisman*, 76 Va. 691.

Garnishment is the exercise of a special and limited statutory power, the requisites of which are jurisdictional. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300.

Courts Having Jurisdiction.—On a garnishment proceeding a court of law has jurisdiction as well as a court of equity. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502.

A cause in chancery in which an attachment is sued out and served upon a garnishee, who is a defendant, must be proceeded in, governed and determined according to the rules and principles governing courts of chancery, in the absence of legislation to the contrary. *Sims v. Bank of Charleston*, 8 W. Va. 274.

B. SERVICE ON GARNISHEE.

See generally, the title **SERVICE OF PROCESS**.

1. In General.

The Return Must State All Facts Essential to Valid Service.—"The return of the writ must state all of the facts that are essential to a valid service thereof. It must be certain, and must show that the property was attached in the hands of the garnishee, or the court acquires no jurisdiction over the res. The return should also state on whom the writ was served, and the time when service was made. It must recite the performance of those acts required by the statute as conditions precedent to a valid service in

garnishment." *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 467, 44 S. E. 300.

Process Must Be Made Returnable to a Return Day.—Process returnable to a day which is not a lawful return day is void. An order indorsed upon an attachment, requiring a garnishee to appear and answer, is process. It must be returnable to the next term of the court. If it be not so returnable, but skips a term, and is returnable to the second term after its issuance, it is void. *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

2. Seizure of Property.

How Jurisdiction Acquired of the Res.—Although, in garnishment proceeding, there is no actual manual seizure of property by the executing officer, it is in the nature of a proceeding in rem, and jurisdiction of the debt or property sought to be thereby subjected must be obtained, else the court can not pronounce judgment of condemnation against it. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300.

"Garnishment retains its character as one in the nature of a proceeding in rem, although there is no actual seizure of property under the order of attachment, for by service of the order upon the garnishee, it arrests the debt in his hands and holds it through him, subject to the judgment of the court. The claim subjected by garnishment is estate of the principal debtor in the hands of the garnishee and the proceeding is against it as a res, a thing, and not against the garnishee personally, except to compel him to turn it over to the creditor of the principal defendant in satisfaction of his claim. In every practical sense, it amounts to a seizure of a thing." *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 454, 44 S. E. 300.

Where Defendant Is a Nonresident and Can Not Be Served.—Jurisdiction can not be acquired of a fund attached

by service of process on the garnishee in Virginia, when by reason of the existence of war between the Confederate states and the United States, no legal service of notice can be had upon a nonresident defendant who is in New York. It is the same in legal effect as if under ordinary circumstances no attempt were made to give notice at all, or as if jurisdiction having been acquired and notice given, a hearing were denied. *Dorr v. Rohr*, 82 Va. 359. See Va. Code, § 2979.

Where Garnishee Is Not the Agent of Nonresident Defendant.—Where a garnishee in a foreign attachment is not the agent and representative of his creditor, the principal defendant, a seizure of the res, or attached fund in the hands of the garnishee, is not notice to the nonresident defendant, and can not give jurisdiction. The court said: "The theory upon which in proceedings purely in rem a seizure is notice and gives jurisdiction, is that the res, if not in the possession of the owner himself, is intrusted to an agent, who has the power, and whose duty it is to represent the owner and protect his interests." *Dorr v. Rohr*, 82 Va. 359.

3. Service on Individual.

Necessity of Service to Give Jurisdiction.—Jurisdiction of the person of the garnishee must be acquired by service upon him. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 455, 44 S. E. 300; *Wagon Co. v. Peterson*, 27 W. Va. 322; *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Section 197, W. Va. Code, relating to garnishment, requires the delivery of a copy of the order or attachment to the person designated by the plaintiff as garnishee, and there is no provision for his appearance until after that is done. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 465, 44 S. E. 300.

4. Service on Corporation.

Defective Return.—Omission to show

in the return of service of an order of attachment upon a foreign corporation as garnishee that the agent upon whom the service was made resides in the county in which he was served, renders the service invalid, and, in such case, the court obtains no jurisdiction of the res, for want of service on the garnishee. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 451, 44 S. E. 300.

5. Defects in Service Not Subject to Waiver by Garnishee.

Can Not Accept or Waive Service.—

"The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no cost to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense and injury of another, and creating actually a privilege with priority in favor of one creditor to the prejudice of another." *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 466, 44 S. E. 300.

Voluntary Appearance of Garnishee Does Not Confer Jurisdiction.—"In order that the defendant may be concluded by the proceedings, it has been held necessary that there should have been a proper service on the garnishee. The latter has no power to affect the rights of the defendant by voluntarily appearing as garnishee, and if he does voluntarily appear, the proceedings will afford no protection to him against subsequent liability to the defendant." *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 467, 44 S. E. 300. See post, "Appearance and Answer of Garnishee," XVII, C.

A garnishee can not give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300.

C. APPEARANCE AND ANSWER OF GARNISHEE.

Necessity for Appearance and Answer.

—No decree can be had against a party who is summoned as a garnishee in a suit in chancery, who is not made a party to the suit, and who does not appear and answer. *Chilicothe Oil Co. v. Hall*, 4 W. Va. 703. See generally, the titles ANSWERS, vol. 1, p. 389; APPEARANCES, vol. 1, p. 667.

In a garnishment case, if a party is summoned as a garnishee and appears and admits under oath that he has sufficient money in his hands belonging to the defendant in the attachment proceedings to satisfy the plaintiff's claim, which is proven, judgment may be given against the garnishee to be applied in satisfaction of the plaintiff's demand. *Lively v. Southern, etc., Ass'n*, 46 W. Va. 180, 33 S. E. 93.

County Court Can Not Be Compelled to Issue Process to Compel Appearance.

—In the case reported it was held, that a county court ought not to be compelled by a superior court to issue process to another county to compel the appearance of a person summoned as a garnishee under an attachment against an absconding debtor. *Jackson v. Justices*, 1 Va. Cas. 314.

Incomplete Answer.—Parties are summoned under § 11, ch. 188, and ch. 151, Va. Code, 1860, respectively, as garnishees. Without objection they file written answers, which are subsequently, on motion of the plaintiff, stricken from the file, and the court below proceeds to hear evidence as to the indebtedness to the plaintiff, and gives judgment against him. It was held, the court should have, instead of striking the answers out, required the garnishees to answer further if desired by the plaintiff. *Seamon v. Bank*, 4 W. Va. 339.

The party summoned to answer a suggestion, like a defendant summoned to answer a bill, is advised by the sug-

gestion what he is to answer, and when and where; and upon his failure to do so the suggestor is entitled to his rule to compel an answer. *O'Brien v. Camden*, 3 W. Va. 29.

Answer of Corporation.—When a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer; that is, under its corporate seal. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 653. See the title CORPORATIONS.

D. ORDER FOR PAYMENT OR DELIVERY INTO COURT.

In General.—West Virginia statute (§ 14, ch. 106, Code, 1887) provides that when a garnishee under an attachment appears he shall be examined under oath; and that, if it appear from his examination that at or after service of the attachment he was indebted to the defendant, or had in his possession or control effects of the defendant, the court may order him to pay the money due from him, and deliver the effects in his hands. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

Previous to the constitution of 1902 it was held, that a county court may at its monthly term provide for the preservation of attached effects, and a garnishee having admitted his indebtedness to the debtor, the court may order him to pay his debt to a receiver appointed by the court. *Withers v. Fuller*, 30 Gratt. 547.

Where Amount of Garnishee's Indebtedness Is Less than Judgment against Nonresident Defendant.—If in an attachment suit against a nonresident defendant the writ is served on him, and a personal judgment is rendered against him, and afterwards the amount due from the garnishee is judicially ascertained to be less than this judgment against the nonresident defendant, such garnishee should be ordered to pay the amount of his

indebtedness directly to the plaintiff as a credit on his judgment and ought not to be ordered to pay it to a receiver, and the receiver ordered to pay it to the plaintiff on his judgment against the nonresident defendant. *Wagon Co. v. Peterson*, 27 W. Va. 314.

Garnishee Can Not Be Compelled to Pay Same Debt Twice.—A garnishee, who, without fault or negligence on his part, has been compelled, by a court of competent jurisdiction, to pay a debt to his creditor, can not be compelled to pay the same indebtedness, or any part thereof, to the person suing out the garnishment. In the case at bar the defendant in error (a corporation), after full disclosures and without fault or negligence on its part, was compelled by a court of competent jurisdiction of North Carolina, to pay the debt to its creditor, and can not now be compelled to pay any part of the same debt to the plaintiff in error although its attachment was duly levied before the decision in North Carolina was rendered. *Virginia Fire, etc., Ins. Co. v. New York, etc., Co.*, 95 Va. 515, 28 S. E. 888.

Plaintiff is a resident of this state. Defendant is a resident of another state. After this suit had been brought, defendant was garnished in the state where he resided, as a debtor of plaintiff, by a creditor of the plaintiff. After judgment had been rendered in this case, defendant moved the court to suspend the execution thereof until the question of plaintiff's liability should be determined in the suit in which defendant had been garnished. It was not error to overrule such motion. *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

Liability of Garnishee — In General.—“Garnishment operates as an attachment or levy upon the effects of the defendant in the hands of the garnishee. It renders the garnishee liable for such effects, or their value, if they are not forthcoming to meet the judg-

ment of the court." *Rollo v. Andes Ins. Co.*, 23 Gratt. 509, 513.

If the defendant in this country appear not to be a debtor of the absentee, but hold effects belonging to him, by a title not effectual against creditors, or without any title at all, he should be considered personally responsible, only for so much as he may have consumed; or appropriated to his own use, so as not to be forthcoming, or for the profits he may have received; but for that amount, a decree may be made against him personally, in the first place; holding the property in his hands ultimately bound, if he be insolvent; and for the balance of the plaintiff's claim the court may proceed in the first place against the property itself, either by considering such defendant a trustee for the use of creditors, and directing a sale, unless the debt be paid by a given day; or by sequestering it (under the act of assembly), as the property of the absentee. *Gibson v. White*, 3 Munf. 94.

The attaching creditor has no interest in the subject beyond his demand. If the garnishee admits funds to that amount or the jury finds them, he looks no further but takes his judgment accordingly. He is not concerned to contest whether his debtor has not further demands against the garnishee; and the judgment against the latter ascertains that there is so much at least in his hands, but not (as against the debtor) that there may not be more. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 600.

If, in a garnishment proceeding, the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding; but it is error for the court to render a judgment against the garnisheed corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was

lost by the act of the corporation. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502.

When Goods Are Wrongfully Taken from Him.—"And it has been held in several cases, that the garnishee will be personally responsible if the goods are taken from him by a wrongdoer; and this, upon the ground that the garnishee may have his action of trespass against the latter." *Rollo v. Andes Ins. Co.*, 23 Gratt. 509, 513.

Where Defendant Has Property in His Keeping for Which Absent Defendant Is Indebted to Him.—In a proceeding by foreign attachment, the home defendant having property of the absent defendant in his possession, for the keeping of which the absent defendant is indebted to him, is entitled to have his claim first satisfied out of the property, as against the attaching creditor. *Williamson v. Gayle*, 7 Gratt. 152.

Amount of Decree.—An attaching creditor should be decreed only so much of the debt garnished as is equal to his demand. *Watts v. Robertson*, 4 Hen. & M. 442.

Interests.—A home defendant decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender, or bring the money into court. *Ross v. Austin*, 4 Hen. & M. 502.

E. PROPERTY SUBJECT TO GARNISHMENT.

1. Debts.

Debts Due at the Time of Service of Process.—It seems that the statute in relation to attachments at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655.

An attachment served on a garnishee indebted to or having effects of the donor binds debts existing or effects in the garnishee's hands at the date of

service of the attachment, as also debts arising or effects coming to the hands of the garnishee until the answer of such garnishee, but not later than such answer. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

Contingent Debt—Construction Contract.—It is the general rule that a garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment, and it follows, therefore, that a contingent liability of a contract affords no ground for garnishment. The cases will illustrate what is meant by a contingent liability in this connection. Thus it is a very usual thing for a railroad company to contract for the building of its road and by the contract to require the contractor to do his work by a specific time, to provide, that, if he should not put force enough on the road to comply with his contract in this respect, the engineer of the railroad company may employ a force sufficient for the purpose and pay such force out of the price contracted to be paid to the contractor for the work. The company also retains a portion of the pay of the contractor as an indemnity against any loss by the non-compliance of the contractor with his contract, usually also providing, that, if the contractor neglect his work, the company may declare the contract void. If, while such a contract is still subsisting, the contractor abandons his work, what may be supposed to be due him can not be garnished in the hands of the railroad company, for such debt is contingent, and it may turn out, that by reason of the subsequent cost of completing his contract, the apparent debt due to him from the railroad company will be extinguished. *Strauss v. Chesapeake, etc., R. Co.*, 7 W. Va. 368; *Baltimore, etc., R. Co. v. Gallahue*, 14 Gratt. 563; *Wagon Co. v. Peterson*, 27 W. Va. 335.

The estimates of work done by a contractor for a railroad company are

made up to the 20th of each month, when they are considered due, though not paid for some days afterwards. As the price of the work done by the contractor after the 20th may be forfeited to the company for several causes, before the 20th of the next month, no debt is due from the company to the contractor until the 20th arrives; and therefore an attachment being served on the company on the 14th of the month, there is nothing then in its hands due to the contractor which may be attached, though in fact no forfeiture occurs, and on the following 20th of the month the amount of the estimate may be due. *Baltimore, etc., R. Co. v. Gallahue*, 14 Gratt. 563.

A contingent debt though arising out of a contract can not be garnished, as it would be unjust to the garnishee to render a judgment against him on a contract, when the amount apparently due may according to the terms of the contract be extinguished by subsequent events. But though for their convenience the garnishee and the nonresident defendant keep books in such a way that the amount apparently due at any time on their books by the garnishee may be decreased by further inquiry into existing facts, such a debt is not properly speaking contingent, and its payment may be enforced by proceedings against him as a garnishee. *Wagon Co. v. Peterson*, 27 W. Va. 315.

The contract between a railroad company and one of the contractors on its line of improvement, provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. The contractor can not recover the amount of the final estimate until he has executed the release; and this attaching creditor at law has no greater rights against the company in respect to this final estimate than he has, and therefore can not recover the amount unless the con-

tractor has executed the release. Baltimore, etc., *R. Co. v. McCullough*, 12 Gratt. 595.

Insurance Company Having Option to Rebuild.—So an insurance company can not be made a garnishee, while it has the option to rebuild the burned property or pay its value; for such liability is contingent and never will exist if it elect to rebuild. *Wagon Co. v. Peterson*, 27 W. Va. 336.

Note Payable to Order.—So the maker of a negotiable note can not be garnished; for the note being payable to order, it is contingent to whom he owes the debt. *Wagon Co. v. Peterson*, 27 W. Va. 336.

Wages.—So a sailor's wages, which are contingent upon the voyage being successful, can not be attached or garnished till the voyage is complete. *Wagon Co. v. Peterson*, 27 W. Va. 336.

Debt Due Nonresident Debtor.—Debts due nonresident debtor by open account may be attached in the hands of resident garnishees. *Porter v. Young*, 85 Va. 49, 6 S. E. 803.

Though the indebtedness of the garnishee to the nonresident defendant be such that the defendant could not sue without first making a demand upon him, yet, though no such demand has been made upon him, he may nevertheless be summoned as a garnishee, and a judgment may be obtained against him as such. *Wagon Co. v. Peterson*, 27 W. Va. 314.

2. Money on Deposit.

Money is left with a person, who is a member of a firm, on a special deposit, and in his absence it is entered on the books of the firm to the credit of the depositor, and paid out by the firm for their own uses, they paying the depositor's checks upon it, by checks in their own name upon the bank, and then an attachment is served upon the firm as garnishees in a suit against the depositor, the summons being served on the other member of the

firm. The attachment binds the money in the hands of the firm. *Pulliam v. Aler*, 15 Gratt. 54.

3. Land in Possession of Garnishee.

In a proceeding by foreign attachment, the home defendant denies that he has any effects of the absent debtor in his hands. He says that a tract of land which had belonged to the absent debtor, had been purchased by himself and paid for, and he in fact held the receipt of the absent debtor for the amount of the purchase money. As, however, he did not pretend he had paid the amount in money, and as the accounts which he endeavored to establish were not proved to the satisfaction of the commissioner and the court, the land was held liable. *Kelly v. Linkenhoger*, 8 Gratt. 104.

4. Personal Property in Hands of Personal Representatives to Be Administered.

The personal representatives of a deceased debtor are not, as such, the debtors of the creditors of their testator or intestate, within the sense of the statute. They are not liable in the debit, but in the detinet only. The personal estate is in their hands to be administered according to law, and is not, therefore, the subject of garnishment by the creditors of the estate of the decedent. *Parker v. Donnelly*, 4 W. Va. 648.

5. Shares of Corporate Stock.

Shares of corporate stock are almost universally held by courts to be choses in action and therefore liable to garnishment. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392; *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502.

The shares of a stockholder in a joint stock company, incorporated by and conducting its operations, in whole or in part, in the state are such estate as is liable to be attached in a proceeding instituted for that purpose, by one of the creditors of such stockholder; and such estate may properly be con-

sidered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502.

6. Property under Equitable Assignment.

Profits.—Where a party seeks by bill in equity and attachment against a nonresident to subject the profits arising from a contract existing between said nonresident and a third party carrying on business for him in this state, and it appears that said third party, in order to obtain credit from a store to enable him to run his business agreed with the owner of said store, in the presence of said nonresident and with his consent, that the profits arising from such business should be applied to the payment of merchandise purchased from said store, such an agreement constitutes an equitable assignment of such profits, and, when paid over, can not be reached by a creditor who garnishees said third party. *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279.

Money.—An order from a person to whom money is due or to become due, on the person in whose hands or under whose control it may be, to pay to the payee, constitutes an equitable assignment, and the fund can not be garnished at suit of the assignors' creditors. *Mack Mfg. Co. v. Smoot (Va.)*, 47 S. E. 859.

7. Property in Hands of Trustee.

"If the creditor thinks proper to take a judgment against the garnishee himself, and the latter interposes no objection, no just cause of exception can be had; but when he attempts thus to sequester the property of third persons, held by the garnishee as a fiduciary, his proceeding is neither within the letter nor the spirit of the statute." *Bickle v. Chrisman*, 76 Va. 692.

"The garnishee can not, by his silence or his direct confession, authorize a judgment against property in his hands, as trustee, or held by him in fiduciary character." *Bickle v. Chrisman*, 76 Va. 692.

F. AGAINST WHOM GARNISHMENT MAY ISSUE.

1. In General.

Where Liability Might Be Enforced at Common Law.—Where the garnishee owes a debt to the defendant in an execution or has estate of his in his hands, and the character of his liability is such that it might be enforced in a common-law suit by an action of debt, detinue or some other appropriate personal action; and when this is the character of his liability, it can be appropriately enforced by the garnishee process; and in all such cases this process may be used for that purpose by the plaintiff in execution. *Swann v. Summers*, 19 W. Va. 125.

Where Liability Can Only Be Enforced in Equity.—But when the liability of the garnishee is such, that it can only be enforced in a court of equity, the garnishee process is obviously unsuited to enforce it; and in such case the plaintiff in the execution is authorized in the name of the sheriff to bring a suit in equity, where alone such a case can be disposed of, to enforce the liability for his own benefit. *Swann v. Summers*, 19 W. Va. 125.

If by any legislation one corporation takes charge of a portion of the property and franchises of another and conducts its business in part, and by such legislation and action it is responsible to render an account in a court of equity for its actings and doings to the first corporation or its creditors, the creditor of the first corporation, who has issued a *feri facias* against the property of the first corporation, can not obtain by the garnishee process a judgment against the second

corporation or any of its debtors. *Swann v. Summers*, 19 W. Va. 115.

Where Liability Enforceable Either at Law or in Equity.—But if the liability of the garnishee is of such a character that it could have been enforced at law or in equity, then the plaintiff, could, if he chose, enforce it by the garnishee process or by a suit in equity in the name of the plaintiff. *Swann v. Summers*, 19 W. Va. 115.

2. Public Officers.

See generally, the title PUBLIC OFFICERS.

City Collector.—A collector of the city of Wheeling collected and paid to the city \$350 as water rent, from Smith & Co., a manufacturing company, which had not been assessed by the city council as directed by an ordinance, the said company having been omitted by the city assessor from the separate list which the ordinance required the assessor to make and return to the city clerk to enable the council to assess the water rent. Aumann, who was a judgment creditor of said Smith & Co., suggested the collector and summoned him to answer as garnishee. Held, that there was no liability on the collector, Black, which could be reached by suggestion to enforce the *feri facias* lien as claimed by Aumann. *Aumann v. Black*, 15 W. Va. 773.

State Treasurer.—The treasurer of the state, who holds bonds of a foreign insurance company, doing business in the state, under the act of February 3, 1866, as amended by the act of March 3, 1871, is not liable to be summoned as garnishee by a foreign creditor of the insurance company. *Rollo v. Andes Ins. Co.*, 23 Gratt. 509.

The treasurer of this state who holds, pursuant to ch. 53, Va. Code, bonds or securities of a foreign insurance company doing business in this state, can not be garnished by a foreign creditor of the company. He holds such bonds or securities first for the people of

Virginia designated by law, and then for the company. When its liabilities to citizens of this state have been satisfied or terminated, the securities deposited must be delivered to the company. The fact that the company has made an assignment, or that a suit has been brought pursuant to § 1274 of the Code to enforce the rights of creditors, does not in any wise alter the rule. Nor can such garnishment be supported merely by uniting the obligors in the bonds deposited with the treasurer. *Buck v. Guarantors Co.*, 97 Va. 719, 34 S. E. 950.

Officers of National Soldiers' Home.—"The National Home for Disabled Volunteer Soldiers," situated within the limits of Elizabeth City county, in this state, upon land purchased by the United States with the consent of the state legislature, is a corporation created under the laws of congress, and is under the exclusive jurisdiction of the federal government. Its officers are disbursing officers of the United States, and the funds in their hands as such can not be garnished under process from a state court. *Foley v. Shriver*, 81 Va. 568.

3. Executors and Administrators.

See generally, the title EXECUTORS AND ADMINISTRATORS.

"It is well settled that process of garnishment at law will not lie against executors and administrators." *Bickle v. Chrisman*, 76 Va. 692.

Neither an administrator nor a debtor of the estate can be garnished, because it disturbs the proper administration of the estate. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

4. Nonresidents.

A nonresident can not be subjected to garnishment, unless he has effects of the debtor within the state or owes any debt payable within the state, or has contracted to deliver to him property within the state. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 459, 44 S. E. 300.

A nonresident can not be subjected to the process of garnishment, although caught within the state temporarily and served with process. The moment that it is made to appear to the court that he is a nonresident, only temporarily within the state, without property or effects of the defendant in his possession in the state, or owing him a debt payable within the state, the jurisdiction of the court ends. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 456, 44 S. E. 300.

5. Corporations.

See generally, the title CORPORATIONS.

In General.—A corporation may be summoned and proceeded against as a garnishee, upon proceedings under Va. Code, ch. 151, § 2, p. 600. *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655.

In a proceeding by the creditor of a shareholder to subject his shares to the payment of his debt, the corporation in which the shares are held should be made the garnishee. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392; *Chesapeake R. Co. v. Paine*, 29 Gratt. 502.

Foreign Corporations—General Rule.—The principle which forbids garnishment of a nonresident individual temporarily in the state, applies to foreign corporations. Unless doing business within the state, they are not subject to garnishment therein. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 462, 44 S. E. 300. See generally, the title FOREIGN CORPORATIONS.

A debt due from a foreign railroad corporation, operating no railroad in this state and doing no business here other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company, to be handled on its lines without the state, is beyond the territorial jurisdiction of the courts of this state and not subject to garnishment here. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 451, 44 S. E. 300.

Railroad Company Engaged in Interstate Commerce.—A railroad car sent loaded with freight from another state into this state, and to be returned loaded to the former state in the transaction of interstate commerce, can not be levied upon under an attachment in this state, nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company against which an attachment was issued. This is because of the commerce clause of the national constitution and the interstate commerce act of congress. *Wall v. N. & W. R. Co.*, 52 W. Va. 485, 44 S. E. 294.

Corporation Chartered by Two or More States.—Drake, in his work on Attachments, 5th Ed., § 479, says: "Where, as is sometimes the case, a corporation is chartered by two or more states, it is not in any of these states a foreign corporation, and may be subjected to garnishment in any of them, though its office and place of business be not in the state in which the garnishment takes place." And he cites *Baltimore, etc., R. Co. v. Gallahue*, 12 Gratt. 655; *Mahany v. Kephart*, 15 W. Va. 609.

Municipal Corporation.—A municipal corporation may be garnished or attached for a debt due to one of its creditors just as a natural person may be. Such a proceeding is not contrary to the public policy of this state. *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 33 S. E. 516. See generally, the title MUNICIPAL CORPORATIONS.

G. LIEN AND PRIORITIES.

Nature of Lien.—"Garnishment is an attachment of effects, differing in no essential particular from attachment by levy, except as is said that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a

lien as gives him the right to hold the garnishee personally liable for it or its value." *Bickle v. Chrisman*, 76 Va. 691. See ante, "Lien," XI.

Section 12, ch. 151, W. Va. Code, which creates the lien, was intended to give to the attaching creditor a preference over all others acquiring rights to the subject after the levy of his attachment by transfer or otherwise from the party or by legal process. It was not designed to take from the garnishee any previous right which he had, nor to subject him to any recovery under the attachment from which by the terms of his contract he was exempt until performance by the other party of his part of the agreement. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 599.

Commencement of Lien.—Section 9, ch. 106, W. Va. Code, 1899, gives the plaintiff in an attachment proceeding a lien on the personal property of the debtor from the time of the levying of the attachment, or serving a copy thereof on the garnishee, on all personal property, choses in action, and other securities of the defendant in the hands of the garnishee, and on any real estate of the debtor levied on by virtue thereof, from the suing out of the same. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392.

Extent of Lien.—"Section 9, ch. 106, W. Va. Code, declares that the lien begins with the service of the attachment, and of course binds debts or effects then in the garnishee's hands; but how long does it continue to attach to and bind new debts arising or effects coming to the garnishee? It certainly continues to attach to new or other debts or effects after that period, for § 14 says that if it appear on examination of the garnishee 'that at or after the service of the attachment he was indebted to the defendant against whom the claim is, or had in his possession or control, any goods, chattels, money, securities, or other effects belonging to

the said defendant, the court may order him to pay,' etc. From this I think the attaching power of the attachment continues up to, but not after, the answer of the garnishee." *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

No lien can be obtained by attachment upon funds charged with a trust in the hands of a public officer. *Rollo v. Andes Ins. Co.*, 23 Gratt. 509; *Foley v. Shriver*, 81 Va. 568; *Buck v. Guarantors' Co.*, 97 Va. 719, 34 S. E. 950.

Enforcement of Lien.—The lien of the attachment can not be enforced without rendering a judgment against the garnishee. *Baltimore, etc., R. Co. v. McCullough*, 12 Gratt. 601.

Priorities.—K. recovers a judgment against F. & H. as partners, and sues out an execution of *fi. fa.* upon it which is returned "no effects." Afterwards S. recovers a judgment against H. for an individual debt of H. There are no assets of the partnership of F. & H., but G. is indebted to H. K. summons G. as garnishee and obtains a judgment for the amount of his debt against G. S. also summons G. and obtains a judgment, the summons of S. being after that of K., but he obtains his judgment first. S. then files his bill to enjoin K. from receiving and G. from paying to K. the debt of G. to H. Held, K. having first recovered his judgment against F. & H. and sued out execution thereon, has the prior lien upon the debt due from G. to H.; and a court of equity can not deprive him of it. *Straus v. Kerngood*, 21 Gratt. 584.

H. DISCHARGE OF GARNISHEE.

Payment by Garnishee to Receiver.

—A county court may at its monthly term provide for the preservation of attached effects, and a garnishee having admitted his indebtedness to the debtor, the court may order him to pay his debt to a receiver appointed by the court, and a payment to the receiver by the garnishee is a valid payment, and a discharge of his in-

debtedness as to the attaching creditor. *Withers v. Fuller*, 30 Gratt. 547.

Voluntary Payment to Creditor.— Voluntary payment to the attaching creditor will not screen the garnishee from his debt to his own creditor. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

I. ACTIONS AGAINST GARNISHEE.

1. In General.

Upon Failure of Garnishee to Make Full Disclosure.— Section 16, W. Va. Code, provides that, if the plaintiff suggests that the garnishee has not made a full disclosure, the court shall impanel a jury to inquire as to such debts or effects, and as to any liabilities on the garnishee established by the verdict, the court shall proceed as if it had been confessed by the garnishee. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46; *Seamon v. Bank*, 4 W. Va. 339; *Joseph v. Pyle*, 2 W. Va. 449. See Code, W. Va., §§ 16, 17, 18, 19, ch. 151.

See *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528, for the oath taken by jury in such proceedings.

Where a suggestion is issued, and, after the garnishee has answered, it is suggested to the court that he has not fully disclosed his indebtedness, the court will, under the provision of the statute, impanel a jury, without formal pleadings, to inquire whether the garnishee, at the time the suggestion was served on him, was indebted to the judgment debtor, and in what amount, if any. *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. 273.

2. Nature of Action.

"Garnishment is substantially a suit by the defendant in the attachment, in the name of the plaintiff against the garnishee. The plaintiff stands upon no higher ground than the defendant, and can acquire no greater right than the defendant himself possesses." *Rollo v. Andes Ins. Co.*, 23 Gratt. 509.

The right under attachment of the garnisher as to the garnishee does not by garnishment rise higher than the right of the principal defendant as to the garnishee. When the right of such defendant is subject to a right of the garnishee under a contract between them, the right of the garnisher is likewise subject to the right of the garnishee. *Wall v. N. & W. R. Co.*, 52 W. Va. 485, 44 S. E. 294.

"Their general and almost universal nature is twofold—first, to obtain a judgment by a creditor against a debtor for the amount of the debt claimed; and secondly, to subject by attachment certain property or credits of the debtor to the payment of such debt. The first inquiry in such cases always is, whether there be in fact any such debt, and what is its amount; and that inquiry is governed by the same principles as if the suit was an ordinary one by a creditor against a debtor." *Withers v. Fuller*, 30 Gratt. 551.

3. Parties.

Where, under our statute, a suggestion is issued, it is unnecessary that any other person than the one designated as indebted to, or holding effects of, the judgment debtor should be summoned. *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. 273.

No decree can be had against a party who is summoned as a garnishee in a suit in chancery, who is not made a party to the suit, and who does not appear and answer. *Chilicothe Oil Co. v. Hall*, 4 W. Va. 703.

4. Defenses.

a. In General.

If a void contract is sued on by a foreign attachment in a foreign jurisdiction the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the

garnishee when sued by his creditor. *Stewart v. Northern Assur. Co.*, 45 W. Va. 734, 32 S. E. 218.

In the case of a foreign attachment in chancery, to attach a debt alleged to be due from a home defendant to the absent defendant, to satisfy a debt due from the absentee to the plaintiff, the garnishee may set up any equitable defense, which shows that in equity he owes no debt to the absent defendant. *Glassell v. Thomas*, 3 Leigh 113.

Garnishee May Interplead.—Where, along with the answer of the corporation in garnishment proceeding, an affidavit is filed, alleging that some third person claims that said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. 502.

An attaching creditor and an assignee both recover judgments against a debtor of an absent defendant, without objection on his part, although he had notice of the assignment before the judgment in the attachment suit. He can not after judgments are obtained file a bill of interpleader against them to require them to litigate their respective rights to the fund; but is liable to pay both judgments. *Haseltine v. Brickey*, 16 Gratt. 116.

b. Want of Jurisdiction.

If the garnishment is under process from a court of a different jurisdiction from that in which the judgment sought to be garnished was entered, there seems to be no doubt that the garnishment can not be permitted. *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

The county court has no jurisdiction at a monthly term of the court to render a judgment in favor of an attaching creditor against his debtor. Such

a judgment is not simply voidable, but it is absolutely void, and can not be the foundation for any subsequent proceeding. *Withers v. Fuller*, 30 Gratt. 547.

c. Statute of Limitations.

In a case of attachment in equity instituted in July, 1861, upon service of process on resident garnishee and execution of order of publication against nonresident debtor, in New York, the proceedings subsequent to the attachment having been set aside and an amended bill filed, and the nonresident debtor brought for the first time before the court, the running of the statute of limitations was not suspended by those proceedings, and the plaintiff's claim being an account for work and labor done, was barred before the filing of said amended bill. *Dorr v. Rohr*, 82 Va. 359.

5. Judgment.

See generally, the title JUDGMENTS AND DECREES.

Upon What Based—Answer or Verdict.—A judgment against a garnishee must have something on which to rest, either an answer of the garnishee, sufficient to warrant it, or a verdict of a jury of legal certainty, finding facts to warrant judgment. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

"Under our statutes, garnishment is simply the process by which a creditor enforces the lien of his execution against the effects of his debtor in the hands of the garnishee, and the statute plainly contemplates only a personal judgment in such case, based upon proof, or rather upon the confession of the garnishee, that he has effects in his hands belonging to the debtor." *Bickle v. Chrisman*, 76 Va. 691.

Finding of Jury.—Where a garnishee does not appear the court may hear evidence under § 15, W. Va. Code, to establish his liability; but where, as in this case, the garnishee answers, and the answer does not warrant judgment,

the only resource given by the statute is an inquiry by a jury, and its verdict, either alone or in connection with the answer, constitutes the only basis for judgment against the garnishee. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

A finding by the jury as to indebtedness of a garnishee to the attachment debtor and effects in his hands, rendered upon a suggestion of the insufficiency of the garnishee's answer, must be sufficiently definite and certain to warrant judgment against the garnishee. The finding here is too vague. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46.

Plaintiff Must Establish His Debt against Debtor before He Can Have Judgment against Garnishee.—"As the whole object of garnishment is to reach effects or credits in the garnishee's hands so as to subject them to the payment of such judgment as the plaintiff may recover against the defendant, it results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered. And the judgment against the defendant must be a final one. If appealed from by the defendant there can be no judgment against the garnishee while the appeal is pending." *Withers v. Fuller*, 30 Gratt. 551; *George v. Blue*, 3 Call 455; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

In a suit in chancery, against a defendant, who is out of this country, and another, within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree can not be entered against the defendant in this country until, by legal and regular proceedings, the plaintiff has established his claim against the absentee. *Gibson v. White*, 3 Munf. 94.

When Judgment May Be Rendered against Garnishee.—Where a sum is found due from a garnishee in an attachment to the defendant, it is not

improper to render a judgment against such garnishee personally for the amount thereof, where it appears that a judgment has been had by the plaintiff in the attachment against the defendant; and where the judgment against the garnishee is not greater in amount than that against the defendant. *Joseph v. Pyle*, 2 W. Va. 449.

In cases in which the garnishee makes answer before the plaintiff in attachment has obtained his judgment against his debtor, it is proper that any amount which the garnishee may owe the defendant should not be paid to the defendant but should be placed under the control of the court to be paid to the plaintiff in case he recovers judgment. (W. Va. Code, § 17, ch. 151.) *Joseph v. Pyle*, 2 W. Va. 449, 454.

Judgment by Confession.—"The garnishee can not, by his silence or his direct confession, authorize a judgment against property in his hands, as trustee, or held by him in a fiduciary character." *Bickle v. Chrisman*, 76 Va. 692.

Amendment of Judgment.—Where a judgment and execution creditor files a suggestion against a debtor of the judgment and execution debtor, to enforce his execution lien, and the debtor summoned upon such suggestion appears in court and answers, that he is indebted to the judgment and execution debtor in a sum greater than the amount of the judgment creditor's debt including principal, interest and costs thereon, and the court in rendering judgment upon such answer of the garnishee against him by miscalculation of the amount of the judgment creditor's debt including principal, interest and costs renders judgment against the garnishee for the sum greater than the amount of the judgment creditor's debt including principal, interest and costs, such judgment may be amended under the provision of § 5, ch. 134, W. Va. Code, upon notice and motion; and the excess of the judgment against such garnishee affords no grounds for

the interposition of a court of equity to enjoin, correct or set aside such judgment because of such excess. *Alleman v. Kight*, 19 W. Va. 201.

Costs.—If there be a suggestion that the garnishee has not fully disclosed his indebtedness, and the amount found on the trial to be due from him be ascertained finally to exceed the amount he confessed, there should be included in the judgment against him the costs of such trial. *Wagon Co. v. Peterson*, 27 W. Va. 314.

What Decree Court May Enter.—Where a foreign attachment is sued out, against an absent debtor and a resident garnishee, in a case equitable in its nature, it is competent to the court of chancery to decree between the debtor and the garnishee, what may be due from the latter to the former, after satisfying the claims of the plaintiff. But the evidence, in such case, must arise from the pleadings and proofs between plaintiff and defendant. *Templeman v. Fauntleroy*, 3 Rand. 434.

6. Appeal and Review.

See generally, the title **APPEAL AND ERROR**, vol. 1, p. 418.

Objection to Service and Return of Garnishment.—Though the service of an attachment upon garnishees, and the

return thereon be irregular, yet if the garnishees appear to the action and defend it, without objecting to the irregularity, they can not afterwards make the objection in the appellate court. *Pulliam v. Aler*, 15 Gratt. 54.

Where an attachment was made returnable to the fall term, of a circuit court, and a garnishee appeared and answered at the fall term as to his indebtedness to the defendant, without making objection that no return was made at the fall term, it is too late to make such objection on the hearing of the cause in the appellate court. *Joseph v. Pyle*, 2 W. Va. 449.

Garnishee Can Not Question Justice of Decree against Absent Defendant.—

Upon a foreign attachment in chancery, against absent debtor and home defendant as garnishee, decree against absent defendant for debt, and against home defendant for a debt due by him to absentee, to be paid plaintiff in part of debt due him by absentee, the absentee being in default; the home defendant appeals; held, the home defendant can not in the appellate court contest the justice of the decree as against the absentee, but only so much of it as affects himself. *Heffernan v. Grymes*, 2 Leigh 512.

Attainder, Bills Of.

See the title **CONSTITUTIONAL LAW**.

ATTEMPTS AND SOLICITATION TO COMMIT CRIME.

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CROSS REFERENCES.

See the title CRIMINAL LAW.

As to attempts to commit particular crimes, see the titles treating the specific offenses, such as ABORTION, vol. 1, p. 57; ARSON, vol. 1, p. 722; BRIBERY; HOMICIDE; LARCENY; POISONS AND POISONING; RAPE.

I. Definition and General Consideration.

"The doctrine of attempt to commit a substantive crime is one of the most important and at the same time most intricate titles of the criminal law. There is no title, indeed, less understood by the courts, or more obscure in the text books than that of attempts. There must be an attempt to commit a crime, and an act towards its consummation. So long as the act rests in bare intention, it is not punishable; but immediately when an act is done, the law judges not only the act done but of the intent, with which it was done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal and punishable." *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

An attempt in criminal law is an apparent unfinished crime, and hence is compounded of two elements, viz: (1) The intent to commit a crime; and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently to produce the result intended. It must be something more than mere preparation. *Uhl's Case*, 6 Gratt. 706; *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; *Glover v. Com.*, 86 Va. 382, 10 S. E. 420; *Cunningham v. Com.*, 88 Va. 39, 13 S. E. 309. See post, "Essential Elements," II.

To constitute an attempt there must be an intent to commit the act, and some act done towards its consummation of such a nature as to constitute

the attempt to commit the offense. *State v. Hager*, 50 W. Va. 370, 40 S. E. 393, citing *Com. v. Clark*, 6 Gratt. 675; *Uhl v. Com.*, 6 Gratt. 706.

"An indictable attempt to commit this or any other crime must consist of something more than a mere intention to commit the crime. The very word used in the above statute, which declares an attempt to obstruct the administration of justice a misdemeanor, implies that this misdemeanor can be committed only by some act intended to result in the crime. An indictable attempt is therefore such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime, which it was designed to effect. This is the definition given by Wharton in his *Commercial Law* (eighth edition) chapter eight, section one hundred and seventy-three." *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

II. Essential Elements.

A. THE INTENT.

See post, "The Indictment," IV.

In order to constitute an attempt to commit crime two elements are essential. One is the intent to commit the crime. *Uhl v. Com.*, 6 Gratt. 706; *Cunningham v. Com.*, 88 Va. 39, 13 S. E. 309; *State v. Hager*, 50 W. Va. 370, 40 S. E. 393; *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; *Glover v. Com.*, 86 Va. 382, 10 S. E. 420.

"It seems impossible to doubt that the only distinction between an intent and an attempt to do a thing is that the former implies purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution." *State v. Hager*, 50 W. Va. 370, 40 S. E. 393.

B. THE OVERT ACT.

See post, "The Indictment," IV.

In General.—The other element essential to constitute an attempt to commit crime is the doing of some act by the accused towards the commission of the crime. *Uhl v. Com.*, 6 Gratt. 706.

An attempt can only be made by an actual, ineffectual deed, done in pursuance and in furtherance of the design to commit the offense. *Com. v. Nutter*, 8 Gratt. 699; *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; *Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309; *Christian v. Com.*, 23 Gratt. 958; *Glover v. Com.*, 86 Va. 382, 10 S. E. 420; *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66; *State v. Hager*, 50 W. Va. 370, 40 S. E. 393.

In order to constitute the attempt, there must appear to have been more than the design or intention to commit the offense. There must have been some ineffectual act or acts toward its accomplishment. *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

The question as to what is such an act, done by the defendant as to constitute an attempt, is often a difficult one to determine, and no general rule, which can be readily applied as a test to all cases, can be laid down. It has been truly said by a philosophical writer that "the subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very obscure in the books, and apparently not well understood either by the text writers or the judges." And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law. Each case must, therefore, be determined upon its own facts, in the light of certain principles which appear to be well settled. The difficulty generally is in determining the proximity of the act in question to the offense in contemplation. *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done towards its commission. Code, § 3888; 2 Bish. Crim. Prac., § 71. Or, as Wharton defines it, "an attempt is an intended apparent unfinished crime." Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. *Uhl's Case*, 6 Gratt. 706; *McDade v. People*, 29 Mich. 50; *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

Attempted Arson.—See the title ARSON, vol. 1, p. 724.

In *Uhl v. Com.*, 6 Gratt. 706, it was held, on an indictment against several for an attempt to burn a barn: "that an attempt according to the true intent and meaning of the statute, can only be made by an actual, ineffectual deed done in pursuance of, and in furtherance of, the design to commit the offense. But if the parties combined to commit the offense, and they all assented to it, and a part of them only went to do the act, those who were absent knowing with what intent the others went to the place, and assenting to the same, are principals in the offense. The overt act done in the attempt to commit the offense, need not be the last proximate act prior to commission of the felony attempted to be perpetrated." *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

Attempt to Commit Murder.—See the title ASSAULT AND BATTERY, vol. 1, p. 744.

Thus, it has been often held, under

statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. "To make the act an indictable attempt," says Wharton "it must be a cause as distinguished from a condition. And it must go so far that it would result in the crime unless frustrated by extraneous circumstances." 1 Whart. Crim. Law, § 181; *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

Where an attack is made with murderous intent and with a deadly weapon, there being a sufficient overt act, the person attacked being himself without fault, is under no duty to fly or retreat; he may stand his ground and if need be kill his adversary. *State v. Clark*, 51 W. Va. 457, 4 S. E. 204.

Attempt to Commit Incest.—See the title INCEST.

Where the defendant was indicted for an attempt to contract an incestuous marriage with his niece, and it was shown that after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted, on appeal, the judgment was reversed, the appellate court holding that these were mere preparations, and did not constitute an attempt within the meaning of the statute. This is obiter dicta. *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

Attempt to Administer Poison.—See the title POISONS AND POISONING.

Where the evidence shows only a procurement of the poison and an ineffectual solicitation of a third party to put it in the drink of the intended victim, such acts do not constitute an

attempt to administer poison, but only a preparation. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party. *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

The mere delivery of poison by one person to another does not constitute an attempt to administer poison within the meaning of the statute because it is not such an act as is likely, in the natural course of events, to bring about the result desired. On the contrary, the presumption in such a case is the other way, since a criminal intent on the part of the person to whom the poison is delivered, is not to be presumed, and hence, for this reason, if no other, the act of delivering the poison is not such an one as can be considered a judicial cause, or a direct step in the actual endeavor to commit a crime, without which there can be no attempt within the meaning of the statute. *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

"The application of these principles to the facts of the present case shows very clearly, we think, that the judgment is erroneous. Here, undoubtedly, there was an intent to commit murder; but the acts done do not amount to anything more than the mere arrangement of the proposed measures for its commission. They were nothing more than mere preparations, and even the intended preparations were not completed before the criminal design was frustrated. The means intended to be employed to consummate the offense were: First, the purchase of poison, and secondly, the delivery of the poison to an agent, to be by her administered. But as the party to whom the poison was delivered refused to administer it, or to do any act in furtherance of the design, there has been no direct act done towards

the commission of the offense, and, consequently, no attempt, in a legal sense, to commit the crime has been established. In other words, the acts proved, no matter how, in a moral point of view, they may be regarded, do not, in the eye of the law, approximate sufficiently near to the commission of murder to advance the conduct of the prisoner beyond the sphere of mere intent." *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

Husband and wife had long been at enmity. He had threatened to kill her. He was enamored of another woman. On day of the alleged crime he and his children were dining. She was out, but returning went into the sitting room where children soon followed, leaving him alone at table. She came to dinner. He handed her bread. She took gravy, but at first mouthful cried out: "This is awful bitter," and spit it out. Children being asked what was the matter with the gravy, said: "Nothing; we all ate of it," but tasting it again, said it was bitter. They gave it to the dog. Wife complaining of the effects, children sent for a doctor who gave her sweet milk. Husband said: "If milk be good for her, give me some for the dog." The dog soon died. The doctor found in wife some symptoms of strychnine poison. No analysis was made of the gravy or anything else. Husband made no explanation. At the trial of the husband for attempt to poison, the jury found him guilty. *Bell v. Com.*, 88 Va. 365, 13 S. E. 742.

Distinction between Cause and Condition.—For a discussion of proximate cause, see the title NEGLIGENCE.

The great difficulty is to determine, what must be the nature of these preliminary acts and the nature of their connection with the intended crime, so as to make them an indictable attempt to commit such crime. These preliminary acts, if connected with the intended crime only as a condition as distinguished from a cause, can never

according to the better authorities constitute an indictable attempt to commit such crime. While it is often not difficult to distinguish a condition from a cause, yet they frequently approximate so closely, that it becomes exceedingly difficult to distinguish them. By cause is meant that condition which determines the final result. As illustrating the difference between a cause and a condition I will put the case of the death of a child proceeding from suffocation produced by forcing moss into the child's throat. This would still be considered the cause, as the swelling arose from the forcing of the moss into the child's throat, though the immediate occasion of the child's death was the swelling up of the passages of the throat causing suffocation. In this case the swelling of the throat, which occasioned the suffocation, was the condition of the death, while the cause of it was the forcing of the moss into the throat. *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

Last Proximate Act.—Thus, the act done towards a commission of the offense, but falling short of the execution of the ultimate design, need not be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently to produce the result intended. It must be something more than mere preparation. *Uhl v. Com.*, 6 Gratt. 706; *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; *Glover v. Com.*, 86 Va. 382, 10 S. E. 420; *Cunningham v. Com.*, 88 Va. 39, 13 S. E. 309.

On an indictment against several for an attempt to burn a barn; held, that an attempt according to the true intent and meaning of the statute, can only be made by an actual, ineffectual deed done in pursuance of, and in furtherance of, the design to commit the offense. But if the parties combined to commit the offense, and they all assented to it, and a part of them only

went to do the act; those who were absent knowing with what intent the others went to the place assenting to the same, are principals in the offense. The overt act done in the attempt to commit the offense, need not be the last proximate act prior to the consummation of the felony attempted to be perpetrated. *Uhl v. Com.*, 6 Gratt. 706.

III. Subsequent Voluntary Abandonment.

When the prisoner took the prosecutrix into the stable, and there did acts toward an attempted rape, the attempt to commit a rape was complete; for there was the unlawful intent accompanied by acts done towards the commission of the intended crime, but falling short of its commission. Indeed, it is not denied that there was such attempt, but it is contended—and such was the main defense at the trial—that the subsequent voluntary abandonment of the criminal purpose cleansed the prisoner of all crime, so far as the attempt was concerned. But this is a mistaken view. For on the contrary, it is a rule, founded in reason and supported by authority, that if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, though he voluntarily abandons the evil purpose. *Glover v. Com.*, 86 Va. 382, 10 S. E. 420.

IV. The Indictment.

Must Allege What the Crime Is.—On an indictment for attempting to commit any crime it is not necessary in any case to allege or prove, that the crime was actually committed; but the indictment in such case must specifically allege, what the crime is, which the accused is charged with attempting to commit or to procure to be committed. *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

Intent.—See ante, "The Intent," II, A.

"The allegation of the attempt implies the intent to do the act attempted. In fact, the allegation of attempt implies both the intent and an actual offer to consummate the intent, and therefore such an allegation has been held in itself sufficient." *State v. Hager*, 50 W. Va. 370, 40 S. E. 393.

The better course is to charge both the intent and the overt act, for both must coexist. 1 McClain's Crim. L., § 228. *State v. Hager*, 50 W. Va. 370, 40 S. E. 393.

A Good Indictment for an Attempt.

—An indictment charging that the accused on a certain day in a certain county with malice aforethought, in and upon a certain person named then and there being, feloniously, unlawfully and willfully did make an assault with a certain knife which he, the accused, in his right hand then and there held, and had drawn and open, feloniously, willfully and unlawfully did attempt to stab, strike at and cut with said knife, with intent in so doing, willfully and of his malice aforethought a certain person named contrary to the form of the statute, is a good indictment for attempting to commit felony. *Com. v. Nutter*, 8 Gratt. 699.

Overt Act.—See ante, "The Overt Act," II, B.

It is an elementary rule of criminal pleading that an indictment for an attempt to commit an offense must allege some act done by the defendant of such a nature as to constitute an attempt, in a legal sense, to commit the contemplated offense, otherwise the indictment will not be sufficient. *Hicks v. Com.*, 86 Va. 226, 9 S. E. 1024; *Cunningham v. Com.*, 88 Va. 39, 13 S. E. 309; *State v. Hager*, 50 W. Va. 370, 40 S. E. 393; *Com. v. Clark*, 6 Gratt. 675; *State v. Baller*, 26 W. Va. 9. See these cases cited and approved in *Com. v. Peaslee*, 117 Mass. 267, 59 N. E. 550.

Attempt to Maim, etc.—An indict-

ment alleging that the accused on a certain day named "with a certain pistol then and there loaded with gunpowder and one leaden bullet, which he the said Leonard Clark in his right hand then and there held, then and there did attempt feloniously to maim, disfigure, disable and kill Cyrus Ross of the same county," etc., will be quashed on motion of the defendant, because it does not allege that the defendant did some ineffectual act towards the commission of the offense. *Com. v. Clark*, 6 Gratt. 675.

Attempt to Rape.—See the title RAPE.

In an indictment for an attempt to commit rape, it is necessary to constitute the crime that the accused should have done some act toward the commission of the said rape; this is an element of the offense, an essential element of the offense, and without its existence the crime does not exist. Being, therefore, an essential part of the offense, which is not complete without it, it must be averred and proved. *Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309.

Under Va. Code, 1887, § 3888, in an indictment for attempt to commit rape, some act towards its commission must be alleged, and at the trial proved; but to aver that the accused "violently and feloniously made an assault" in the attempt is sufficient. *Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309.

An indictment for an attempt to administer poison under Code 1887, § 3699, that does not allege such acts as, in a legal sense, constitute an attempt to commit the offense charged, but only such as show preparation, is demurrable. *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891. See the title POISONS AND POISONING.

V. Punishment.

See generally, the title SENTENCE AND PUNISHMENT.

In Virginia.—Every person who attempts to commit an offense, and in such attempt does any act towards its commission, shall, when not otherwise provided, be punished as follows: If the offense attempted be punishable with death, the person making such attempt shall be confined in the penitentiary not less than two nor more than five years, except that attempts to commit rape shall be punished with death, or in the discretion of the jury, or of the court trying the case without a jury, by confinement in the penitentiary not less than three nor more than eighteen years; if it be punishable by confinement in the penitentiary, he shall be confined in jail not less than six nor more than twelve months; if it be punishable by confinement in jail or fine, he shall be confined in jail not exceeding six months or fined not exceeding one hundred dollars; but if the attempt be to commit grand or petit larceny, he shall be fined or imprisoned in jail, in the discretion of the jury, or of the court trying the case without a jury, not less than fifteen days nor more than six months. Va. Code, 1904, § 3888; *Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309.

The punishment for an attempt to administer poison is prescribed by § 3669, Va. Code, which enacts as follows: "If any person administer, or attempt to administer, any poison or destructive thing in food, drink, medicine, or otherwise, or poison any spring, well, or reservoir of water, with intent to kill or injure another person, he shall be confined in the penitentiary not less than three nor more than five years." *Hicks v. Com.*, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

In West Virginia.—Every person who attempts to commit an offense, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows: If the offense attempted, be

punishable with death, the person making such attempt shall be confined in the penitentiary not less than one nor more than five years. If it be punishable by confinement in the penitentiary, he shall be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars. If it be punishable by confinement in jail, or fine, he shall be confined in jail not more than six months, or fined not exceeding one hundred dollars. *W. Va. Code, 1899, ch. 152, § 9.*

VI. Solicitation to Commit Crime.

Definition and Distinctions.—Merely soliciting one to do an act, is not an attempt to do that act. In a high, moral sense, it may be true that solicitation is an attempt; but in a legal sense, it is not. *Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.*

"There is no question but that solicitations to do certain acts or commit certain crimes are indictable, as for instance, if the object is to provoke the breach of public peace, as in challenges to fight a duel or seditious addresses or the counselling of the resistance of a judicial writ, or when the object of the solicitation is to defeat public justice, as where perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. But in these cases these solicitations constitute at common law substantive offenses, which are per se punishable as misdemeanors, and it is not as attempts to commit crimes that they are punishable. Except in those few cases, in which the common law made solicitation to do certain acts a substantive crime, it seems to me that solicitation to commit a crime is generally not a substantive crime and never can be properly an attempt to commit a crime." *State v. Baller, 26 W. Va. 90,*

53 Am. Rep. 66; Com v. Feely, 2 Va. Cas. 1.

In *Womack v. Circle, 29 Gratt. 192*, the court refused to decide whether the solicitation to commit a felony would be an attempt within the meaning of the Code of 1873, ch. 195, § 10.

Grade of Offense.—To solicit another to commit a felony, although the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable. *Womack v. Circle, 29 Gratt. 192.*

Arson.—In an action of trespass on the case, the count, without any special averments, charges that the defendant falsely and maliciously charged that the plaintiff attempted to bribe H (a negro woman), to burn the wheat stacked on his land—Held: The statute, Code of 1873, ch. 188, § 5, makes the malicious burning of a stack of wheat a felony. To solicit another to commit a felony, though a felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, and the count avers a good cause of action. *Womack v. Circle, 29 Gratt. 192.*

Solicitation to Administer Poison.—See the title POISONS AND POISONING.

Where there is a delivery of poison by one person to another with directions to administer it and how to administer it, but the party to whom the poison is delivered refuses to administer it, or to do any act in furtherance of the design, there is no direct act done towards the commission of the offense and consequently no attempt, in a legal sense, to commit the crime of attempting to administer poison. *Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.*

Attempt to Obstruct Justice.—See the title OBSTRUCTING JUSTICE.

Using means to prevent a witness from attending court is an indictable offense as an attempt to obstruct jus-

tice, and the indictment need not allege that any inducement was offered the witness to absent himself. *Com. v. Feely*, 2 Va. Cas. 1; *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

Carrying Concealed Weapons.—See the title WEAPONS.

"In some cases acts preparatory to the commission of a crime are themselves a crime and indictable as such, and not as an attempt to commit the crime. Decisions based upon the doing of such acts, as constitute a substantial crime in themselves, should be distinguished from those decisions which hold certain acts to be crimes, only on the ground that they are attempts to commit crimes. As examples of cases, where the doing of certain preliminary acts, which look to the commission of certain crimes, are regarded per se as indictable, as substantive crimes and not properly as attempts to commit the future crime contemplated, I may refer to the carrying of concealed weapons." *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

"Whether or not carried with the specific purpose of being used to assail a particular individual this is a substantive crime and should be indicted as in itself a crime and not as an attempt to commit a crime, even though they were carried with the specific intent of assailing a certain person. So the procuring of dies, wherewith to counterfeit, is an indictable offense per se and should be indicted as an independent misdemeanor and not as an attempt to counterfeit." *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

The Preparatory Acts.—The great weight of authority and reason lay it down that the preparatory acts done by the accused, and which

constitute the offense of attempting to procure the committing of a certain crime, must be stated to have been actually done and must be proven to have been done as stated. *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66; *Com. v. Feely*, 2 Va. Cas. 1.

The great mass of judicial decisions proceed on the assumption, that an attempt to commit a crime, is such an intentional preliminary act, as will apparently result in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this can not be said of mere advice given to another, which he is at full liberty to accept or reject. *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66.

An indictment alleges, that C. B. unlawfully furnished one A. R. for the use of P. E. money to unlawfully induce P. E. to absent himself from the circuit court of the county at a certain term, to which he, P. E., had been summoned as a witness against said C. B. in a trial on an indictment against said C. B. then pending in said court, whereby the said C. B. attempted to obstruct and impede the administration of justice. Held, this indictment was fatally defective in not alleging, that A. R. paid or offered to pay said money to the witness P. E. to induce him to absent himself as such witness at said time from the circuit court. Without this act done by the defendant is not of such a nature as to constitute an attempt to commit the offense mentioned in the indictment; and therefore on motion of the defendant the court ought to have quashed this indictment. *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66. See *Com. v. Feely*, 2 Va. Cas. 1.

ATTENDANCE.—A person summoned as one of a panel of sixteen free from exception, who at the time of selecting the jury is serving on the grand jury, is not "in attendance," in the sense of Va. Code, § 4019; and it is not error to refuse to place him on the panel, or examine him on his voir dire. *Short v. Com.*, 90 Va. 96, 17 S. E. 786. See the title JURY.

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I. Definition.

An attorney is defined to be one who is set in the place of another, and he is either public, as an attorney at law, or private, as being delegated to act for another, in private contracts or agreements. In *re Leigh*, 1 Munf. 468.

II. Nature of Office.

Not a Public Officer of State.—An attorney is not a public officer of state. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791; *Ex parte Faulkner*, 1 W. Va. 269; *Ex parte Quarrier*, 2 W. Va. 569; *In re Bland and Giles County Judge Case*, 33 Gratt. 443; *Leigh's Case*, 1 Munf. 468.

An attorney at law is not a public officer. Nor is the practice of the law an office or place within the meaning of the act to suppress duelling. In *re Leigh*, 1 Munf. 468.

While one person was holding the office of county judge under an unexpired commission, another was appointed thereto. Held, that the former did not abandon his title to the office by taking up the practice of the law, an attorney not being an officer. In *re Bland & Giles County Judge Case*, 33 Gratt. 443.

An Officer of the Court.—An attorney at law is an officer of the court under clause 3, § 27, ch. 147, of the West Virginia Code of 1891. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

An attorney is an officer of the court acting in the presence and under the control of the court. *McGinnis v. Curry*, 13 W. Va. 29.

As to the control of courts over attorneys, their power to suspend or revoke their licenses, etc., see post, "Disbarment and Suspension of Attorneys," XI.

III. Admission and Qualification.

A. NECESSITY FOR OBTAINING LICENSE.

1. In General.

The right to practice as an attorney

in Virginia, is not conferred by the court as in England, but is derived from a license obtained in a prescribed mode, which entitles the person obtaining it to be admitted as an attorney and counsel in each and all of the courts of the commonwealth. *Ex parte Fisher*, 6 Leigh 619.

With respect to public attorneys, or attorneys at law, in order to insure a due degree of probity and knowledge in their profession, none are permitted to act as such but those who are allowed by the judges to be skilled in the law, and certified by the court of the county of their residence to be persons of honesty, probity and good demeanor. *Leigh's Case*, 1 Munf. 468.

Having obtained the sanction of the proper tribunal an attorney is licensed or allowed to practice. *Leigh's Case*, 1 Munf. 468.

2. Practicing Lawyer of Another State.

Under Va. Code, § 3192, as amended by Acts, 1897-8, p. 400, any duly licensed and practicing lawyer of another state may practice in Virginia without further examination.

A Virginia license to an attorney, resident in West Virginia at the time of its formation, avails as fully as if granted in the latter state. *Ex parte Quarrier*, 2 W. Va. 569.

Since the constitution of West Virginia provides that the laws of Virginia not in conflict with the constitution shall continue in force in West Virginia, until altered or repealed by the legislature, a license, valid in Virginia would be equally so in West Virginia, so far as those are concerned who were residents within the bounds of the new state upon this organization. Under this view of the case, no resident attorney of West Virginia was required to procure a new license. *Ex parte Faulkner*, 1 W. Va. 269.

3. Effect of Acting as Attorney without Qualification.

If a suit is brought by an attorney

not qualified to practice, it should not be dismissed; but the attorney should himself suffer the punishment imposed by law. *Rader v. Snyder*, 3 W. Va. 413.

The fact that a complainant's attorney who prepared the bill, has not been admitted to practice in the court where an injunction has been granted, is no cause for the dissolution of the injunction and dismissal of the bill. *Peterson v. Parriott*, 4 W. Va. 42, citing *Rader v. Snyder*, 3 W. Va. 413.

B. REGULATIONS AS TO OBTAINING LICENSE.

For the rules and regulations for licensing persons to practice law in Virginia, see Acts, 1895-6, p. 49; Rules of Supreme Court, 95 Va. XV.

C. ELIGIBILITY.

A person, who had practiced as an attorney before the civil war, applied for admission to practice in the courts of West Virginia. He admitted that he had voted for the ordinance of secession, that he had voluntarily entered the military service of the confederate states, and that he had borne arms against the United States of America. He also produced a copy of the amnesty oath which he had taken and subscribed under the proclamation of the chief executive of the United States. Held, that as the applicant had not been convicted of treason according to the course of the common law, and as no treason against the state to whose courts he applied for admission had been proved or confessed, he could not be refused permission to qualify and practice. *Ex parte Quarrier*, 2 W. Va. 569.

Right of Clerk to Practice.—See post, "Right of Clerk of Court to Practice," V, A.

D. OATH.

In General.—The act "concerning attorneys at law and counsel" (1 Rev. Code 96) prescribes an oath to be taken by attorneys at law previous to being

allowed to practice. *Leigh's Case*, 1 Munf. 468.

This oath can only be considered as an additional security for the good conduct of the attorney. *Leigh's Case*, 1 Munf. 468.

A licensed attorney has as unquestioned a right to qualify by taking the oaths required at the time of his application for admission as he has to practice after he has qualified. *Ex parte Quarrier*, 2 W. Va. 569.

Oath Prescribed for Public Officers.

—An attorney is not a civil or public officer within the meaning of the act of November 16, 1863, and is not required to take the oath therein prescribed for officers. *Ex parte Faulkner*, 1 W. Va. 269.

An attorney not being an officer of the commonwealth within the meaning of the act, is not bound, as a requisite to his admission to the bar of any court, to take the oath prescribed by the act to suppress duelling. *In re Leigh*, 1 Munf. 468.

Attorney's Test Oath.—A person, who had qualified as an attorney before the passage of the attorney's test oath act of February 4, 1866, did not acquire such a vested right in the office of attorney as released him from being required to take the oath prescribed in that act. Nor is said test oath act unconstitutional. *Ex parte Quarrier*, 4 W. Va. 210.

A pardon granted to rebels from the federal government restores the parties to the rights and privileges derived from it only. It does not entitle an attorney, who was admitted to the practice of the law before the civil war, to resume his practice without complying with the terms of the state statute requiring a certain oath to be taken by attorneys. *Ex parte Hunter*, 2 W. Va. 122. This case, however, was practically overruled by *Ex parte Garland*, 4 Wall. (U. S.) 333.

IV. Taxation.

Power to Impose and Collect License Tax.—"The power of the general assembly to authorize municipal corporations to impose and collect a license tax from lawyers and others for the privilege of practicing their profession and carrying on business in the corporation has repeatedly received the sanction of this court. *Ould v. Richmond*, 23 Gratt. 464; *Petersburg v. Cocke*, 94 Va. 244, and cases cited." *Blanchard v. Bristol*, 100 Va. 470, 41 S. E. 948.

The council of the city of Richmond has authority to lay a tax on lawyers as such. *Ould v. Richmond*, 23 Gratt. 464.

The city of Bristol has the power, both under the general law (Code, § 1040) and under its charter, to impose a license tax on lawyers; and the power to impose fines and penalties for a failure to pay a license tax is not only an incident of the power to levy the tax, but, in the case at bar, is expressly conferred by the charter of the city. Acts, 1899-1900, p. 639. *Blanchard v. Bristol*, 100 Va. 469, 41 S. E. 948.

"There can be no doubt of the authority of the city to impose the tax complained of in this case. Section 1040 of the Code provides that, in addition to the state tax on any license, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same, and require a license to be obtained therefor. And the charter of the city empowers the council to require a license from lawyers, and to levy a tax thereon and impose a fine for any violation of the ordinance making the exaction. Acts 1899-1900, §§ 64, 65, p. 639." *Blanchard v. Bristol*, 100 Va. 470, 41 S. E. 948.

Imposition of License Tax on Non-resident Attorneys.—The legislature has power to authorize municipal cor-

porations to impose taxes on persons whose ordinary avocations are pursued within the corporate limits, although residing beyond those limits, the same as upon residents, and, in the case at bar, the city of Petersburg has power, under its charter, to impose a license tax on an attorney at law having his office and place of business in the city, and practicing his profession therein, although he resides outside of the city's limits, in like manner as upon an attorney residing and doing business within the city. *Petersburg v. Cocke*, 94 Va. 244, 26 S. E. 576.

A city ordinance imposing a specific license tax "on every attorney at law" includes nonresident attorneys who have offices and practice their profession in the city, as well as resident attorneys. *Petersburg v. Cocke*, 94 Va. 244, 26 S. E. 576.

V. Disabilities, Privileges and Liabilities.

A. RIGHT OF CLERK OF COURT TO PRACTICE.

In *Ex parte Collins*, 2 Va. Cas. 222, the court was unanimously of the opinion that the duties of a clerk of a superior court of law and of counsel and attorney in the court are incompatible with each other and that they interfere so much one with the other that there is danger lest they might not both be executed with impartiality and honesty and therefore decided that the clerk of a superior court ought not to be permitted to take the oaths prescribed by law for counsel and attorneys nor to practice as such in the court of which he is clerk, notwithstanding his license to practice law in all the courts of the commonwealth.

B. EXEMPTION FROM ARREST.

Attorneys at law are exempt from arrest in civil suits during their attendance at court. *Commonwealth v. Ronald*, 4 Call 97. See generally, the title PRIVILEGE.

C. LIABILITY FOR COSTS.

See generally, the title **COSTS**.

Suing in feigned names, or in the name of others without their privity or consent, is an abuse of the process of the court and the attorney, or the party at whose request the suit is brought, may be attached for the costs. *Howard v. Rawson*, 2 Leigh 733.

"Where a suit has been brought in a fictitious name or in the name of a person without his privity and consent, or of a deceased person, the court will interfere in a summary way, and will hold the party by whom the suit was prompted, or even the attorney in the case responsible for costs." *Pates v. St. Clair*, 11 Gratt. 22.

Where an attorney knowingly brings ejectment in the name of a deceased demandant, he is liable for cost. *Howard v. Rawson*, 2 Leigh 733.

D. LIABILITY FOR CONTEMPT.

Generally, as to liability to punishment for contempt, see the title **CONTEMPT**.

Failure to Attend by Reason of Conflicting Engagement.—The failure of an attorney in a cause to attend court at the time of trial previously fixed with his consent is not a contempt of court where it appears that he subsequently accepted a retainer, and entered upon the trial of another cause with every reasonable expectation of being able to complete it before the time fixed for the hearing of the first cause, and, finding this impossible, notified the court of the fact, and disclosed a courteous and respectful consideration for the court. *Wise v. Com.*, 97 Va. 779, 34 S. E. 453.

Manner of Purging of Contempt.—Where a rule is made against a person to show cause why he shall not be punished for a contempt of the court in aiding to obstruct the execution of its decree, he purges himself of the contempt by answering under oath that in what he had done he acted as counsel

in good faith with no intention of committing any contempt of the court. *Wells v. Com.*, 21 Gratt. 500.

VI. Employment or Appointment.

In General.—The licensing judges can not be said to "elect" or "appoint" an attorney. He can, perhaps, only be said to be "appointed" by the particular clients who, after he is licensed, may severally employ him. *Leigh's Case*, 1 Munf. 468.

As to the power to employ attorneys in particular instances, as by executors and administrators, municipal corporations, trustees, etc., see the appropriate titles.

Right of Prosecutor to Employ Counsel.—See the title **COMMONWEALTH'S ATTORNEY**.

In a criminal trial, the prosecutor may employ counsel to aid the attorney for the commonwealth, and such counsel will be permitted to aid in the prosecution. *Hopper v. Com.*, 6 Gratt. 684. And see *Sawyers v. Com.*, 88 Va. 357, 13 S. E. 708.

Assignment by Court.—Courts of equity, as well as the common-law courts, have jurisdiction in suits of paupers for freedom; and, in a proper case, will appoint counsel to prosecute for the pauper. *Dempsey v. Lawrence*, Gilmer 333.

VII. Retainer and Authority.**A. PRESUMPTION AS TO RETAINER AND AUTHORITY.**

In General.—Where an attorney institutes a suit, he is presumed to have authority to appear. *Low v. Settle*, 22 W. Va. 387; *Fisher v. March*, 26 Gratt. 765.

Where the petitioner in a partition suit died and the suit was revived in the name of his widow and infant son, the counsel employed by the deceased petitioner will be presumed, in the absence of evidence to the contrary, to

be continued as counsel in the cause. *Wilson v. Smith*, 22 Gratt. 497.

Presumption from Acknowledgment of Service.—Where an attorney makes an acknowledgment of service on the back of the summons, it will be presumed that he had authority for so doing. *Marling v. Robrecht*, 13 W. Va. 440. See the title SERVICE OF PROCESS.

Record Affording Prima Facie Evidence of Authority.—In an attachment suit by F. against M. there is no service of process on M., or order of publication; but there is a declaration in assumpsit with a special and general count, and counsel appears for him and pleads, and the cause is tried by a jury and judgment for F. The record affords at least prima facie evidence, that the counsel was authorized to appear for M., and defend the action. *Fisher v. March*, 26 Gratt. 765.

B. ESTOPPEL TO DENY AUTHORITY.

Where a court, having jurisdiction of plaintiffs' ancestor's estate and person, orders sale of latter's property to satisfy his indebtedness, and the record shows that plaintiffs appeared and were made parties, and that they acquiesced in the sale and took no steps to avoid it for thirteen years, knowing that the purchasers had sold the property, such plaintiffs can not annul the sale on the ground that they were never summoned or appeared in the cause; and where it appears that the attorney for plaintiffs' ancestor was authorized to represent him in such suit, and that plaintiffs were aware of such fact and did not, after their ancestor's death, revoke or question his authority pending said suit, such plaintiffs, after such sale has been made, are estopped from denying the said attorney's authority to represent them in said suit. *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605.

Where an execution is delivered to

the sheriff of a county other than that in which the creditor resides, and the creditor employs an attorney, practicing in the sheriff's county, to collect the money, without, however, giving the attorney a written order, and the attorney makes a demand of the money from the sheriff; such demand, if no objection be made at the time to the authority of the attorney to receive the money, is a sufficient demand to justify a judgment against the sheriff. *Chapman v. Chevis*, 9 Leigh 297.

C. SCOPE AND EXTENT OF AUTHORITY.

1. In General.

An attorney being an officer of the court acting in the presence and under the control of the court, as such has a right to take any legal steps he may deem proper in prosecuting or defending the suit and he may do many acts in court by which his client may be prejudiced, but by which the latter is nevertheless bound. *McGinnis v. Curry*, 13 W. Va. 29.

Power to Appear for Client.—See the title APPEARANCES, vol. 1, p. 670.

Admission of Facts.—An attorney at the trial of a case may admit facts, and his client is bound by such admission. *McGinnis v. Curry*, 13 W. Va. 29.

Confession of Judgments.—An attorney may confess a judgment in court, which will bind the client. *McGinnis v. Curry*, 13 W. Va. 29. See the title CONFESSION OF JUDGMENTS.

Submission to Arbitration.—While an attorney at law, as such, has no authority, before or after the institution of a suit, to make an agreement in pais to submit his clients' cause to arbitrators, he may, if his clients are adults, consent in open court to submit their cause to arbitration. *McGinnis v. Curry*, 13 W. Va. 29. And see *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59. See the title ARBITRATION AND AWARD, vol. 1, p. 690.

Power to Demur to Evidence.—An attorney may demur to the evidence and thus prevent a jury from acting on the case. *McGinnis v. Curry*, 13 W. Va. 29. See the title DEMURRER TO THE EVIDENCE.

Power to Direct Correction of Errors in Decree.—In *Hill v. Bowyer*, 18 Gratt. 364, decrees by default in favor of husbands and wives gave interest upon interest; but the counsel of the parties directed the clerk to correct this error by endorsement on any executions that might be issued upon such decrees, which was done. It was held, that the counsel had full authority to direct the correction, and to bind the wives as well as their husbands; and thus to correct the error.

Power to Execute Appeal Bonds.—See the title APPEAL AND ERROR, vol. 1, p. 520.

2. To Act for Other than Clients.

In a suit to set aside a fraudulent conveyance made by a husband to his wife, where depositions are taken after notice given to the wife, the counsel of the wife has no right to appear for her husband, at her request, to object to the deposition for him, on the ground that he had no notice of the taking of such depositions. *Silverman v. Greaser*, 27 W. Va. 550.

3. Limitations on General Authority.

In General.—An attorney at law only represents the plaintiff or defendant in court, to do such acts as the plaintiff or defendant, if in court, might do himself. *Herbert v. Alexander*, 2 Call 498.

Power to Enter into Private or Executory Contracts.—An attorney at law has no right to enter into private or executory contracts. "Such a dangerous power ought not to be implied, especially against a stranger to the suit, who had no occasion for an attorney to represent him in it. For if so, he might subject any person he pleased (although such person was no party to the suit) to payment of the debt, damages and costs; which would be

intolerable." *Herbert v. Alexander*, 2 Call 498.

Power to Enter Order Permanently Barring Client's Rights.—The general authority of an attorney does not include power to voluntarily enter, or cause to be entered, an order that perpetually bars the right of his client, such as retraxit. Such act can be done only by the party in person, or by his attorney in pursuance of special authority conferred upon him for the purpose. *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238. And see *Smith v. Lamberts*, 7 Gratt. 138.

Consent to Decree on Behalf of Infants.—An attorney who is counsel for parties having interest adverse to those of infant parties can not be allowed to consent to a decree on behalf of such infants. *Walker v. Grayson*, 86 Va. 337, 10 S. E. 51.

4. Authority to Collect Claims and Receive Payment.

a. In General.

In *Smith v. Lamberts*, 7 Gratt. 138, Daniel, J., in the course of the opinion laid down the following doctrine as to the powers of attorneys at law in the prosecution and collection of claims put into their hands for collection: "Practitioners of the law in this country are generally regarded by the courts as vested with a larger authority in the control and disposition of demands placed in their hands for collection, than has been usually attributed by the common law to an attorney at law in England. Here the characters of attorney and barrister or counsellor at law, are in most instances blended, and the powers pertaining to this double capacity, are held to be of a wider scope than those belonging to the office of an attorney merely. In some of our sister states the relation of client and attorney has been held to confer upon the latter the authority even to compromise, compound or commute demands of the former confided to him for collection. The general

doctrine, however, so far as I have had it in my power to collect it from a review of the decisions, is, that the attorney has no right to commute the debt of his client, to release the person of the debtor when in prison by virtue of a ca. sa., or to enter a retraxit, in a suit, to execute a release, or to do any other act which destroys the cause of action without receiving payment. But, on the other hand, that he has an extensive control over the remedy, and is vested with a liberal discretion in the use of the means he may deem best adapted to procuring the payment of his client's debt. He may accept payment of the debtor, if voluntarily made to him, at any time whilst his powers continue; or he may take such steps as he may think best calculated to procure payment. In the honest exercise of a sound discretion, unless otherwise instructed by his client, he may delay bringing suit, he may consent to continuances of it, after it is brought, during its progress to judgment, and after judgment he may postpone issuing execution; he may elect whether to take one against the person or the lands or goods of the debtor; and if he issues one against the lands or goods, he may direct on what property of the debtor it shall be levied; and after levy he may control the proceedings of the sheriff or other officer having charge of the execution, and may from time to time postpone a sale of the property levied upon."

b. To Receive Payment.

(1) In General.

So much was the attorney considered the mere instrument of the law to enforce the payment to the client that the question in the early cases was, whether he was authorized to receive the money himself, under any circumstances. *Wilkinson v. Holloway*, 7 Leigh 277.

At the present time, however, it is well established that payment to an attorney is good, especially if he has possession of the evidence of the debt.

Smith v. Lamberts, 7 Gratt. 143; *Branch v. Burnley*, 1 Call 147; *Smock v. Dade*, 5 Rand. 639; *Kent v. Chapman*, 18 W. Va. 485; *Donahue v. Fackler*, 21 W. Va. 124.

Under particular circumstances, it may be otherwise; as if notice be given that no such power is vested in the attorney. *Hudson v. Johnson*, 1 Wash. 10.

An attorney or counsel may receive money in payment of a debt due to his client, and the payment is valid. *Ellis v. Heptinstall*, 8 W. Va. 388.

A receipt was given by attorneys for certain notes, received for collection, containing a description of the note followed by the clause, "On the above notes we are to bring suits, prosecute them to judgment, and to have a fee of five dollars in each case." Held, that while this clause may be construed to relieve them from the obligation to collect, and from the corresponding compensation for collecting, it can not be construed to deny to them the authority to collect. *Johnson v. Gibbons*, 27 Gratt. 632.

The payment of a judgment or decree to the attorney of record who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff, so far, at least, as the defendant is concerned. *Yoakum v. Tilden*, 3 W. Va. 167; *Harper v. Harvey*, 4 W. Va. 539.

An attorney at law who prosecutes a suit and obtains judgment has full power to receive the money recovered when levied by execution, and a demand made by him of the sheriff by whom it is levied is sufficient to authorize a motion against such sheriff for nonpayment. *Wilson v. Stokes*, 4 Munf. 455.

An attorney may receive the money due on a judgment and his receipt will discharge the judgment. *Branch v. Burnley*, 1 Call 147; *Wilson v. Stokes*, 4 Munf. 455.

(2) Duration and Termination of Authority.

In *Branch v. Burnley*, 1 Call 147, it was claimed that the attorney's authority to receive the money expired at the end of a year and a day; the court, however, held that such power continued until revoked, and that it was the duty of the attorney to move for judgment and award of execution on the bond.

Burden of Proof to Show Revocation.—On a motion to quash a writ of *feri facias* on the ground that it had been previously paid to the attorney of record of plaintiff, it devolves on the plaintiff to show the revocation of the authority of the attorney to receive the money, before it was paid to him, and that the defendant had notice of such revocation, before the defendant can be compelled to pay it over again. *Yonkum v. Tilden*, 3 W. Va. 167.

Termination Where Debt Secured and Regarded as Investment.—After an attorney who has in his hands a debt for collection reports the same as properly secured, and both debtor and creditor thereafter treat the debt so secured as an investment, and the debtor regularly, for a period of ten years, pays the semiannual interest directly to the creditor, the debt can not thereafter be regarded as in the hands of the attorney for collection, although he still retains the evidence of it; and his release of the security therefor, without further authority from the creditor, or subsequent ratification by him, will not defeat the creditor's right to the security given for his debt. *Willis v. Gorrell*, 102 Va. 746, 47 S. E. 826.

Termination by Entry of Attorney within Confederate Lines.—In *Harper v. Harvey*, 4 W. Va. 539, it was held, that the relation of attorney and client ceased or was suspended, when the former went into the lines of the con-

federate states, and no payment to him would be good.

(3) Necessity for Payment to Be in Good Faith.

While it is true, that a payment made to an attorney is a good payment on his client's claim, yet such payment, to operate as a discharge of the debt in whole or in part, must be made in good faith, or the money must be paid to the creditor by the attorney. *Chalfants v. Martin*, 25 W. Va. 394.

If the attorney and the debtor enter into a fraudulent agreement, that the debtor will pay the attorney a part of the claim and is to receive and does receive a receipt for the whole, and it is understood between them, that the money so paid is not to go to the creditor, but to be kept by the attorney, the payment made under such circumstances is not a payment on the claim; and the debtor will not receive credit therefor, unless the attorney pays it to his client. *Chalfants v. Martin*, 25 W. Va. 394.

A payment so made can not inure to the benefit of the surety of the principal debtor, any more than to the benefit of the fraudulent principal himself. *Chalfants v. Martin*, 25 W. Va. 394.

(4) Acceptance of Payment Other than in Money.**(a) In General.**

The authority of the attorney to receive payment of the debt which he is employed to collect, does not extend to its commutation without the consent of the client. *Smock v. Dade*, 5 Rand. 639; *Smith v. Lamberts*, 7 Gratt. 141; *Paxton v. Steele*, 86 Va. 311, 10 S. E. 1.

An attorney at law can not by an agreement in pais commute the debt of his client without express authority so to do. *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

To extend the authority of the attorney beyond this limit, without a

general discretionary power from the party employing him, would carry the responsibility of the first client into transactions far beyond the first engagement, and which might be induced solely with a view to the profit of the attorney, or the accommodation of the debtor. *Smock v. Dade*, 5 Rand. 639.

An attorney, having in his hands a claim for collection, has no authority to receive anything but money in payment thereof without previous authority obtained from the owner. *Willis v. Gorrell*, 102 Va. 746, 47 S. E. 826; *Smith v. Powell*, 98 Va. 431, 36 S. E. 522.

The payment of a judgment or decree to an attorney of record to be valid and binding must be a payment of money, or if not a payment of money, it must be accepted by the plaintiff in lieu of money, or the attorney must have authority to receive it. *Harper v. Harvey*, 4 W. Va. 539.

Where an attorney is employed to collect a debt, he has no authority to accept anything else in satisfaction or as collateral security for the debt without express authority from his client. *Kent v. Chapman*, 18 W. Va. 485; *Wilkinson v. Holloway*, 7 Leigh 277.

An attorney at law employed to collect a debt may receive payment in money but has no right to accept bonds, notes or anything else in satisfaction or as collateral security for the debt without express authority from his client; and if he does, it will be no payment, and will not bind his client, unless he expressly or impliedly ratifies the act of his attorney. *Kent v. Chapman*, 18 W. Va. 485.

If he accepts a note for it, no subsequent dealings of his with reference to the note, without previous authority or subsequent ratification of the client, can be deemed a ratification by the client. *Willis v. Gorrell*, 102 Va. 751, 47 S. E. 826; *Smith v. Powell*, 98 Va. 431, 36 S. E. 522.

(b) Payment in Confederate Notes.

In General.—The payment of confederate states treasury notes made to an attorney, without the authority of the plaintiff to receive them, was not a payment in money that would satisfy a judgment or decree against the defendant. *Harper v. Harvey*, 4 W. Va. 539.

Inference of Authority to Receive Payment in Confederate Money.

It may be conclusively inferred from facts and circumstances shown in evidence, that an attorney during the late civil war, was authorized by his client, to receive payment on a claim in his hands, in confederate money—all the parties being and residing at the time within the confederate lines. *Ellis v. Heptinstall*, 8 W. Va. 388.

(c) Effect of Acceptance of Bonds, etc., of Debtor.

In General.—An attorney has no right to receive a bond from the debtor in discharge of his client's claim, without the assent of his client. If he does, he is the agent, not of the plaintiff, but of the defendant, and the plaintiff may still proceed against the defendant. *Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780.

An attorney receives a claim for collection, brings suit upon it and obtains judgment. The debtor then puts into his hands the bond of a third person for about the amount that is due on the judgment; and the attorney gives him a receipt by which he says he has received the bond on which he is to bring suit, and after paying himself his fee and commission, is to apply the balance to the credit of the judgment. The attorney receives the money on the bond but does not pay it over to the creditor. Held, that this is a valid payment by the judgment debtor. *Smith v. Lamberts*, 7 Gratt. 138.

Where an attorney employed to collect a debt, without the consent of his client, accepts bonds, etc., of the debtor, with the understanding that he is to

collect and apply them as payment on the claim when collected, he is acting as attorney for the debtor, and not as attorney for his original client. But as soon as he receives any money on the claim, thus put in his hands for collection by the debtor, it is a payment, to that extent, less his fees for collecting, upon the claim of his original client. *Wiley v. Mahood*, 10 W. Va. 206.

Substituting Attorney's Personal Debt.—Where an attorney employed to collect a debt discounts from it a debt he himself owes the debtor, and takes for the balance the debtor's assignment of a bond of third persons, the creditor is not bound by such arrangement. *Wilkinson v. Holloway*, 7 Leigh 277; *Wiley v. Mahood*, 10 W. Va. 206.

(5) Compromise or Settlement.

In the absence of express authority, an attorney has no power to compromise or settle his client's claim. *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59. And see *Cady v. Straus*, 97 Va. 701, 34 S. E. 615.

An attorney at law, employed to collect a debt, merely as such, has no power to compromise after judgment, and accept a sum of money less than the full amount of the judgment as satisfaction. *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007. See the title COMPROMISE.

c. Revocation of Directions to Pay Money to Third Person.

A, having claims in the hands of an attorney for collection, gives him a verbal direction to pay part of the money when collected to B in satisfaction of a debt due B from a third person. A, in his lifetime or his administrator after his death, may revoke this direction to the attorney, and demand the money. *Beers v. Spooner*, 9 Leigh 153. In this case it was held, that this was the case of a man directing another verbally to pay the debt

of a third person out of his funds without consideration. Such direction is void; and though if complied with before countermand the party could not complain, yet it may be countermanded at any time.

As to a direction for payment to third persons which will constitute an irrevocable appropriation by the debtor of the fund to the payment of a judgment, see *Smith v. Lamberts*, 7 Gratt. 138.

d. Recovery Back of Money Collected a Second Time.

Where an attorney who has for collection a claim which is in judgment on forthcoming bond and the same is paid to him in full by the principal judgment debtor, and the attorney afterwards causes execution to be issued on said judgment and to be levied on the property of one of the sureties in said forthcoming bond, the property sold and the money again collected by said attorney, such attorney is liable in an action by such surety to recover back the money so collected on said judgment the second time, and it is no defense to such action to plead that he was acting therein as attorney for the judgment creditor. *Parsons v. Maxwell*, 53 W. Va. 39, 44 S. E. 172.

5. Ratification by Client.

In General.—Although the acts of an attorney may not have been originally binding on his client yet they may have become binding by their subsequent ratification by such client. *Wilkinson v. Holloway*, 7 Leigh 277.

Where an attorney at law, employed to collect a debt, accepts notes, bonds, etc., of the debtor as collateral security for the debt, such agreement becomes binding when ratified by his client. But a recitation in a bill afterwards filed against the debtor that the attorney had made such an agreement is not necessarily a ratification. *Wiley v. Mahood*, 10 W. Va. 206.

An attorney at law, employed to col-

lect a debt, takes in satisfaction thereof the debtor's assignment to the creditor of a bond of third persons held by the debtor, and institutes a suit on the assigned bond against the obligors. The creditor prosecutes the suit, which is long pending, and pays the costs therein incurred. Held, that the creditor does not thereby ratify the act of the attorney in commuting the original debt; and the recovery against the obligors in the assigned bond having proved unavailing, the debtor's original liability still continues. *Wilkinson v. Holloway*, 7 Leigh 277.

Ratification a Question of Fact.—As to whether or not there has been such a ratification by the client of his attorney's acts as to make such acts binding on him is a question of fact to be determined by the evidence. *Wilkinson v. Holloway*, 7 Leigh 277.

D. DELEGATION OF AUTHORITY.

Where an attorney at law has been employed to prosecute a suit, he can not, in the absence of direction, from his client, delegate his authority as such to another attorney. *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

An attorney of record, or the original counsel employed by a party to collect a debt, or conduct a suit, may appoint another to act in his place, if so authorized by his client. *Ellis v. Heptinstall*, 8 W. Va. 388.

"Counsel or attorney to the record have now large powers in conducting the suits, and often concluding the interests of their clients. They are selected by parties for what are regarded as their ability, learning, integrity and fidelity, which are qualities of a personal character, and their duties and powers are not of a nature to be delegated to others by the attorneys who are first entrusted therewith. Others may, indeed, be requested or appointed by them to act in their place, but such appointment must first be authorized,

or subsequently ratified, by the client, to give it validity." *Ellis v. Heptinstall*, 8 W. Va. 388.

VIII. Duties, Disabilities and Liabilities as to Client.

A. DUTIES.

It is the duty of an attorney to give to his client the benefit of his best judgment, advice, and exertion. *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149.

"It is unquestionably the duty of an attorney to endeavor, to the best of his ability, by his advice and counsel, and by his conduct, to secure to his client every legal right and remedy to which he may think him even probably entitled; and if he fails to do it he is faithless to his trust and should be held morally and legally responsible. And if he acts in good faith if he means himself honestly, he is not responsible for an error in judgment." *Wells v. Com.*, 21 Gratt. 500. The court further held, that this duty of the attorney to his client can not conflict with his obligations to demean himself honestly in the practice of the law, or to be faithful to his country.

As to the liability of an attorney to punishment for contempt, see ante, "Liability for Contempt," V, D.

B. PRIVILEGED COMMUNICATIONS.

1. In General.

There is no rule of law better settled than that a counsel, solicitor, or attorney shall not be permitted to divulge any matter communicated to him in professional confidence. *Chahoon's Case*, 21 Gratt. 822; *Parker v. Carter*, 4 Munf. 273; *Tate v. Tate*, 75 Va. 522; *Lyle v. Higginbotham*, 10 Leigh 63; *Clay v. Williams*, 2 Munf. 105.

"With respect to such communications, the mouth of the witness is forever sealed, and he can not reveal them at any time, or in any proceeding, although the client be no party to it, however improbable it may be under

the circumstances, that any injury can result to him from the disclosure, and although the relation of attorney and client has ceased by the dismissal of the attorney." *Chahoon's Case*, 21 Gratt. 822, citing *Starkie on Evidence*, p. 395.

This is the privilege of the client, and is founded on the policy of the law which will not permit a person to betray a secret which the law has intrusted to him. *Chahoon's Case*, 21 Gratt. 822, quoting 2 *Starkie on Evidence*, p. 395.

This restriction is not confined to facts disclosed in relation to suits actually pending, but extends to all cases in which the counsel or attorney is applied to in the line of his profession, whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise; unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear them. *Parker v. Carter*, 4 Munf. 273.

The same rule applies to interpreters acting as the organ of communication between the client and his attorney. *Parker v. Carter*, 4 Munf. 273; *Clay v. Williams*, 2 Munf. 105.

A licensed counsel, or attorney, employed as such to draw a deed, must be considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him. *Parker v. Carter*, 4 Munf. 273.

This principle extends even to scriveners acting as attorneys in any particular transaction. *Clay v. Williams*, 2 Munf. 105.

3. What Communications Privileged.

In General.—In order to bring a case within the rule as to privileged communications "the matter must have been one of professional confidence; it must have been at the time a secret, for if known to all the world there

is no reason for further concealment; the disclosure must be in invitum as it respects the client; and lastly, if it might be forced from the client by the rules of the court, *pari ratione* it may be drawn from the attorney." *Lyle v. Higginbotham*, 10 Leigh 63.

The entire professional intercourse between an attorney and his client, whatever it may have consisted in, should be protected by profound secrecy. Hence professional communications of every character are forbidden to be given in evidence against a client by an attorney. *State of W. Va. v. Douglass*, 20 W. Va. 770.

By professional communications are meant, not only what the client may have said to his attorney as such, but also every fact, which the attorney has learned only in his character as attorney. *State of W. Va. v. Douglass*, 20 W. Va. 770.

If, for instance, a prisoner charged with murder informs his attorney where the pistol, with which the man was murdered, is hidden, the attorney can not state to the jury, that he found the pistol, as his finding it was the result only of the knowledge of the place where it was hidden, which was communicated to him by his client; and the rule, which prohibits him from disclosing professional communications, is violated by his stating, where the pistol was found, though he refrains from stating, that his knowledge of where it was to be found, was derived from what his client told him. *State v. Douglass*, 20 W. Va. 770.

Communications Held Not to Be Privileged.—Communications by assignor to attorney of assignee are not privileged where the attorney was acting for his client. *Hall v. Rixey*, 84 Va. 790, 6 S. E. 215.

Under the particular circumstances of this case, a letter written by a mortgagee to his attorney, informing him that the mortgage debt had been paid, and requesting him to dismiss a suit

then pending to foreclose the mortgage, was held to be proper evidence in favor of a subsequent incumbrancer in a controversy with the executor of the mortgagee, who had revived the proceedings to foreclose. *Lyle v. Higginbotham*, 10 Leigh 63.

3. Waiver of Privilege.

The rule of law which protects professional communications is for the benefit of the client, and there is no doubt he may waive this protection, but the waiver must be distinct and unequivocal. *Tate v. Tate*, 75 Va. 522.

4. Application of Rule Where Attorney Witness for Client.

"If a lawyer becomes a witness for his client, it is by no means clear, that the professional privilege is not waived. *Wharton's Law of Evidence*, § 583. In that section it is said: 'Where, however, a party offers himself as a witness, it has been argued, that he may be asked as to his communications to his counsel, if part of the case he undertakes to prove.' Vide §§ 479, 584, and note. If this be so, when the attorney is introduced by the client should not the same rule apply?" *Moats v. Rymer*, 18 W. Va. 646.

It has been held that the client does not waive his privilege by calling his solicitor as a witness unless he also examines him as to the privileged matter. *Tate v. Tate*, 75 Va. 522.

An attorney, who is examined as a witness for his client, may be properly asked what his fee is, to show his interest in the suit and to go to his credibility. If on being asked such question he declines to answer and states, that his agreement with his client is in writing, the court may either compel him to answer or award a writ of subpoena duces tecum, requiring him to produce it. Whether such subpoena was impropriately awarded, is defective on its face or calls for a private paper are not questions which can affect the client; the only question as

to him is, whether it is proper evidence however procured. *Moats v. Rymer*, 18 W. Va. 642.

M. makes a contract with his attorney to pay him fifty dollars retainer and in addition thereto one-half of the amount recovered, the attorney not to be liable for any costs. This agreement may be properly read to the jury, to show the interest of the witness in the suit and to go to his credibility as a witness. Such a paper does not come under the rule of professional communications or confidence. *Moats v. Rymer*, 18 W. Va. 643.

"The counsel for the plaintiff in error argues, that this contract as to the fee comes under the rule of professional communications and confidences, which can not be disclosed to the prejudice of the client's case. I do not so understand it; nor can it in any way affect the client's right to recover. What compensation he may choose to pay his attorney, does not enter into the question at all. It would be incompetent testimony, so far as it affected or was intended to affect the client, and as original evidence would clearly have been inadmissible. But I know no rule of law, when an attorney goes upon the stand as a witness, which exempts him from the rules applicable to all other witnesses, for testing the interest which he has in the suit." *Moats v. Rymer*, 18 W. Va. 645.

5. Application of Rule Where Client a Witness.

In *Tate v. Tate*, 75 Va. 522, it was held that if the client offers himself as a witness he may be asked as to communications to his counsel if it be part of the case he undertakes to prove. See also, *Moats v. Rymer*, 18 W. Va. 646.

C. DEALINGS BETWEEN ATTORNEY AND CLIENT.

1. In General.

"All dealings between attorney and client for the benefit of the former, are

not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded in public policy, and operates independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise." *Thomas v. Turner*, 87 Va. 12, 12 S. E. 149.

"It is the duty of an attorney to give to his client the benefit of his best judgment, advice, and exertions, and it would be a just reproach to the law if he were permitted to bring his own personal interest into conflict with that duty by securing a benefit to himself through the influence which the relation implies. All transactions between the parties, to be upheld in a court of equity must be *uberrima fides*, and the onus is on the attorney to show, not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair; (2) that it was entered into by the client freely; and (3) that it was entered into with such a full understanding of the nature and extent of his rights, as to enable the client to thoroughly comprehend the scope and effect of it." *Thomas v. Turner*, 87 Va. 12, 12 S. E. 149.

2. Agreements as to Compensation.

"Before entering on the business of his client, an attorney may contract for the measure of his compensation, and a contract then made will stand on the same footing as any contract between other persons competent to contract. This is now settled by the statute. Code, § 3201. But a contract for com-

pensation made after the fiduciary relation has commenced, and while it continues, will not be upheld in equity, unless it be shown not only to be reasonable, but that it was entered into under the circumstances just mentioned. Indeed, the established rule, broadly stated, is, that an attorney who occupies a security or other benefit from his client, must show that the client had the information and advice which he presumably would have received, and that he is not worse off than he presumably would have been, if he had consulted a competent adviser, who had no selfish end in view. And especially is this so when the transaction is connected with the subject matter of litigation, as then the confidence reposed and the influence of the relation place the client most in the power of his attorney." *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149.

Va. Code, 1873, ch. 160, § 2 (see Code, 1887, § 3201), enacting that "any contract made with an attorney for other or higher fees shall be valid and may be enforced in like manner with other contracts" does not apply to an agreement made after the relation of attorney and client is established. *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149. See post, "Amount," IX, B.

In a contest between an attorney and his client about the amount charged for fees, where it appears that the client is old and ignorant, and wholly unacquainted with the conduct of business affairs, it is the duty of a court of equity to scrutinize with jealous care the transactions between them and see that no oppression is exercised, and no advantage taken of the client's necessities and inexperience. It is incumbent upon the attorney to show that the transactions were fair, and that the fees charged were reasonable and just. *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611, citing *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149.

Withholding Information from Client.—Neither agents nor subagents nor attorneys nor assistants thereto, can withhold from principal or client information acquired by them in the exercise of such agency or attorneyship, and use the same to extort an increased compensation from such principal or client, or coerce such principal or client into a contract he would not enter into upon full information. *Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014.

3. Purchase from Client.

Where an attorney at law undertakes the collection of a claim for his client and, while such relation exists, buys the claim from his client, whether under false representations or not, or even if the claim was sold for an adequate price, such sale is voidable at the option of the client. *Lane v. Black*, 21 W. Va. 617.

But such sale can not be avoided after it has been deliberately ratified or confirmed on full information. *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

An attorney can not, as a general rule, make a valid purchase of the property of his client in litigation, but the same is voidable at the option of the client. However, the suit to avoid such sale must be brought within a reasonable time. Nor can it be set aside as against subsequent purchasers for value without notice, the only remedy of the client in such case being against the attorney. *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

4. Acquiring Property Adversely to Client's Interest.

General Rule.—In *Newcomb v. Brooks*, 16 W. Va. 32, it was queried whether an attorney at law could in any case, even with the consent of his client, purchase property sold for the benefit of his client by a judicial sale pending the suit, or on an execution after judgment. And it was held, that without the consent of his client an

attorney can not purchase property of the defendant sold under execution, unless he gives for it an amount equal to the whole of his client's judgment; and without such consent he can not purchase for his own benefit his client's property sold at a judicial sale. See the titles JUDICIAL SALES; SHERIFF'S SALES.

In a suit by the beneficiaries against the trustee for an accounting, the court directed a sale of the trust estate and a partition of the proceeds. The attorney of the trustee bought in the property in the name of a third person, and the sale was confirmed in ignorance of this fact. Held, that the beneficiaries have a right to have the sale set aside without any inquiry as to the adequacy of the price. *Newcomb v. Brooks*, 16 W. Va. 32.

The principle of equity jurisprudence that a party holding a fiduciary relation to trust property can not become the purchaser of such property either directly or indirectly is not confined to trustees and fiduciaries in the technical sense of those terms, but extends to every person coming within the reason of the rule and embraces attorneys at law. *Reilly v. Oglebay*, 25 W. Va. 36.

After Termination of Relations.—

An attorney for a client whose property is sold at judicial sale to satisfy liens and charges against it, who notified such client prior thereto of the time and terms of sale, and of the result thereof soon after the sale and confirmation, and no objection was made thereto by the client, the relation of attorney ceased between the parties, as to the land itself, from the confirmation of the sale, and only continued so far as such attorney might have to do with the proceeds of the sale. *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909. In this case the court held, that the moment such relation ceased the attorney was at liberty to purchase the land or an interest in it.

D. LIABILITY TO CLIENT.**1. Liability for Negligence.****a. In General.**

"It is well settled law, that the responsibility of attorneys is that of ordinary bailees. If they have acted to the best of their skill and with a bona fide and ordinary degree of attention they will not be responsible." *Pidgeon v. Williams*, 21 Gratt. 251.

While an attorney is not bound to undertake to conduct a suit for another without compensation, yet if he voluntarily engages to do so, he is liable for the consequences of his improper management, and can not allege a want of consideration for his services. *Stephens v. White*, 2 Wash. 203.

An attorney, acting in accordance with his best judgment, after consultation with other attorneys, can not be considered negligent. *Tanner v. Bennett*, 33 Gratt. 251.

b. In the Collection of Claims.

Where the client fails to show that claims put in the attorney's hands were solvent, or that the attorney was negligent in the discharge of his duty, or that he was injured by the attorney's conduct of the business, the attorney is not chargeable. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

An attorney accepted confederate currency in settlement of his client's claim. At the time this was the only currency, and very little depreciated. Held, that he was not liable to his client for receiving such money, the client not having forbidden it. *Pidgeon v. Williams*, 21 Gratt. 251.

An attorney's receipt for claims for collection may be so far added to by parol testimony as to show a contemporaneous additional contract on the part of the attorney to receive the claims as collateral security for debts due him from the client. But the liability of attorney or transferee is only for the exercise of due diligence to collect those claims; and in neither capacity is he responsible for their

loss, unless such loss be occasioned by his negligence. *Tuley v. Barton*, 79 Va. 387.

c. In the Conduct of the Action.

Where an attorney is charged with negligence in failing to file a declaration, the proof must show that he was employed at the time when it should have been filed. *Stephens v. White*, 2 Wash. 203.

A declaration in an action on the case alleged that plaintiff, by advice of defendant, an attorney, instituted a suit against J. S. and then and there employed defendant to prosecute said suit to judgment, who in consideration thereof, undertook to conduct the same to the best of his skill; yet he had neglected to file a declaration, whereby, etc. It being stated that the defendant understood how to conduct the suit and mismanaged it, the want of a consideration is not material. *Stevens v. White*, 2 Wash. 203.

2. Liability for Money Collected.

In General.—Attorneys at law are liable as ordinary bailees for money collected for their clients. *Pidgeon v. Williams*, 21 Gratt. 251.

A debt due from an attorney to his client for money collected on a judgment is only a debt by simple contract. *Gathright v. Marshall*, 1 Hen. & M. 427.

The 15 per cent. damages allowed by act, February 18, 1819, against sheriffs for failing to pay money received on executions, is not recoverable against an attorney, who receives the money of his client and fails to pay it to him. *Taylor v. Armstead*, 3 Call 200.

A purchaser at a judicial sale executed her bonds to S. as receiver. To him, as her attorney, she also assigned certain claims to collect and pay on her bonds. Part of the collections he applied as directed; the balance he did not so apply. There was nothing to show that he had charged himself, as such receiver, with

said balance. Held, that as S. collected the money as the purchaser's attorney, she was not entitled to have it credited on her bonds until he had so applied it. *Paxton v. Steele*, 86 Va. 311, 10 S. E. 1.

"Even if it were conceded that all the claims in question were collected by Steele still there is no proof that he ever passed the proceeds from himself as attorney, to himself as receiver; and this it was incumbent on the appellant to show to maintain her position. Without something to show an election on his part to hold the money in his character as receiver—such, for example, as charging himself with it on his receiver's account, or entering it as a credit on the appellant's bonds—he continued chargeable with it as attorney, and to hold it subject to the appellant's order; and the responsibility therefor can not be shifted to the sureties in his receiver's bond, whose rights are concerned, although they are not parties before the court." *Paxton v. Steele*, 86 Va. 311, 10 S. E. 1.

Liability for Collections Deposited as "Collection Account."—An attorney, having collected a debt, deducted his fees from the amount, and deposited the balance in a bank of good credit, not in his own name but to "collection account," an account in which he deposited all money collected by him for his clients. The name of the client, for whose benefit the deposit was made, was written in the bank book opposite the entry of the deposit. The client failed to call for the money for several years and in the meantime the bank had failed. Held, that the attorney was not liable for the money so lost. *Pidgeon v. Williams*, 21 Gratt. 251.

Necessity for Giving Notice of Collection.—The client living in Maryland, but the place of his residence being unknown to the attorney, though the client comes to the town where the

attorney lives occasionally during the war, when the federal forces have possession of it, but does not call upon the attorney or let him know he is there; the attorney is not liable for failing to give him notice that the money has been collected. *Pidgeon v. Williams*, 21 Gratt. 251.

Restitution after Reversal of Decree.

—Where a decree is collected and the money paid to the plaintiff's attorneys and disposed of as the plaintiff directs, after reversal, an action will not lie against attorneys to recover the money paid by a defendant who did not appeal, because of want of privity between him and them. *Green v. Brengle*, 84 Va. 913, 6 S. E. 603.

Statute of Limitations as Defense to Action.—The statute of limitations is a good plea to a suit in equity brought to recover money collected by an attorney for his client and not accounted for by him. *Kinney v. McClure*, 1 Rand. 284.

3. Liability for Interest.

Prior to statutory enactment, Va. Code, 1887, § 2676, allowing interest in such case, where an attorney at law was employed to collect debts, and some of them were lost to his client through his negligence, he was chargeable for the principal of the debts so lost, but not with interest thereon. *Rootes v. Stone*, 2 Leigh 650. This case seems to be in conflict with *Chapman v. Shepherd*, 24 Gratt. 385.

By the Va. Code, 1849, p. 548, ch. 132, § 6 (Code, 1887, § 2676), it is provided that if any attorney at law, shall, by his negligence or improper conduct lose any debt or other money, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal.

IX. Compensation.

A. RIGHT TO COMPENSATION.

Not Affected by Want of License.—A client can not refuse to pay his attorney

his fees, although that attorney is practicing without license. *Yates v. Robertson*, 80 Va. 475.

Under Contracts for Professional Service in Procuring Legislation.—Section 6, ch. 5, Criminal Code of 1878, p. 295, aims at the offense of paying money or other compensation to secure the passage or defeat of any measure, and was doubtless intended to apply to the use of money in buying votes, etc.; and not to contracts with attorneys for purely professional services, such as drafting petitions, setting forth client's claim, taking testimony, collecting facts, preparing arguments, oral or written, addresses to the legislature or its committee, with the intention to reach its reason by argument. Hence, contracts for the latter purpose are valid. *Yates v. Robertson*, 80 Va. 475.

As to lobbying contracts, see the title **ILLEGAL CONTRACTS**.

Compensation of Brokers for Services as Attorneys in Collecting Coupons.—In *Parsons v. Maury*, 101 Va. 516, 44 S. E. 758, the controversy grew out of the employment of the defendants in error to enforce the collection of coupons from a large amount of Virginia bonds. The evidence shows that the defendants in error were not mere brokers with respect to the coupons, but were also engaged as attorneys in an arduous task which tested the resources of the most alert, diligent, successful, and learned lawyers, and that their compensation was not limited to the commission agreed to be paid them upon coupons actually sold and delivered.

Recovery by Firm for Services of One Member.—Business intrusted to a law firm may be attended to by any member of the firm, and it would be no defense to an action for fees that all the members did not take part in prosecuting or defending the case. *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457.

Effect of Dissolution of Firm.—A law firm was employed to assist in the prosecution of a suit in the state court upon a contingent fee, and when the cause was ready for trial, the plaintiff, without the consent of his counsel, dismissed his suit in the state court, and employed one of the said firm, after the dissolution of the partnership, to bring a suit in the circuit court of the United States for the same purpose, and filed substantially the same bill. Held, that this was a separate and distinct suit, that the former employment had nothing to do with it, and that the old firm was not entitled to any of the fees earned in the new suit. *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457.

Attorney for Losing Party Not Entitled to Fee from Recovery.—Upon the final determination of a cause, the decree for costs must follow the recovery, and go to the party who substantially prevails. And upon no principle can the attorneys of the losing party be adjudged fees out of the amount recovered by the winning party. *Allen v. Shriver*, 81 Va. 174. See the title **COSTS**.

B. AMOUNT.

1. Statutory Provisions.

Under §§ 14, 15, ch. 76, 1 Va. Code, 1819, the lawyers of the commonwealth were limited to fees provided for in the said fourteenth section; the fifteenth section providing that no lawyer, in any suit to be brought for his fees or services, shall recover more than the fees so provided, notwithstanding any agreement, contract or obligation made or entered into by the party against whom such suit shall be brought; retaining from the older acts of 1761, ch. 3, §§ 11, 12, edition of 1769, and ch. 71, § 12, editions of 1794, 1803, 1814, the provision: "If such agreement, contract or obligation shall have been entered into before the suit or suits in which such fees shall have

accrued, or services been rendered, were finally determined;" which provisions were in force from January 1, 1820. The legislature, however, January 2, 1840, repealed this provision of the law, and enacted the provision. "But any contract made with an attorney for other or higher fees shall be valid, and may be enforced in like manner with any other contract;" which provision appears in the Code of 1849, and is the law in the present Code. *Yates v. Robertson*, 80 Va. 479. And see *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149.

Section 13, ch. 120, of the West Virginia Code provides that "an attorney shall be entitled for his services as such to such sums as he may contract for with the party for whom the service is rendered and in the absence of such contract he may recover of such party what his services were reasonably worth." *Watts v. West Virginia*, etc., R. Co., 48 W. Va. 262, 37 S. E. 700.

The clerk of the court can not tax against the losing party in a suit, other than the fees prescribed by statute. *Yates v. Robertson*, 80 Va. 475.

2. Amount as Fixed by Contract.

In General.—Contracts, expressed or implied, between attorney and client for fees, are not limited as to amount, and may be enforced as other contracts. *Yates v. Robertson*, 80 Va. 475; *Watts v. West Virginia*, etc., R. Co., 48 W. Va. 262, 37 S. E. 700. See also, *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149.

Agreement by Debtor to Pay Commission to Creditor's Counsel.—In a negotiation between debtor and creditor, it is agreed that the debtor, besides paying the principal and interest of the debt, out of certain securities placed in the hands of the creditor's counsel (who is his agent in the transaction) to be collected and appropriated to the debt by him, shall pay the counsel two and a half per cent. commission on the debt. If this is a bona fide al-

lowance to the counsel for his trouble in the negotiation, and the extra trouble of collecting the securities, it is not usury. *Hopkins v. Baker*, 2 Pat. & H. 110.

C. CONTINGENT FEES.

In General.—"A contingent fee is only permitted to attorneys as reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and is not allowed for the rendition of mere minor services which any layman or inexperienced attorney might perform. It is the skill, diligence, ability, experience, judicial knowledge and judgment of the attorney that is thereby rewarded, and the performance of duties that require no such qualities is wholly insufficient to sustain such fee, as the true measure of such services can be ascertained on a quantum meruit." *Dorr v. Camden*, 55 W. Va. 234, 46 S. E. 1014.

The payment of large contingent fees can not be provided for by the court, no matter how great and peculiar their merit may be. That, as far as lawful, must be left as a matter of express contract between client and attorney. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 91.

What Necessary to Sustain Contingent Fee.—To sustain a contingent fee it must be shown that no unfair advantage was taken of his client by the attorney, but that the same was entered into by the client after full knowledge of the facts and circumstances for legal services of skill, judgment and ability of a character to justify a contract for such contingent fee. Ordinary services requiring no legal ability is not a sufficient consideration for such fee, wholly disproportionate thereto. *Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014.

When the services rendered are not of such character as to furnish consideration for a contract for a contingent fee, unfairly obtained from a client, the attorney may recover for the

value of has actual services rendered his client upon pleadings and proofs justifying such recovery. *Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014.

Validity of Agreements for Contingent Fees.—A contract between an attorney and his client in the regular course of the practice of his profession, for a part of the recovery as a compensation for his services is not void for champerty. *Nickels v. Kane*, 82 Va. 309.

"If the attorney should agree to pay the expenses of the suit and the costs of the litigation, it would be otherwise, though in New York, it has been held that this would not come within the inhibition of the law." *Nickels v. Kane*, 82 Va. 309.

An agreement that an attorney shall receive ten per cent. on the amount which he may succeed in getting reduced on a certain decree against his client is not champertous. *Nickels v. Kane*, 82 Va. 309.

An agreement between attorneys and their client, whereby they should "have ten per cent. on whatever might be recovered in a certain chancery suit * * * for their services in the prosecution of it; and if nothing were recovered in it, then no compensation for their said services, in attending before the commissioners to take accounts, or in court, or in taking depositions," is not champertous or of immoral tendency, nor is it such an agreement as is forbidden by 1 Rev. Code, 1819, ch. 76, § 14, for it comprehends services not embraced by that act, such as taking depositions, etc. *Major v. Gibson*, 1 Pat. & H. 48, affirming by a divided court the decision below. See the title CHAMPERTY AND MAINTENANCE.

Contracts for Contingent Fees Construed.—A client, under a contract whereby he agrees to pay an attorney for the prosecution of an action a fee of \$50, and also a percentage of the damages which he may recover in the

action, is not liable for such percentage of the judgment obtained, but only for a percentage of the damages received. *Fisher v. Mylius*, 42 W. Va. 638, 26 S. E. 309.

In *Conrad v. Johnston*, 1 Va. Dec. 111, a covenant was entered into between an attorney and his client whereby the client agreed to pay the attorney a certain sum in consideration for his services in a suit in chancery, to be paid out of the moneys which might be recovered in said suit, but if no recovery were had in the same, then no further fee for such services was to be charged. It was held, that such a covenant is not absolute, but contingent on a recovery in the chancery suit, and that the said sum of money is payable out of said recovery, if such recovery be had.

Where a decree has been rendered in the circuit court for a certain sum, and the plaintiff, not satisfied therewith, obtains an appeal to the supreme court, where the decree is affirmed, and four parties interested therein employ an additional attorney to obtain a rehearing of said cause, and, in the event the same is reversed, and further prosecuted, agree to pay him one thousand dollars certain, and a contingent fee of five per cent. on the net recovery in excess of the decree rendered in the circuit court, said fees to be paid pro rata by said four parties, said contract is unambiguous, needs no construction, and is enforceable against each of said four parties. *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637.

A stockholder engaged attorneys to recover a debt due his company, and for their services they were to retain a percentage for all fees and disbursements, and hold the stockholder harmless from liability. The claim was established, but declared subordinate to a mortgage. The stockholders, to secure a bidder at a sale of the mortgaged premises, gave a bonus. A receiver was appointed for the company, and

was allowed commission and attorney's fees, of all of which such stockholder had full knowledge; held, that as the bonus, receiver's counsel fees, and commissions were necessary charges incurred in the creation of the fund, they should be deducted from the entire fund collected, and not borne entirely by the attorneys. *McDonald v. Logan*, 2 Va. Dec. 687.

Operation of Covenant for Fees from Proceeds as Equitable Assignment.—In *Conrad v. Johnston*, 1 Va. Dec. 111, it was held, that a covenant to pay an attorney a certain sum out of the moneys which might be recovered in a suit operated as an assignment in equity to the attorney of any moneys which might be recovered by the plaintiff in the said suit, to an amount not exceeding the specified sum, and if any moneys were so recovered in the said suit and appropriated by the plaintiff to his own use such appropriation entitles the attorney to an attachment against the estate and effects of the plaintiff in this state (he being a non-resident), and to subject the same to the payment of the sum to which the attorney was entitled out of said recovery.

Assignment of Portion of Judgment as Compensation.—A writing given by a client to his attorney in a suit authorizing the attorney to retain out of the judgment, when recovered, a part for his compensation, is an assignment of such part. *Bent v. Lipscomb*, 45 W. Va. 183, 31 S. E. 907.

Damages for Breach of Contract for Contingent Fees.—P. & Son, attorneys, contracted in writing with L. as follows: "It is agreed that P. & Son are to receive \$100 certain and if the suit (referred to and mentioned in the agreement) is decided in favor of L. then P. & Son are to receive \$200, making \$300 in all." P. & Son brought an action of assumpsit, setting forth the agreement and alleging that L. dismissed said suit without their consent

and thereby hindered P. & Son from prosecuting said suit to a final decision, although plaintiffs were ready and willing to do so. The declaration also contained the common counts for work and labor. Held, that P. & Son were not necessarily entitled, upon issue joined on a plea of nonassumpsit, to recover the whole amount of the contingent fee therein specified; but for breach of said contract, by defendant, might recover such damages, by way of compensation for their time, labor and attention, as these were reasonably worth, and for any loss or injury they might have sustained; provided the whole recovery did not exceed the amount stipulated in the contract. *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457.

D. WHEN FEES RECOVERABLE AS DAMAGES OR COSTS.

In General.—As a general rule fees paid to counsel can not be recovered as damages. If the injury complained of was not wanton or malicious, and exemplary damages are not recoverable, no greater attorney's fee can be recovered against the defendant than that prescribed by law to be taxed in favor of the winning party. *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875.

On the trial of an action for malicious prosecution or false imprisonment, where exemplary damages are recoverable, the fees paid or incurred to counsel for defending the original suit or proceeding may be proved, and if reasonably and necessarily incurred, may be taken into consideration by the jury in the assessment of damages. *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875, citing *Parsons v. Harper*, 16 Gratt. 64.

In a suit upon a breach of warranty of title to land, the grantee can not recover his counsel fees for defending the title, where the grantor had employed competent counsel for that pur-

pose. *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2.

Creditors have no legal right to be reimbursed by their debtors for counsel fees contracted by them. *Gurnee v. Bausemer*, 80 Va. 867.

Damages in Action on Injunction Bond.—In an action on an injunction bond with condition "to pay all such costs as may be awarded against the plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," fees paid to counsel in the injunction suit can not be recovered as damages, although the bill be a pure bill of injunction. *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. 56. See the title INJUNCTIONS.

Taxation as Costs in Criminal Cases.—In *Commonwealth v. Hooper*, 2 Va. Cas. 223, the defendants were jointly indicted; two were acquitted and two convicted. Upon the question whether the fee to the attorney prosecuting for the commonwealth, of ten dollars given by the act of assembly, should be taxed in the bill of costs against each defendant convicted, it was held, that in this case the attorney's fee ought not to be taxed in the bill of costs against each defendant, it not appearing that the two defendants against whom the judgment was rendered had severed in their defense.

Generally, as to the allowance of attorney's fees as costs, see the title COSTS.

E. PAYMENT OUT OF TRUST FUNDS — REIMBURSEMENT.

Where trustees in good faith engage counsel to aid them in the execution of the trust, they are entitled to pay them out of the trust fund, or to be reimbursed out of that fund for all expenses which they have incurred, including reasonable attorney's fees. *Cochran v. Richmond, etc., R. Co.*, 91 Va. 339, 21 S. E. 664.

In *Doswell v. Anderson*, 1 Pat. & H. 185, it was queried whether the

trust subject was liable beyond the profits for fees of counsel employed by cestuis que trust and trustees.

Compensation from Administration Assets after Substitution of Administrator.—If an attorney at law, by virtue of his employment performs services for an administratrix in the prosecution of a claim due the estate, to be paid for out of the proceeds thereof, and another administrator is substituted in lieu of the first and afterwards receives such proceeds, such attorney is entitled to payment for such services therefrom unless he has been otherwise paid therefor. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178.

Allowance from Decedent's Estate.—The supreme court of West Virginia has on several occasions strongly disapproved the allowance of heavy fees out of dead men's estates and funds. *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447. See the title EXECUTORS AND ADMINISTRATORS.

F. ACTIONS TO RECOVER COMPENSATION.

Accrual of Right.—If a contract is made with a law firm for a certain fee upon a favorable termination of the suit, and the plaintiff, without their consent, dismisses the suit, the cause of action for the recovery of fees by such law firm arises at once upon the dismissal of the cause. Such dismissal puts an end to the employment of every one of the plaintiff's attorneys, and whatever rights they had against him for fees were then perfected and they could sue. *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457.

Declaration in Action for Services.—Where a law firm has been employed as general counsel for a corporation, and served it in that capacity, and brings an action of assumpsit, the declaration containing the common counts, and also the following averment: "And

also in the further sum of two thousand, five hundred dollars for legal work and services done and rendered to said defendant during the years of 1895, 1896 and 1897 by said plaintiffs;" and said plaintiffs also file with their declaration a bill of particulars, charging the defendant with legal services as general counsel from July 7, 1895, to March 7, 1897, at one thousand, five hundred dollars per year, two thousand, five hundred dollars—under this state of pleading the plaintiffs can recover what they can show their services were reasonably worth, notwithstanding one of said law firm was a director of said corporation at the time the service was rendered. *Watts v. West Virginia, etc., R. Co.*, 48 W. Va. 262, 37 S. E. 700.

In the absence of an express contract, such attorneys were entitled to recover reasonable compensation as general counsel during the period mentioned in said bill of particulars, without itemizing the services rendered at different times. *Watts v. West Virginia, etc., R. Co.*, 48 W. Va. 262, 37 S. E. 700.

X. Lien of Attorney.

A. GENERAL RULES.

Extent of Lien on Judgment or Decree.—An attorney has a lien on the judgment or decree, obtained by him for his client, for services and disbursements in the case, whether the amount of his compensation is agreed upon or depends upon a quantum meruit. This lien includes not only the amount necessary to pay for his services and disbursements in the case, in which the judgment or decree is rendered, but also the amount necessary to pay for his services and disbursements in any other case, so connected with it as to form the basis on which such judgment or decree is rendered, or essential to the realizing of such judgment or decree. *Renick v. Ludington*, 16 W. Va. 378. And see *Bent v. Lipscomb*, 45 W. Va. 183, 31 S. E. 907.

This lien of the attorney is subject to all the equitable liens of the defendant in the judgment, existing at the time of the rendition of the judgment or decree. *Renick v. Ludington*, 16 W. Va. 378.

To What Funds Limited.—An attorney has no lien upon a fund which he is not instrumental in creating, and which never came to his hands. *Schmertz v. Hammond*, 51 W. Va. 409, 41 S. E. 184.

An attorney's special lien for pay for his services out of a fund in court exists only where his client is entitled to participate in that fund. He can not claim it out of a fund decreed to go to a party under a right adverse to that of the party represented by the attorney. Such party can not be compelled to pay for the services of an attorney rendered against him. *Schmertz v. Hammond*, 51 W. Va. 409, 41 S. E. 184.

An attorney's charging lien for his fee is confined to the payment or fund recovered by him as attorney. *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, citing *Fowler v. Lewis*, 36 W. Va. 113, 14 S. E. 447.

Where a fund in court arising from a sale of property is consumed by a prior lien, the attorney representing a junior demand has no lien upon that fund for his services. *Schmertz v. Hammond*, 51 W. Va. 409, 41 S. E. 184.

Retaining Lien Dependent on Possession of Papers.—An attorney's retaining lien on papers of his client for fees due him for general services depends on his possession of such papers, and ceases when he voluntarily parts with possession of them. *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609.

Validity as Dependent on Notice.—An attorney at law has a lien upon a judgment recovered by him for his client for his compensation, which lien is good against an assignee of the judgment, though he had no notice of the lien. *Bent v. Lipscomb*, 45 W. Va. 183, 31 S. E. 907.

Notice to the defendant express or implied of the claim of the plaintiff's attorney to such lien, before the defendant pays such judgment or decree to the plaintiff, is essential to the maintenance of such lien; but notice of the existence of such lien to the assignee of such judgment or decree is not essential to the maintenance of such lien against such assignee without notice. *Renick v. Ludington*, 16 W. Va. 378.

B. ILLUSTRATIONS.

Where a fund is brought into a court of equity through the services of an attorney, who looks to that alone for his compensation, although his interest can not technically be called a "lien," he is regarded as the equitable owner of the fund, to the extent of the reasonable value of his services; and the court administering the fund will intervene for his protection, and award him a reasonable compensation, to be paid out of it. *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

If a client contracts to pay his attorney a certain percentage out of a particular fund, which the attorney is to recover for him, the attorney has a lien on the fund for the amount of his fee, and if, in the process of collection, the client buys the land of the debtor for the amount of his debt, the attorney has an equitable lien on said land, to be paid in preference to all other debts of the client, which a court of equity will protect, at the instance of the attorney, either by withholding the deed, or by directing a conveyance to the client reserving a lien for the amount of the fee on the face of the deed in favor of the attorney. *Fitzgerald v. Irby*, 99 Va. 81, 37 S. E. 777.

Even after a deed has been directed to be made to a client, a court of equity may, for good cause, amend its decree so as to protect the interest of an attorney who has a lien upon the funds used to pay the purchase price of the land. *Fitzgerald v. Irby*, 99 Va. 81, 37 S. E. 777.

Where an attorney has a lien for money advanced his client to pay for land purchased in a pending suit, the better practice is not to enforce the lien in that suit, and thereby keep other parties in court who have no interest in that question, but to make a proper decree for the protection of the attorney, giving him leave to enforce it in an independent suit for that purpose. *Fitzgerald v. Irby*, 99 Va. 81, 37 S. E. 777.

Where an attorney is employed to institute proceedings in equity to subject land to the payment of debts and liens, and obtains a decree directing a sale for the satisfaction of the same, and the debtor compromises and pays off the claims asserted against him, the attorney for the plaintiff has no lien against the land of said defendant which would entitle him to a sale thereof. *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. 973.

An attorney has no lien upon land for his fee or compensation for services in a suit wherein the land is recovered for his client. *Hogg v. Dower*, 36 W. Va. 200, 14 S. E. 995.

An attorney has no lien upon a fund arising from the sale of land of a person or estate, already owned by such person or estate, for services purely defensive, in resisting suits to establish demands against it. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

An attorney has no lien against land for prosecuting a suit to recover it for his client, or for defending a suit to recover it from his client, or to subject it to a debt or claim. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. 973.

C. WAIVER OF LIEN.

The lien of an attorney on the judgment may be waived by any arrangement or transaction made by or with the attorney, which satisfactorily shows an intention to waive such lien and rely exclusively on some other security or mode of payment; but such lien

will continue to exist, unless a manifest intention, that it shall not continue to exist, appears. *Renick v. Ludington*, 16 W. Va. 378.

P., an attorney, recovers a judgment for R. against L., and after L. becomes totally insolvent, R. assigns this judgment for a valuable consideration to D., who has no notice of the attorney's lien on this judgment. P., the attorney, then takes the bond of R. for his fee in the case, and at the same time R. confesses a judgment to P. for the amount, and simultaneously he assigns his judgment against L. to his attorney P. to satisfy his fees. These transactions are not a waiver by the attorney of his lien on this judgment; and he is entitled to priority over D. in the distribution by the court of the amount of this judgment. *Renick v. Ludington*, 16 W. Va. 378.

XI. Disbarment and Suspension of Attorneys.

A. POWER OF COURT TO DISBAR OR REVOKE LICENSE.

In General.—The courts have a continuing control over attorneys, with the power to revoke their licenses for unworthy practices or behavior. *Leigh's Case*, 1 Munf. 468.

It would seem that independently of any statutory restrictions the courts of record of Virginia might, in a proper case, suspend or annul the license of an attorney, so far as it authorizes him to practice in the particular court, which pronounced the sentence but no further. *Ex parte Fisher*, 6 Leigh 619.

Discretion of Court as to Exercise.—The power to disbar an attorney is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility, but in doing so the court should exercise a sound and just judicial discretion. *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620. See also, *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

Power to Disbar Distinct from Power to Punish for Contempt.—The power to disbar an attorney proceeds upon a very different ground from the power to punish for contempt. *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407. See the title CONTEMPT.

B. GROUNDS.

The circuit court may, by summary proceedings, according to the common law, strike from its roll the name of an attorney who is guilty of writing and publishing in a newspaper a false and libelous charge against the judge of such court, in respect to his official conduct, and the disclaimer by the attorney of intentional wrong or disrespect to the judge or court will not excuse him, when the contrary appears upon a fair interpretation of the language employed. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

An attempt by an attorney to bribe a witness to swear falsely against the judge of the court, if proved, would render it the duty of the court to revoke the privilege of such attorney to practice in that court. *Walker v. State*, 4 W. Va. 749.

C. PROCEDURE.

In Disbarment.—Circuit courts have jurisdiction and power, upon their own motion, without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he had reasonable notice, and an opportunity to be heard. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

A disbarment proceeding properly speaking is simply the old common-law *ex parte* proceeding taken by a court to exclude an officer of its own, an attorney, for conduct unfitting him for longer exercising his prerogatives and privileges before that court. *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

The proceeding by a court to exclude from practice one of its own officers, and

to protect public and court against him, is not a suit, but a peculiar proceeding, *sui generis*, though very ancient and long practiced. The case is not that proceeding authorized by § 6, ch. 119, of the West Virginia Code, empowering courts to annul or suspend the effect of an attorney's license, though it would seem to be tantamount thereto; but it has been twice held in West Virginia that the old common-law proceeding of disbarment, is not that for the annulment or suspension of license under that statute. *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618, citing *Walker v. State*, 4 W. Va. 753; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

To Annul or Suspend License.—Under the provisions of 1 Rev. Code, 1819, ch. 76, § 6, a court can not, for malpractice of an attorney, committed in its presence, suspend the license of the party offending, in a summary way, but must direct an information to be filed against him, and inflict the punishment on the verdict of guilty found on such information. *Ex parte Fisher*, 6 Leigh 619.

Since the right to practice in Virginia as an attorney is not conferred by the court but is derived from a license entitling the person obtaining it to be admitted in all the courts of the commonwealth, to deprive him of such license is the exertion of a higher authority than that which can be exercised by any one court, by analogy to the English practice. *Ex parte Fisher*, 6 Leigh, 619.

Sufficiency of Rule Summoning Attorney to Answer.—Where a rule to disbar an attorney summons him to answer charges contained in an affidavit of an informant filed in the case, it is sufficient, as the affidavit thus becomes

part of the rule. *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

D. EVIDENCE.

The evidence in a proceeding to disbar an attorney must support the charges and be clear and preponderating. *States v. Stiles*, 48 W. Va. 425, 37 S. E. 620; *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

"Charges against an attorney with a view to his suspension and removal must be proved by a clear preponderance of evidence." *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618; *Walker v. State*, 4 W. Va. 749.

Continuance to Procure Affidavits and Testimony.—It is error in a circuit court, on a proceeding on a rule to disbar a party from practicing as an attorney in that court, to hear the cause and enter an order making the rule absolute, and disbaring the party from the practice of the law, where a continuance of the cause is asked for to enable the defendant to procure an affidavit which is out of the county, and the testimony of a witness who is also out of the county, and whose materiality is shown, where the defendant is chargeable with no want of diligence in procuring the same, and where no opportunity has been allowed him to procure the affidavit and witness within the short period of one day from the issue and service of the rule until the trial. *Walker v. State*, 4 W. Va. 749.

E. REVIEW ON ERROR.

The supreme court has jurisdiction of a writ of error to a judgment disbaring an attorney. *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620; *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618. See the title APPEAL AND ERROR, vol. 1, p. 418.

ATTORNEY GENERAL.

CROSS REFERENCES.

See the titles COMMONWEALTH'S ATTORNEY; PUBLIC OFFICERS.

As to matters relating to the filing of bills in chancery against the attorney general, as representative of the commonwealth, see the title STATE.

Election and Commission Provided for by the Constitution.—By art. 6, § 8, of the state constitution, the election and commissioning of an attorney general is provided for, and it is directed that he shall perform certain duties and receive such compensation as the law may prescribe. *Blair v. Marye*, 80 Va. 485. See generally, the title ELECTIONS.

Nature of, and the Necessity for, His Services.—The attorney general, is the constitutional adviser of the executive of the state, and the law officer of the commonwealth in the state and federal courts, and his services are constantly and indispensably useful to the public business and interest of the state. *Blair v. Marye*, 80 Va. 496.

Member of the Board of Education.—Constitution, art. 8, § 2, constitutes the governor, attorney general, and superintendent of public instruction, a board of education for the state. Acts approved July 11, 1870 (Va. Code, 1873, ch. 78, § 7, cl. 4), empowers this board to appoint and remove district school trustees, until otherwise provided, and applies as well to cities and towns as to counties. *Childrey v. Rady*, 77 Va. 518. See the title SCHOOLS.

Money Paid by Mistake May Be Recovered by the State.—The commonwealth may maintain a suit against the attorney general for money paid him by the auditor of public accounts under the mistaken belief that he was entitled thereto as part of his compensation. *Commonwealth v. Field*, 84 Va. 26, 3 S. E. 882. See generally, the titles PAYMENT; STATE.

Salary.—The attorney general is entitled, under acts approved April 4, 1877, amended March 12, 1878, to be paid out of the public treasury, his

salary and nothing more. *Commonwealth v. Field*, 84 Va. 26, 3 S. E. 882.

Legislative Provisions with Respect to Salary.—Act approved March 12, 1878, acts, 1877-8, ch. 183, § 2, p. 174, providing that "the attorney general shall receive a salary of \$2,500 annually for his services, and shall not be entitled to any further compensation therefor," refers to salaries payable out of the state treasury, and not to fees taxed in the costs as fees of attorneys on the winning sides in any case, under Va. Code, ch. 181, § 13. *Thon v. Com.*, 77 Va. 289.

Services Covered by Salary.—It is provided by the general assembly that the attorney general shall discharge such other duties as may be imposed by it, but shall receive no other compensation than his salary. The attorney general appeared for the state in certain cases, under an act of the general assembly. Held, those services were covered by his salary. *Field v. Auditor*, 83 Va. 882, 3 S. E. 707.

Legislature May Reduce during Term.—Under the constitution, art. 6, § 8, the legislature has power to reduce the salary of the attorney general during his term, there being no limitation of power in that respect as there is as respects the salaries of judges. *Field v. Auditor*, 83 Va. 882, 3 S. E. 707.

Legislature Can Not Withhold.—It is not within the power of the legislature to withhold the salary of the attorney general which is prescribed by law from him, nor to delegate such power to the auditor of public accounts. *Blair v. Marye*, 80 Va. 485.

Auditor Can Not Withhold the Salary of a Constitutional Officer.—The act of assembly passed November 24,

1884, acts (extra session) 1884, p. 90, requiring the auditor to withhold the salary of any officer who is indebted to the state for money collected by him, or improperly drawn by him during his term of office, until the default is made good, is unconstitutional and void, so far as it affects constitutional officers. *Blair v. Marye*, 80 Va. 485. See generally, the title PUBLIC OFFICERS.

Not Subject to Debt or Counterclaim.—The salary of the attorney general is of constitutional grant, and of public official right, and the doctrine of off-set can not be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of public policy, it has absolute immunity from

detention for debt or counterclaims. *Blair v. Marye*, 80 Va. 485.

May Compel Payment by Mandamus.—The officer's remedy for the withholding of the salary attached to his office is by mandamus. *Blair v. Marye*, 80 Va. 485. See generally, the title MANDAMUS.

Specified Fees—Laws Unrepealed.—The law requiring fees to be taxed for the commonwealth in any case have never been repealed nor amended, and the losing suitor has them to pay, whether they go into the state treasury or to the attorney general. The laws requiring such fees to be taxed in the costs and paid to said attorney are also unrepealed. *Thon v. Com.*, 77 Va. 289. See generally, the title COSTS.

Attorney in Fact.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; ACKNOWLEDGMENTS, vol. 1, p. 104; AGENCY, vol. 1, p. 240.

Attornment by Tenant.

See the title LANDLORD AND TENANT.

ATTRACTIVE NUISANCE.—In *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, it is said: "Judge Thompson, in § 1024, vol. 1, puts it thus: 'A well grounded exception to the foregoing principle is that one who artificially brings or creates upon his own premises any dangerous thing which from its nature has a tendency to attract the childish instinct of children to play with it, is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it, or coming in its vicinity. Things of this kind frequently pass under the designation of **attractive nuisances**.' That statement is very broad, as it includes any dangerous thing which in nature has a tendency to attract the childish instincts of children to play with it. It is not confined to machinery. Where do we stop under this head? If machinery, what does it include? In these days of machinery, when it has so largely relieved the hands of man, the rule of dangerous and attractive machinery would be comprehensive. What things would be deemed dangerous under the rule quoted from Thompson? What machinery would be dangerous? Almost all machinery is, in some conceivable circumstances or contingencies, dangerous. Surely we cannot deny an owner's use of his property by denying to him machinery and appliances that may, under some circumstances, be dangerous. But the thing doing the injury must also be attractive to children. Where do we stop under this head? When we go to say what machinery is attractive to some child, or even to children, we enter upon a wide, uncertain field." See also, *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 997. And see the titles NEGLIGENCE; NUISANCES; TRESPASS.

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See the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 82; ACTIONS, vol. 1, p. 122; AGENCY, vol. 1, p. 240; CIRCUMSTANTIAL EVIDENCE; CONTRACTS; EVIDENCE; FRAUDS, STATUTE OF; JUDICIAL SALES; PAROL EVIDENCE; SHERIFFS' SALES; TAXATION; WITNESSES.

I. Definition.

As to definition of auctioneers, see post, "Authority of Auctioneer," III.

A sale by auction is a compact between the seller and the highest bidder, whereby the property passeth from one to the other. The highest bidder therefore must be a bidder to whom the property can pass. *Hinde v. Pendleton*, Wythe 356.

II. Auctioneer as Agent.

See post, "Frauds, Statute of," VII.

A. GENERAL RULE.

In auction sales, an auctioneer is agent of the vendee as well as the vendor. *Brent v. Green*, 6 Leigh 17; *Smith v. Jones*, 7 Leigh 165, 30 Am. Dec. 498; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 613; *Capehart v. Hale*, 6 W. Va. 551; *Peck v. List*, 23 W. Va. 377; *Brown v. Butler*, 87 Va. 621, 13 S. E. 71. See the title FRAUDS, STATUTE OF.

In general, an auctioneer may be considered as the agent and witness of both parties. *Brent v. Green*, 6 Leigh 27.

Acting without Authority.—An auctioneer who was conducting the sale of real estate wrote the name of one party as the purchaser. The auctioneer's partner, who was not present at the sale, without any communication with, or authority from another party, on the day after the sale wrote the name of this second party, as a joint purchaser with the former party. This second party was not bound by the action of the auctioneer's partner. *Walker v. Herring*, 21 Gratt. 678.

A deputy sheriff, at an auction sale of an insolvent debtor's interest in real estate, is the agent for both the vendor and the purchaser. *Brent v. Green*, 6 Leigh 16.

Auctioneer as bidder, see post, "Duties of Auctioneer," IV.

B. DISCLOSURE OF PRINCIPAL.

A licensed auctioneer does not come

within the requirements of § 13, ch. 100, W. Va. Code, or under § 2877, Va. Code, which states that where any person transacts business as a trader with the addition of the word "agent," and fails to disclose the name of his principal or partner, all the property, stock, choses in action acquired or used in such business shall, as to creditors, be liable for his debts. *Morris v. Clifton Forge Gro. Co.*, 46 W. Va. 197, 32 S. E. 997.

If a person who has no license as an auctioneer or commission merchant transact business in his own name under a general merchant's license, all the property, stock, and choses in action acquired or used in such business are liable for his debts under the express terms of § 2877, Va. Code. Personal property consigned to such person under unrecorded written contracts, or left with him for sale in the course of his business under verbal instructions from the owner, is property "used in such business" within the meaning of said section, and is liable for the debts of such person. But personal property stored with such person with no power of sale, and office furniture rented with the building, are not so liable. *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472. See generally, the title AGENCY, vol. 1, p. 271.

III. Authority of Auctioneer.

A. PRESUMPTION OF.

If one expressly employ another as his auctioneer, the presumption of authority to deal with the property to be auctioneered by the auctioneer, according to his usual course of business, will arise, although the principal privately restricts the power of the auctioneer. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

Receiving Payment.—As auctioneers are bailees to sell, they are as well

bailees to receive payment. *Townes v. Birchett*, 12 Leigh 194.

B. PARTY DEALING WITH BOUND TO KNOW WHAT AUTHORITY IS.

Where an auctioneer acts under special or express authority written or verbal, any party dealing with him is bound to know, at his peril, what the auctioneer's power is, and if the auctioneer exceeds his power, the act is void as to the party employing the auctioneer. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

To make an auctioneer's act binding on the party employing him, any party dealing with the auctioneer, must show by clear, competent, direct and satisfactory evidence the terms and authority of the auctioneer, or a ratification of his act by the party employing him. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

C. AS TO RECEIVING NOTES FOR PURCHASE OF PROPERTY.

When auctioneers are allowed to sell on credit, the common course of business with them, is to make notes used for the purchase of property payable to them. *Townes v. Birchett*, 12 Leigh 194.

Auctioneers employed to sell goods, with discretion to sell on credit, take notes from certain buyers to themselves, payable at a future day, and the makers of these notes fail before they come to maturity. It was held, that the principal, and not the auctioneers, shall bear the loss, unless it appear that the auctioneers appropriated the notes to their own purposes; and though the auctioneers procure such notes to be discounted for their accommodation, yet, if at the time they were in advance to their principal to an equal or greater amount, this will not be such an appropriation to their own use, as will make them liable to bear the loss. *Townes v. Birchett*, 12 Leigh 173, 174.

D. HAS NO AUTHORITY TO BIND PURCHASER BY SUBSCRIBING LATTER'S NAME AFTER SALE.

An auctioneer can not bind the purchaser at auction of real estate by subscribing his name to the terms of the sale, after the sale is completed. *Walker v. Herring*, 21 Gratt. 678.

IV. Duties of Auctioneer.

If a commissioner or auctioneer faithfully discharges his duties, he will, of course, honestly obtain the best price he can get for the property. On the other hand, if he undertakes to become the purchaser for himself, or for another, his interest and his duty alike prompt him to obtain the property upon the most advantageous terms. *Rover on Judicial Sales*, 30. *Brock v. Rice*, 27 Gratt. 816.

Hilleary v. Thompson, 11 W. Va. 118, cites *Brock v. Rice*, 27 Gratt. 812, and upholds the law therein contained that it is manifestly improper for the auctioneer to receive any but real bids. If bystanders saw that the auctioneer was conducting the sale for himself, and the bidder too; that he was crying bids that were not made; it was not likely that they would bid at all; the direct rule of such a course would be to discharge bidding. Men expect fair and open competition; and if they discover that the bids are not real bids, they will be apt to refuse to bid at all. See also, *Peck v. List*, 23 W. Va. 377.

An auctioneer may fairly bid for a third person who employs him at an auction sale, but not for the owner. *Peck v. List*, 23 W. Va. 377. See ante, "Duties of Auctioneer," IV.

An auctioneer can act as agent for the purchaser if on the day of the sale he makes known a distinct specific offer for a part of the property the purchaser wishes to bid on, but he can not act as agent when he assumes to bid for the property in any way, which is prejudicial to other parties attend-

ing the sale. *Brock v. Rice*, 27 Gratt. 817.

Where a purchaser had stated that he only desired to purchase a part of the property at an auction sale and the auctioneer volunteered to act for the purchaser, the auctioneer claimed he was clothed with an unlimited authority to bid for the entire contract at a sum he thought proper; it was held, that this was a departure from the plain line of the auctioneer's duty, and throws suspicion, if not discredit upon his conduct. *Brock v. Rice*, 27 Gratt. 817.

V. Bidders.

A. OWNER AS BIDDER.

An owner of goods set up for sale at an auction, never yet bid in the room for himself. *Peck v. List*, 23 W. Va. 376.

In the case of *Peck v. List*, 23 W. Va. 377, it was held, that a bidding by the owner privately or its equivalent, a direction given to the auctioneer privately, not to let the property go under a certain sum would be fraud upon the sale.

Auctioneer as bidder, see ante, "Duties of Auctioneer," IV.

B. CAPACITY.

The highest bidder must be the bidder to whom the property can pass, because it has been held that a sale by auction is a compact between the seller and the highest bidder, whereby the property passes from one to the other. *Hinde v. Pendleton*, Wythe 356.

C. BY-BIDDERS AND PUFFERS.

1. Who Is a By-Bidder.

A by-bidder is one who offers "a price for the thing proclaimed to be sold, professeth a wish to buy it; which profession is false; for he, not only doth not wish to buy the thing, but wisheth another man to buy it, and tempteth him to bid more for it. The by-bidder, instead of being one who would be a buyer, as he pretendeth to be, is in truth the seller

disguised, lending his own person to the seller. His office is dramatic, no less so than the office of an actor in theatrical exhibitions, they both represent others; and the object of both is to deceive." *Hinde v. Pendleton*, Wythe 355.

2. When By-Bidder Substantially a Puffer.

A by-bidder, employed by any one interested in the proceeds of an auction sale, who has good reason to believe and does believe from assurances made or from an understanding expressed or implied, that neither he nor his employer will be held responsible for the bid he makes, if it happens to be the highest bid, by the auctioneer not knocking down the property on such bid, or by escaping the responsibility of his bid in any other manner, if the power exists in his employer to make good this assurance or understanding, is substantially a puffer. *Peck v. List*, 23 W. Va. 338.

3. Effect.

No Transition of Property to By-Bidder.—"To a by-bidder there can be no transition of property, for, if the thing proclaimed for sale be, in the auctionary language, stricken off to the by-bidder, the property remaineth unchanged; he being the agent, consequently, his offer being the offer of the seller." *Hinde v. Pendleton*, Wythe 356.

Exorbitant Price Caused by By-Bidder Set Aside.—The plaintiff, known to have a feeling of attachment to certain slaves that were sold at auction, was induced to bid and buy them at an exorbitant price by a by-bidder. One of the defendants, suspecting that some would decline bidding in order to favor the plaintiff, instructed the auctioneer not to let the slaves be sold under a reasonable value. The auctioneer then employed a by-bidder, without having any special instructions to do so. Judgment rendered for the

purchase money was then enjoined, and the sale set aside as to the excess of the price and an issue directed, or a reference to the commissioner by consent, to ascertain a fair price. *Hinde v. Pendleton*, Wythe 354.

Attendance of Puffer at Auction Is a Fraud.—The attending of an auction sale as a puffer is a fraud. *Peck v. List*, 23 W. Va. 400.

Contract Need Not Be Completed Because of.—If the owner of goods or of an estate, put up for sale at auction by his direction employ one or more puffers to bid for him, it is a fraud on the real bidders and the highest bidder can not be compelled to complete the contract. *Peck v. List*, 23 W. Va. 338.

VI. Auction Sales.

See the titles JUDICIAL SALES; SHERIFFS' SALES; VENDOR AND PURCHASER.

A. ENFORCEMENT OF.

See the title JUDICIAL SALES.

1. When Regular.

If a tract of land being advertised to be sold on the premises, be sold at auction, not immediately on the premises, but within eighty yards of the dwelling house, within full view of it, and about fifteen or twenty yards from the boundary line; it being believed by some present that they were actually on the premises; such a sale being regular in other respects, and no fraud appearing, is not to be set aside. *Ferguson v. Franklins*, 6 Munf. 303. See the title JUDICIAL SALES.

2. When by Metes and Bounds—Not by Acreage.

A piece of ground was sold at public auction, expressly according to certain metes and bounds. The purchaser was shown the ground before he became the highest bidder, he being given the opportunity to judge of the ground as to its value, by reason of it being shown him. Whether the ground proved more or less than that claimed,

the purchaser was not entitled to any compensation for a deficiency in size. He paid for what he valued the land, not for the acreage. *Grantland v. Wight*, 2 Munf. 178, 5 Munf. 295. See the titles JUDICIAL SALES; VENDOR AND PURCHASER.

B. NONENFORCEMENT OF.

1. When Agreement Proved Void.

By advertisement signed by the vendors, real estate was offered for sale. Before the auctioneer commenced, he announced that any purchaser should have the right to examine the title, and if he was not satisfied with it, he should not be required to comply with the terms of the sale. As soon as he had knocked off the property to the purchasers, the auctioneer made a memorandum in writing of the contract and signed it, but omitted the stipulation announced as a condition. The purchaser, however, had relied on the announcement, and at once employed counsel to examine the title, who reported that he could not recommend it. Therefore purchaser refused to complete the purchase. It was held, although the vendors could make good title, yet the purchaser could not be compelled to take the property, and specific performance would not be decreed. The parties themselves had stipulated that in a given event, the agreement should be void—and that event came to pass. *Averett v. Lipscombe*, 76 Va. 404, 405.

2. Right of Uninformed Purchaser to Abandon Sale.

A purchaser not informed at the time of his purchase of land at auction, that the title to one moiety thereof is vested in infants, and that it can only be obtained by a suit in chancery, may, when informed of the fact, refuse to proceed with the purchase, and abandon it. *Goddin v. Vaughn*, 14 Gratt. 102. See generally, the titles JUDICIAL SALES; VENDOR AND PURCHASER.

3. Where Puffer or By-Bidder Has Bid.

See ante, "By-Bidders and Puffers," V, C.

A bona fide bidder, to whom property has been knocked down, at an auction, where there has been a puffer or by-bidder, who has bid, is not bound by his bid or purchase, though it be proven that he bought the property at a reasonable price, for the purchaser has a right to repudiate his purchase, if he does so promptly on ascertaining that there was such a puffer or by-bidder, who bid at the auction. *Peck v. List*, 23 W. Va. 338.

4. Chilling Bidding.

All sales made at auction must be open to full and free competition. When prospective purchasers combined to prevent the property bringing a fair price, the sale is invalid. *Underwood v. McVeigh*, 23 Gratt. 426.

C. RIGHTS OF PURCHASERS UNDER.**1. Entitled to Clear Title.**

See the titles JUDICIAL SALES; VENDOR AND PURCHASER.

Deed with Covenants of General Warranty.—The rule is, that where a sale of real estate is made in the ordinary mode and in general terms without any stipulation as to the character of the title which the purchaser is to get, the purchaser is entitled to demand that a clear title shall be made, and that it shall be assured to him by deed with covenants of general warranty. And this rule holds good equally as well when the sale is made at public auction as when it is concluded by private negotiations. *Goddin v. Vaughn*, 14 Gratt. 117.

Deed with Special Warranty.—But in *Fleming v. Holt*, 12 W. Va. 143, it was held, that a purchaser of lands at public auction must look to the title of the grantor of the land, and he is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent: he can not look to

the creditor, for he sells nothing, and is merely to receive the proceeds of the sale.

2. Waiving Rights by Informed Purchaser after Auction.

A purchaser, upon being informed of the state of the title immediately after an auction, plainly manifested his intention to proceed with the purchase, was content to take a conveyance for the one moiety which could be made at once, and to look to the court of chancery for the title to the other moiety, thereby waived the objection which he was entitled to make for the want of a conveyance with general warranty. *Goddin v. Vaughn*, 14 Gratt. 102.

VII. Frauds, Statute of.

See the title FRAUDS, STATUTE OF.

VIII. Jurisdiction.**A. EQUITY CAN RELIEVE WHEN AUCTIONEER IS STAKEHOLDER OR TRUSTEE.**

Where auctioneers are stakeholders and trustees of proceeds of sales by them made, bound to pay them to one or the other of the two parties, upon conditions agreed upon, equity has jurisdiction to relieve, on a bill by one of the claimants against the auctioneers and the other claimants. *Townes v. Birchett*, 12 Leigh 173.

IX. Evidence.**A. PAROL EVIDENCE.**

A piece of ground being sold at public auction, expressly according to certain metes and bounds (then and there shown to the purchaser before he became the highest bidder), be the same more or less; he is not entitled to any compensation for a deficiency, although the previous advertisement described the tenement as containing more than the actual quantity; neither is the case varied by subsequent articles of agreement under seal (written by the purchaser, and signed by the vendor, for the purpose of binding the

vendor to make a title), in which the terms of the sale are referred to, but the quantity of ground mentioned in the advertisement is specified, omitting the words "more or less." The vendor is not precluded by such articles from proving the terms of sale by parol testimony. *Grantland v. Wight*, 2 Munf. 179. See generally, the titles **PAROL EVIDENCE; VENDOR AND PURCHASER.**

In a suit by the vendors of land sold at public auction, against a purchaser to compel him to comply, parol evidence is admissible to prove that a written memorandum of a contract signed by the auctioneer does not contain a stipulation relied on as a general condition. *Averett v. Lipscombe*, 76 Va. 404.

B. CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence may be employed to prove the attending of an auction sale as a puffer. *Peck v. List*, 23 W. Va. 400.

X. Witnesses.

A. DEPUTY SHERIFF.

If a high sheriff bring an action against the purchaser to recover the

purchase money of lands sold by the deputy sheriff at an auction sale, the deputy sheriff is a competent witness for the plaintiff to prove the facts. *Brent v. Green*, 6 Leigh 16.

XI. Taxation.

See generally, the titles **LICENSES; TAXATION.**

A. ON REAL ESTATE AUCTIONEERS.

Amount Taxable.—Under provision of § 50, ch. 245, acts of 1889-90, real estate auctioneers are liable to a tax of one-fourth of one percentum of the amount of their sales, in addition to the specific tax. *Adams v. Walker*, 100 Va. 770, 42 S. E. 866.

Method of Ascertaining Amount to Tax.—The method of ascertaining the amount of the sales of real estate auctioneers, is pointed out by § 44 of the acts of 1889-1890, ch. 244, which requires each of such auctioneers to keep an account of sales made by him, and whenever required by a commissioner of the revenue, to "render an account for assessment of all his sales" under oath. *Adams v. Walker*, 100 Va. 770, 42 S. E. 866.

AUDITA QUERELA.

CROSS REFERENCES.

See the titles **EXECUTIONS; EXECUTIONS AGAINST THE BODY; MOTIONS; SUMMONS AND PROCESS.**

Nature of Proceeding.—Audita querela is an equitable action to be relieved from some oppression or injustice in the proceedings, where the party has had no day in court and can not obtain a writ of error. *May v. State Bank*, 2 Rob. 76.

By What Superseded.—In Virginia the audita querela is entirely superseded in practice, the proceedings by motion being considered the cheaper and more convenient mode. The cases of *Taylor v. Dundass*, 1 Wash. 94; *Hendricks v. Dundass*, 2 Wash. 50; *Downman v. Chinn*, 2 Wash. 189, suffice to show that it has been the constant and

approved practice of our courts to exercise the power of quashing process which has issued irregularly, or been abused in the execution of it, on motion. *Windrum v. Parker*, 2 Leigh 367.

Relief May Be Had upon Motion.—It is well settled by the modern decisions in England and by the uniform practice in Virginia, that the more summary and less expensive mode of proceeding by motion is proper, and that relief may be given in this way in all cases, where by the ancient practice the party would be entitled to an audita querela. *Smock v. Dade*, 5 Rand. 644; *Steele v. Bovd*, 6 Leigh 552.

Auditor.

See the titles MANDAMUS; PUBLIC OFFICERS; STATE.

Australian Election Law.

See the title ELECTIONS.

Authentication of Deeds and Records.

See the titles ACKNOWLEDGMENTS, vol. 1, p. 104; RECORDING ACTS; RECORDS.

AUTHORIZE.—See BE AUTHORIZED.

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AUTREFOIS, ACQUIT AND CONVICT.

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CROSS REFERENCES

See the titles CRIMINAL LAW; EVIDENCE; FORMER ADJUDICATION OR RES ADJUDICATA; IDENTITY; INDICTMENTS, INFORMATION AND PRESENTMENTS; JUDGMENTS AND DECREES; JURISDICTION; JURY; JUSTICES OF THE PEACE; PLEADING; VERDICT.

I. Provisions of Law Relating to Jeopardy.

A. CONSTITUTIONAL PROVISION.

The provision in the constitution of the United States that no person "shall be subject, for the same offense, to be twice put in jeopardy of life or limb," applies as such only to the courts of the United States, and not to the state courts. *Jones v. Com.*, 20 Gratt. 848. See generally, the title CONSTITUTIONAL LAW.

B. COMMON LAW.

Common-Law Maxim Extent in Virginia.—The common-law maxim on which the federal provision relative to jeopardy is founded, exists in Virginia, and goes even further than that provision. For while that is confined, in terms, to cases involving "life or limb," that maxim extends to all criminal cases. *Jones v. Com.*, 20 Gratt. 848.

The common law forbids that there should be a second trial for the same offense, whether the accused has suffered punishment or not, if in the first trial he had been acquitted or convicted. And hence the plea of autrefois acquit, or autrefois convict, is a good defense to a criminal prosecution. *Price v. Com.*, 33 Gratt. 824.

For matters relative to the plea of autrefois, acquit or convict, see post, "General Consideration of the Plea of Autrefois, Acquit and Convict," IV.

"No man can be twice punished for the same offense. In civil cases the maxim is, *nemo debet bis venari pro uno et eadem causa*. In criminal law the same principle is expressed in the Latin phrase, *nemo debet bis puneri pro uno delicto*. Ex parte Lange, supra, was decided mainly upon this principle—that is, that no one ought to be punished twice for the same offense." *Price v. Com.*, 33 Gratt. 824. See generally, the title CRIMINAL LAW.

Assignment and plea are necessary. *State v. Conkle*, 16 W. Va. 736; *Bailey's*

Case, 1 Va. Cas. 261. See also, the title CRIMINAL LAW.

II. What Constitutes a Jeopardy.

A. GENERAL RULE.

In order to make the defense of former jeopardy with success, the party relying thereon must show that he has been put upon trial before a court which has jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and that a jury has been empaneled and sworn, and thus charged with his deliverance. Anything short of this, is insufficient to raise a bar against a new indictment or prosecution for the same offense. *Dulin v. Lillard*, 91 Va. 722, 20 S. E. 821. See generally, the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JURY.

B. ESSENTIAL ELEMENTS.

1. Competent Jurisdiction of the Trial Court.

See generally, the title JURISDICTION.

a. In General.

It must appear that the trial court was one of competent jurisdiction in order that a former conviction or acquittal of the accused may operate as a bar to further prosecution. *Bailey's Case*, 1 Va. Cas. 261; *Dulin v. Lillard*, 91 Va. 722, 20 S. E. 821. See also, *Day v. Com.*, 23 Gratt. 915; *Marshall v. Com.*, 20 Gratt. 845.

b. Discharge of Accused.

An examining court, without authority to do so, acquits defendant of murder and remands him to be tried for manslaughter. This does not bar the superior court from indicting him for murder. *Bailey's Case*, 1 Va. Cas. 258; *Com. v. Myers*, 1 Va. Cas. 188; *Sorrell's Case*, 1 Va. Cas. 253. See post, "Omission to Exercise Optional Jurisdiction," II, B, 1, e.

Pending Cases Fall with Repealing or Amending Statute.—Where original jurisdiction of certain criminal cases is taken from the circuit courts by a repealing or amending statute, and no provision is made for cases pending therein, such cases fall with the statute, and a subsequent order of a circuit court discharging a person held for trial under an indictment originally found in said circuit court, is a nullity, and does not relieve the prisoner from liability to further prosecution. *Dulin v. Lillard*, 91 Va. 719, 20 S. E. 821. See generally, the title **STATUTES**.

c. Effect of Removal of Indictment to a Court Having No Jurisdiction.

On indictment for a felony, the indictment was removed from the county to the corporation court. The corporation court had no jurisdiction. It was held to invalidate that indictment but to be no bar to a new indictment. *Marshall v. Com.*, 20 Gratt. 845. See post, "Must Have Been Tried on a Good Indictment or Information," II, B, 2.

d. Variance in Warrant Ignored by Consent of Accused.

Consent can not confer jurisdiction of the subject matter, but may confer jurisdiction of the person, and may operate as a waiver of irregularities in the warrant of arrest; and when the trial is on the merits, the mere omission of the word "feloniously" in a warrant for larceny will not prevent an acquittal from being a complete bar to further prosecution, provided no objection was taken to such omission. *Jones v. Morris*, 97 Va. 43, 33 S. E. 377.

e. Omission to Exercise Optional Jurisdiction.

An acquittal in the examining court is no bar to an indictment in the superior court, except when the record shows that the discharge was upon an examination of the facts charged. *McCann's Case*, 14 Gratt. 570; *Lindsay's Case*, 2 Va. Cas. 345; *Wortham's Case*,

5 Rand. 669; *Myers' Case*, 1 Va. Cas. 188; *Sorrell's Case*, 1 Va. Cas. 253. See ante, "Discharge of Accused," II, B, 1, b.

Order of Dismissal by Examining Court.—On indictment for a felony, an entry on the record of the examining court that it is "ordered that this case be dismissed" does not bar a subsequent prosecution. Such words do not convey the idea of trial and acquittal, but have had a definition affixed to them, by judicial decisions and analogous cases, importing a cessation of the proceedings without any examination of the cause upon its merits. *McCann's Case*, 14 Gratt. 581.

Cause Remanded to County Court by a Justice.—Where a justice has power to try and punish or send to county court for trial and he does only the latter, his action can not be set up in bar of trial in county court. *Wolverton v. Com.*, 75 Va. 909.

2. Must Have Been Tried on a Good Indictment or Information.

a. General Rule.

To support the plea of former jeopardy the indictment or information upon which the defendant was put on trial must have been sufficient in form and substance. *Dulin v. Lillard*, 91 Va. 722, 20 S. E. 821; *Randall v. Com.*, 24 Gratt. 644; *Richards v. Com.*, 81 Va. 110.

And where there is no indictment there is no jeopardy. *Bailey's Case*, 1 Va. Cas. 261.

Formal Defects in the Charge of a Misdemeanor.—A reversal, at the instance of the prisoner, of the judgment of a justice of the peace, for formal defects in the charge of a misdemeanor, is no bar to further prosecution for the same offense. *Watts v. Com.*, 99 Va. 872, 39 S. E. 706. See post, "Presumptions and Implication of Waiver after Verdict," IV, H, 2.

b. Material Variance.

See generally, the title **VARIANCE**.

Variance between Allegata and Probata.—An acquittal on account of a variance between allegations in the indictment and proof at the trial is not a bar to another prosecution for the same offense. *Com. v. Adcock*, 8 Gratt. 661. See also, *Robinson v. Com.*, 32 Gratt. 870. See generally, the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**.

Discrepancy in Amount of Order Forged.—An indictment for forging an order for \$47.23 is not barred by a previous acquittal of charge for forging an order for \$47.25; the latter charge having failed because of a material variance. *Burress v. Com.*, 27 Gratt. 934.

Certificate of Facts and Indictment.—On an indictment for grand larceny of certain United States treasury notes, or bank notes, the certificate of facts did not show that the subject proved to have been stolen was the same as that charged in the indictment, and a conviction on such indictment was reversed. The former conviction in the lower court, however, was no bar to a subsequent prosecution for the same offense. *Johnson v. Com.*, 24 Gratt. 555.

c. Quashal of Indictment.

An acquittal obtained by the first verdict is not affected, if the indictment on which it was founded is afterwards quashed by the court on the motion of the attorney for the commonwealth. *Stuart v. Com.*, 28 Gratt. 950.

Same Rights under Second Indictment as under the First.—A prisoner is not entitled to be discharged from prosecution on another indictment for the offense of which he was convicted in the first indictment, because that indictment was subsequently quashed; he would have every right under the second indictment that he had under the first, and no more. *Stuart v. Com.*, 28 Gratt. 950.

Quashal Set Up by Way of Rejoinder.—A prisoner when arraigned

pleads in abatement that he has not been tried by an examining court for the offense for which he has been indicted. The attorney for the commonwealth files a defective replication, to which the prisoner demurs; and the court sustains the demurrer and quashes the indictment. The prisoner is then again indicted without any other trial before an examining court; and he pleads in abatement again the want of a trial for the offense before the examining court. To this plea the attorney for the commonwealth replies that he has been tried by the examining court, and vouches the record; and then the prisoner rejoins setting up the quashing of the former indictment as a bar to any other and subsequent indictment against the prisoner for the same offense, based upon the trial by the examining court which had been had before the first indictment. Held, that the matters set up in the rejoinder constitute no bar to the prosecution. *Souther v. Com.*, 7 Gratt. 673.

d. Insufficient Description.

An indictment charging the prisoner with stealing certain papers of the value of \$110, not otherwise describing the papers charged to have been stolen, is fatally defective. The charge of stealing certain papers was altogether too vague and indefinite. An acquittal on such an indictment will not bar a subsequent prosecution. *Robinson v. Com.*, 32 Gratt. 870.

e. Nolle Prosequi by Commonwealth's Attorney.

The indictment being defective, the proceedings in the case will not prevent the finding of another indictment against the prisoner for the same offense, after the attorney for the commonwealth has, with the consent of the court, entered a nolle prosequi upon the pending indictment. *Randall v. Com.*, 24 Gratt. 644. See also, *Robinson's Case*, 32 Gratt. 870; *Stuart v.*

Com., 28 Gratt. 950. See post, "Nolle Prosequi," II, E.

3. Jury Must Pass upon the Case.

See post, "Discharge of Jury before Rendition of Valid Judgment," II, C, 2.

A prisoner can not be said to be twice put in jeopardy, unless he has been already once tried; that is, unless a jury has once passed upon his case. *Com. v. Fells*, 9 Leigh 613. See also, *Dulin v. Lillard*, 91 Va. 722, 20 S. E. 821. See generally, the title JURY.

C. MODIFICATIONS OF THE DOCTRINE OF JEOPARDY.

1. Convictions Obtained by Fraud.

If a person charged with an assault and battery, be recognized to appear at the next superior court to answer an indictment to be then and there preferred against him for the said offense, in the meantime fraudulently procure himself to be indicted for the same offense in the county court, and confess his guilt, and a small amercement be thereupon assessed on him, such fraudulent prosecution and conviction, present no bar to the indictment preferred against him in the superior court. *Com. v. Jackson*, 2 Va. Cas. 501.

2. Discharge of Jury before Rendition of Valid Verdict.

See ante, "Jury Must Pass upon the Case," II, B, 3.

a. Prior to Act of 1848.

In case of necessity the judge may discharge the jury, and try the prisoner again before new jury, though the offense be a felony. But in case of felony, mere inability of the jury to agree presents no such case of necessity, and a discharge of the jury for that cause alone will bar a subsequent prosecution for the same offense. *Logan v. Com.*, 2 Gratt. 571. See also, *Com. v. Fells*, 9 Leigh 613.

On the trial for a felony, the court has no authority to discharge the jury without the consent of the prisoner, merely because the court is of opinion

that the jury will not be able to agree. There must be a necessity for the discharge of the jury to authorize it. If the court improperly discharges the jury without the consent of the prisoner, he is entitled to be discharged from the prosecution. *Williams v. Com.*, 2 Gratt. 567.

In case of misdemeanor the court may discharge the jury against the consent of defendant, and such discharge is no bar to subsequent prosecution for same misdemeanor. *Dye v. Com.*, 7 Gratt. 662.

Adjournment of Court without Discharging Order.—It is not sufficient ground for a discharge of a prisoner from further prosecution, under an indictment, that at a former term of the court, he had been arraigned upon the said indictment, a jury had been impaneled, been charged with his case, had retired to consult of their verdict, and, not agreeing, were confined the full legal term of the said court, and did not render any verdict in the case, but separated in the adjournment of the court at the end of the term without an order discharging them. *Com. v. Thompson*, 1 Va. Cas. 319. See generally, the title ADJOURNMENT, vol. 1, p. 179.

b. Subsequent to Act of 1848.

When Objected to Action of Court May Be Reviewed.—Under § 12, ch. 202, Va. Code, 1873, in any criminal case the court may discharge the jury when it appears they can not agree in a verdict, or that there is manifest necessity for such discharge, and such discharge is no bar to a subsequent prosecution for the same offense. But if such discharge is objected to, and exception taken, the action of the court may be reviewed in the appellate court. *Wright v. Com.*, 75 Va. 914. This section is re-enacted in Va. Code, 1887, § 4026, and was applied in case of *Jones v. Com.*, 86 Va. 740, 10 S. E. 1004. See also, *Crookham v. State*, 5 W. Va. 510.

No Injury when Indictment Is Defective.—On a trial for stealing certain bank notes, "the numbers and denomination of which are unknown to the jurors," the evidence of the commonwealth shows that the number and denomination of the notes were known to the jurors, and for this variance between the indictment, and the evidence, the court, on the motion of the prisoner, excludes the evidence, and then, against the objection of the prisoner, discharges the jury. On a second indictment for the same offense; held, that if the jury had, on the first trial, rendered a verdict in favor of the prisoner, it would not, under the statute, Va. Code, 1860, ch. 199, § 16, have been a bar to another indictment and trial for the same offense; and therefore the discharge of the jury was no injury to the prisoner. *Robinson v. Com.*, 32 Gratt. 866. See ante, "Material Variance," II, B, 2, b.

c. Without Knowledge of Nonassent of a Juror.

Verdict a Nullity for Lack of Assent.—Discharge of jury by the court, without knowing that one of the jury did not assent to the verdict which error rendered the verdict a nullity is no bar to a prosecution on a new indictment. *Gibson v. Com.*, 2 Va. Cas. 111-120. See generally, the title VERDICT.

D. DISCHARGE BY OPERATION OF THE STATUTE LIMITING TIME FOR PROSECUTION.

See generally, the titles CRIMINAL LAW; LIMITATION OF ACTIONS.

A discharge by operation of the statute of limitation is a bar to further prosecution for the same offense. *Com. v. Adcock*, 8 Gratt. 661.

As to autrefois acquit in general, see Va. Code, 1887, §§ 3893, 3894, 4026-4040.

E. NOLLE PROSEQUI.

See generally, the title DISMIS-

SAL, DISCONTINUANCE AND NONSUIT.

The dismissal of a presentment by the court, at the instance of the attorney for the commonwealth, is not an acquittal. It is an informal nolle prosequi. *Wortham v. Com.*, 5 Rand. 669.

Nolle Prosequi No Bar.—A nolle prosequi entered by commonwealth's attorney in a justice's court on examining trial, is not a bar to further prosecution for felony. *Lindsay v. Com.*, 3 Va. Cas. 345; *Wortham's Case*, 5 Rand. 669; *Archer's Case*, 10 Gratt. 627; *Randall's Case*, 24 Gratt. 644; *Robinson's Case*, 32 Gratt. 870; *Stuart v. Com.*, 28 Gratt. 950.

Grade of Offense Too Low.—When the prosecuting attorney thinks that the prisoner should be indicted for a higher grade of offense, and enters a nolle prosequi to the indictment brought in by the grand jury, no discharge is effected, and the accused may be indicted by a subsequently impaneled grand jury. *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

F. VERDICT AND JUDGMENT SET ASIDE.

See post, "Waiver of Right to Plead Former Jeopardy," IV, H.

Essential Omitted.—A verdict, set aside by the court for lack of an ingredient essential to constitute the offense charged, is no bar to a subsequent indictment for the same offense. *Com. v. Percavil*, 4 Leigh 686. See also, *Com. v. Hatton*, 3 Gratt. 623. See generally, the title VERDICT.

Arrest of Judgment by the Court before Adjournment.—Upon the trial of P. for murder, the jury found him not guilty of murder, but guilty of involuntary manslaughter, and assessed upon him a fine of \$500. The court thereupon entered a judgment discharging him. At the same term of the court in the absence of P., the court set aside the judgment and entered a judgment against him for the

fine of \$500, and six months' imprisonment, and directed him to be arrested and committed to prison. It was held, that the first judgment was erroneous, and that during the same term of the court the matter was under the control of the court; and it was competent for the court to set aside the first, and render the second judgment; and that it was not necessary that P. should be present in court, when the second judgment was entered. Such action on the part of the court did not subject the defendant to punishment twice for the same offense. *Price v. Com.*, 33 Gratt. 824.

Reversal of Judgment of Conviction.

—Where a judgment on a verdict of guilty on an indictment for felony is reversed by the court of appeals, the prisoner is not entitled to a discharge under the constitutional provision, that no person shall be twice put in jeopardy for the same offense. *Younger v. State*, 2 W. Va. 579.

Plea by Attorney and Not by Defendant—Appearance.—Where a judgment against the defendant on a verdict of guilty on an indictment for felony is reversed by the appellate court, because the verdict was rendered upon a plea of not guilty pleaded by the defendant by his attorney and not in person, the prisoner is not entitled to a discharge under the constitutional provision, that no person shall be twice put in jeopardy for the same offense. *State v. Conkle*, 16 W. Va. 736.

III. Identity of Offenses.

See post, "Identity of Offenses," IV, C, 2.

A. IN GENERAL.

Two Persons Shot by the Same Discharge.—Both act and crime must be the same. On indictment for shooting J. W. a plea of autrefois acquit is not sustained by record showing acquittal of shooting S. W., though the act of shooting be the same. *Vaughan v. Com.*, 2 Va. Cas. 273. See also, *Day*

v. Com., 23 Gratt. 915; *Page v. Com.*, 27 Gratt. 954; *Com. v. Somerville*, 1 Va. Cas. 164. See post, "Responsiveness of Verdict," IV, G.

B. CONVICTION ON ONE OR MORE COUNTS.

See post, "Limitations and Exceptions," IV, H, 2, b. See generally, the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; VERDICT.

1. When Verdict Is Silent as to Others.

It is well settled law in this state, that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice; and the court should enter a judgment accordingly. *Stuart v. Com.*, 28 Gratt. 950. See also, *Com. v. Bennet*, 2 Va. Cas. 235; *Page v. Com.*, 26 Gratt. 943.

Silence Equivalent to an Acquittal.

—The jury by their verdict say P. is guilty of murder in the second degree as charged in the fourth count in the indictment, and fix the term of his imprisonment in the penitentiary, saying nothing as to the other counts of the indictments. This is an acquittal on the other counts, and is a sufficient finding under the fourth count. *Hawley v. Com.*, 75 Va. 847.

Conviction of Forgery, Acquittal of Uttering Forged Instruments.—An indictment contains two counts, one for forgery and another for feloniously using as true a counterfeit note. Held, a verdict finding the persons guilty of forgery, is an acquittal of the charge in the second count. *Page v. Com.*, 9 Leigh 683; *Kirk v. Com.*, 9 Leigh 627. See generally, the title FORGERY AND COUNTERFEITING.

2. When Verdict Acquits of Others.

Guilty on One, Not Guilty as to Others.—On indictment on several

counts when jury finds defendant guilty on one and not guilty as to others, when a new trial is granted defendant can only be tried as to the count on which he was found guilty at the previous trial. *Lithgow v. Com.*, 2 Va. Cas. 297.

The first count in an indictment charges malicious stabbing, the second unlawful stabbing. The verdict finds defendant guilty on second count and not guilty on first count. Held, though new trial granted because verdict was uncertain, yet the second trial must be confined to the second count. *Marshall v. Com.*, 5 Gratt. 663.

3. When Others Are Adjudged Bad.

On indictment for arson containing two counts, one is adjudged bad. Held, on new trial granted, defendant could not be indicted for offense charged in the bad count, the previous trial being an acquittal as to that. *Richards v. Com.*, 81 Va. 110.

C. ACT INVOLVING SEVERAL DISTINCT OFFENSES.

1. Sales of Liquor in Violation of Several Statutes.

Violations of Sunday and Revenue Laws.—Prosecution for selling liquor on Sunday contrary to Va. Code, § 3804, is no bar to prosecution for selling same liquor without license contrary to acts 1889-90, p. 242, § 1. *Arrington v. Com.*, 87 Va. 96, 12 S. E. 224. See generally, the titles SUNDAYS AND HOLIDAYS; LICENSES.

2. Misdemeanors Committed in the Perpetration of Felonies.

A conviction of assault and battery before a justice of the peace, who has no jurisdiction of felonies does not operate as a bar to an indictment for a felony in the perpetration of which the assault and battery was committed; and this would be true though conviction was in a county court which generally has jurisdiction of both mis-

demeanors and felonies. *Murphy v. Com.*, 23 Gratt. 960.

D. CRIME INCLUDING SEVERAL OFFENSES.

1. Conviction of Lower on Prosecution for Higher.

On an indictment for malicious assault the verdict of "not guilty of malicious assault as charged in the indictment but guilty of assault and battery as charged in the indictment" is an acquittal of the felony and conviction of a misdemeanor. *Canada v. Com.*, 22 Gratt. 899; *Montgomery's Case*, 98 Va. 843, 36 S. E. 371; *Stuart v. Com.*, 28 Gratt. 950.

The maximum punishment determines the grade of the offense, and so a conviction for unlawful shooting which is punishable as a felony or misdemeanor in the discretion of the jury, is no bar, when the verdict is set aside, to trial for a felony. Va. Code, 1887, § 4040, has no application in such case. *Forbes v. Com.*, 90 Va. 550, 19 S. E. 164. See also, *Benton's Case*, 91 Va. 790, 21 S. E. 495.

Murder.—See also, the title HOMICIDE.

In *Livingston's Case*, 14 Gratt. 592-606, the court by way of obiter dicta, considers that by the weight of authority, though there be only one count, a verdict of murder in the second degree on a charge of murder is an acquittal of murder in the first degree. In *Gwatkin v. Com.*, 9 Leigh 678; *Ball v. Com.*, 8 Leigh 726, the question was not raised.

Defendant *Stuart* was indicted for malicious assault. He was convicted of unlawful assault. This verdict was set aside, and a new trial granted. Held, the second trial could only be for unlawful assault, the previous verdict being equal to an acquittal of malicious assault. By way of obiter the court says that this rule applies when there is only one count; and that when there is one count for murder

and verdict of manslaughter this is an acquittal of murder. But up to time of this decision the question was still open in Virginia. *Stuart v. Com.*, 28 Gratt. 950.

Dictum in West Virginia.—In West Virginia there is a dictum to the effect that, in the absence of statute, a conviction of murder in the second degree would, when the verdict was set aside, be a bar to conviction of murder in the first degree. *State v. Cross*, 44 W. Va. 315, 29 S. E. 527.

Under § 25, ch. 17, acts of 1877-78, it was decided that though tried for murder and convicted of murder in the second degree, when such verdict was set aside the prisoner could be tried and convicted of murder in the first degree. *Briggs v. Com.*, 82 Va. 554. This changes the rule laid down in *Stuart v. Com.*, 28 Gratt. 950. See also, *Benton's Case*, 91 Va. 790, 791, 21 S. E. 495, decided under the revision of 1887.

Rule Prescribed by the Act of 1877-78 Modified.—In the general revision of the civil and criminal laws made by the Va. Code, 1887, the rule prescribed by the act of 1877-78, under which the case of *Briggs v. Com.*, 82 Va. 554, was tried, was modified, and this provision: "If the verdict be set aside and a new trial granted to the accused, he shall not be tried for a higher offense than that of which he was convicted on the last trial," was enacted in its stead. Section 4040, Code, 1887. The legislature intended by this statute that a person indicted for murder and convicted of murder of the second degree, should not, if granted a new trial, be again liable to conviction for murder of the first degree, for which death was the penalty, while the maximum punishment for murder in the second degree is confinement in the penitentiary for eighteen years; or, if convicted of voluntary manslaughter, for which the maximum punishment is confinement for five

years in the penitentiary, should not be again put upon trial for either murder of the first or second degree. *Benton's Case*, 91 Va. 790, 791, 21 S. E. 495.

2. Acquittal of Greater Barring Prosecution for Lesser.

An acquittal for murder is a bar to prosecution for petit treason. *Lambert's Case*, 9 Leigh 606.

3. Acquittal of Lesser Barring Prosecution for Greater.

An acquittal for manslaughter is a bar to prosecution for murder. *Lambert's Case*, 9 Leigh 606. See ante, "Conviction of Lower on Prosecution for Higher," III, D, 1.

E. CONVICTION OF ONE OFFENSE NO BAR TO PROSECUTION FOR ANOTHER COMMITTED AT THE SAME TIME.

A conviction for advising one slave to abscond is not a bar to a conviction for advising another to abscond though the advice was given to both at the same time. *Smith v. Com.*, 7 Gratt. 593. See also, *Com. v. Kinney*, 2 Va. Cas. 140; *Vaughan v. Com.*, 2 Va. Cas. 273.

F. RULE AS TO CONTINUING OFFENSES.

Housebreaking and larceny may be charged in one count as they may constitute a continued act; and where defendant is judged guilty on such count and the verdict is set aside, he may be convicted of either offense provided the maximum penalty for that offense is no greater than that provided for the offense of which he was formerly convicted. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495. See generally, the titles **BUPLARY AND HOUSEBREAKING; LARCENY.**

G. ACQUITTAL OF CODEFENDANT NO BAR TO PROSECUTION OF THE ACCUSED.

Acquittal of defendant's associate,

when defendant is himself a fugitive from justice, is no bar to conviction of defendant. *Williams v. Com.*, 85 Va. 607, 8 S. E. 470. See generally, the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74.

IV. General Consideration of the Plea of Autrefois Acquit and Convict.

See generally, the title PLEADING.

A. NECESSITY FOR THE PLEA.

To avail himself of the defense of twice in jeopardy, the defendant must plead autrefois acquit and convict, which is said to be an essential prerequisite to the introduction of the record of the prior procedure. *Justice's Case*, 81 Va. 218.

B. NATURE AND FORM.

The plea of autrefois acquit is a special plea in bar. *Page v. Com.*, 27 Gratt. 954.

Informality Does Not Affect if Good in Substance.—Plea of autrefois acquit though informal will be sustained on demurrer if good in substance. *Day v. Com.*, 23 Gratt. 915, Va. Code, 1887, § 3272.

C. ESSENTIALS.

1. In General.

Court Will Reject on Motion.—A plea which does not set forth the court in which, nor the time when, nor any other circumstance of the prosecution, trial or acquittal, and which does not vouch the record of the same court, nor show the record of acquittal if of another court, should be rejected on motion. Neither a demurrer nor plea is necessary in such case. *Wortham v. Com.*, 5 Rand. 669-677.

2. Identity of Offenses.

See ante, "Identity of Offenses," III. **Forged Order and False Privy Token.**—Defendant was prosecuted for fraudulently obtaining goods by means of a false privy token. He pleaded ac-

quittal of the felony of forging an order and uttering as true a forged order. The forged order and privy token were the same. Held, the acquittal was no bar, the offenses being different. *Com. v. Quann*, 2 Va. Cas. 89.

Distinct Offense Apparent.—A plea of autrefois acquit showing on its face a distinct offense from that for which prisoner is indicted, is demurrable. *State v. Evans*, 33 W. Va. 417, 10 S. E. 792.

Assault and Battery, and Riot.—The plea of autrefois convict of the crime of assault and battery will constitute a good bar to prosecution on an indictment for riot, when it is shown that the riotous conduct of the accused was given in evidence to the jury impaneled at the former trial, in aggravation of the said assault. *Kinney's Case*, 2 Va. Cas. 140.

Christian Names Not Identical.—Plea of acquittal of burning barn of Josiah Thompson can not be pleaded in bar on an indictment for burning barn of Josias Thompson. *Com. v. Mortimer*, 2 Va. Cas. 325. See also, *Page v. Com.*, 27 Gratt. 954.

3. Identity of Person.

See generally, the title IDENTITY. The plea of autrefois acquit must aver not only that the second prosecution is for the same offense but that defendant is the identical person who was proceeded against in the first prosecution. *Justice v. Com.*, 81 Va. 209-218.

The plea of autrefois acquit must show the identity of accused with person formerly acquitted. *State v. Cross*, 44 W. Va. 315, 29 S. E. 527; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792.

4. Trial in Due Form.

Must Have Been Indicted and Arraigned.—The plea of former acquittal or conviction must show that the accused was acquitted or convicted in due form. Where the accused was neither arraigned nor indicted there can

be no acquittal or conviction. *Bailey's Case*, 1 Va. Cas. 261. See also, *State v. Conkle*, 16 W. Va. 736. See ante, "Must Have Been Tried on a Good Indictment or Information," II, B, 2.

D. REPLICATION—"NO GOOD RECORD."

See generally, the title **REPLICATION**.

No Such Record.—Persons indicted for burning the house of R. plead autrefois acquit of same offense on same evidence, making the record part of the plea. Held, a reply "no such record" is sufficient, as it denies an essential part of the plea. *Page v. Com.*, 27 Gratt. 954. See also, *McCann's Case*, 14 Gratt. 570; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792.

The court may reject a plea of former acquittal or conviction which does not vouch the record of the trial court, nor show the record of acquittal if of another court, on motion. Neither a demurrer nor plea is necessary in such case. *Wortham v. Com.*, 5 Rand. 669-677.

Replication Showing Fraud Is Good.

—The plea of autrefois convict, in a case of fraudulent conviction, being replied to specially, the replication which sets forth such fraudulent prosecution and conviction, being well drawn, is a sufficient answer to the defendant's plea, and should be adjudged good on demurrer. *Com. v. Jackson*, 2 Va. Cas. 501.

As to convictions procured by fraud, see ante, "Convictions Obtained by Fraud," II, C, 1.

Special Replication Good until Demurrer Is Withdrawn.—On the arraignment of a prisoner on a charge of felony, he files a special plea of autrefois acquit, to which the attorney for the commonwealth files a special replication; and to this replication the prisoner demurs. The demurrer being overruled, the prisoner can not rejoin to the replication without with-

drawing his demurrer. *Page v. Com.*, 27 Gratt. 954.

E. EVIDENCE IN SUPPORT OF PLEA.

See generally, the title **EVIDENCE**.

The plea of autrefois convict to operate as a bar must show by record the identical offense with which the prisoner is charged. *Com. v. Somerville*, 1 Va. Cas. 164.

Parol evidence may be introduced to show the person is the same, and the offense the same, but not to vary the record, which is conclusive. *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367.

Necessity for Production of Record.

—There is no doubt, but that the transcript of the record pleaded, or the records themselves ought to be produced to the circuit court when the plea of autrefois acquit is pleaded. *Com. v. Myers*, 1 Va. Cas. 232. See also, *Com. v. Somerville*, 1 Va. Cas. 164.

Entry by clerk in the minute book of the making of a presentment is a sufficient record of such presentment though not spread at large in the minutes. *Myers v. Com.*, 2 Va. Cas. 160.

F. TRIAL OF ISSUES.

One Jury or Two.—On a plea of autrefois acquit, when the general issue is also put in, the question whether there shall be one jury or two, is in the sound discretion of the court. If the trial is by only one jury, the verdict must respond to both issues. *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367.

G. RESPONSIVENESS OF VERDICT.

If the prisoner, to an indictment for shooting J. W. plead that she had been indicted and acquitted of the shooting of S. W. and that the shooting of which she is indicted is the identical shooting of which she had before been acquitted. and no other. and the ver-

dict find "that she hath not before been acquitted of the same offense," this finding is sufficiently responsive to the issue on that plea, and therefore good. *Vaughan v. Com.*, 2 Va. Cas. 273. See ante, "Identity of Offenses," IV, C, 2.

H. WAIVER OF RIGHT TO PLEAD FORMER JEOPARDY.

See generally, the title **WAIVER**.

1. Constitutionality of Statute.

Section 25, ch. 17, acts, 1877-78, declaring that "if a verdict be set aside on the motion of the accused, and a new trial awarded, on such new trial the accused shall be tried, and such verdict may be found and sentence pronounced as if the former verdict had not been found," is valid and constitutional. *Briggs v. Com.*, 82 Va. 560.

2. Presumptions and Implication of Waiver after Verdict.

See ante, "Verdict and Judgment Set Aside," II, F.

a. In General.

Where the accused has been convicted of an unlawful assault, having moved for a new trial, he is conclusively presumed to have waived all objections to being put a second time in jeopardy for that offense. *Stuart v. Com.*, 28 Gratt. 966. See also, *Lithgow v. Com.*, 2 Va. Cas. 298; *Benton's Case*, 91 Va. 782, 21 S. E. 495; *Com. v. Hatton*, 3 Gratt. 623.

Order of Supreme Court Reversing Circuit Court.—Where a petition in error has been filed by the accused, an order of the supreme court reversing a judgment of the circuit court and its sentence of death, and remanding the cause to the county court for examination, does not place the prisoner in jeopardy a second time, nor bar future prosecution for the same offense. *State v. Strauder*, 11 W. Va. 745. See also, *Younger v. State*, 2 W. Va. 579.

On indictment for malicious assault with intent to maim, etc., a verdict that defendant is guilty of malicious as-

sault is defective, and judgment on such verdict should be reversed on motion of the prisoner. But this is no bar to a new trial for the same offense. *Jones v. Com.*, 87 Va. 63, 12 S. E. 226.

No Punishment Fixed.—A verdict, set aside on petition of the accused because it fixes no punishment, is not a bar to a subsequent indictment. *Mills v. Com.*, 7 Leigh 751.

New Trial Granted because of Erroneous Continuance.—A prisoner is not entitled to be discharged from prosecution for an offense merely because a new trial has been granted him on the ground that his case had been erroneously continued at one term of a county court on the motion of the commonwealth, against his protest. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

Conviction and sentence for a less term than the minimum fixed by law is no bar to a subsequent conviction. The judgment will be reversed upon the application of the prisoner. *Jones v. Com.*, 20 Gratt. 848; *Nemo v. Com.*, 2 Gratt. 558; *Mill's Case*, 7 Leigh 751. See also, *Ex parte Marx*, 86 Va. 47, 9 S. E. 475.

Verdict Improperly Signed.—Where the verdict is set aside, on petition in error by the prisoner, because improperly signed by one who does not appear to be a juror, the judgment will be set aside; but this does not bar a new trial for the same offense. *Younger v. State*, 2 W. Va. 579. See also, *Armistead v. Com.*, 11 Leigh 657; *Washington v. Com.*, 86 Va. 405, 10 S. E. 419; *Dejarnette v. Com.*, 75 Va. 867.

Uncertain Verdict.—On indictment for felony the verdict was too uncertain and was accordingly set aside. The clerk, however, entered up judgment in the usual form. Held, such judgment based on such uncertain verdict and ordered set aside by the court was no bar to a subsequent indictment. *Com. v. Hatton*, 3 Gratt. 623. See also, *Com. v. Percavil*, 4 Leigh 686; *Mar-*

shall *v. Com.*; 5 Gratt. 663. See generally, the title VERDICT.

Juror Biased.—A judgment reversed on petition in error because one of the jurors was not indifferent, is no bar to new trial. *Armistead v. Com.*, 11 Leigh 657; *Washington v. Com.*, 86 Va. 405, 10 S. E. 419; *Dejarnette v. Com.*, 75 Va. 867. See generally, the title JURY.

No Evidence.—On an indictment for murder when there is no evidence to sustain the charge, judgment will be reversed at the instance of the prisoner. But this does not bar a new trial for the same offense. *Grayson v. Com.*, 6 Gratt. 713.

Insufficiency of Evidence.—A verdict, set aside on petition of the prisoner because of insufficiency of evidence to sustain it, is no bar to an indictment for the same offense. *Ball v. Com.*, 8 Leigh 726.

Evidence Erroneously Admitted.—If a judgment is reversed on petition of the accused, because of evidence erroneously admitted, the case will be remanded for a new trial, such former trial being no bar. *Crookham v. State*, 5 W. Va. 510.

Misdirection as to Punishment.—Where the jury is misdirected as to the minimum punishment, the judgment should be set aside, on motion of the accused, and a new trial awarded. Nor can the commonwealth's attorney remit the punishment and so correct the error. *Allen v. Com.*, 2 Leigh 727.

A sentence to punishment, not authorized by the statute, is a ground for reversal on application of the defendant, but such trial and sentence is no bar to new trial. *Ex parte Marx*, 86 Va. 40-47, 9 S. E. 475. See also, *Young's Case*, 1 Rob. 744. See generally, the title SENTENCE AND PUNISHMENT.

b. Limitations and Exceptions.

See ante, "Conviction of Lower on Prosecution for Higher," III, D, 1.

(1) Conviction of One Offense, Acquittal of Others Charged in the Same Count.

Where there is but one count in the indictment upon which the accused may be convicted of one of several offenses which are covered by the indictment, a verdict of guilty, as to one of the said offenses, is a verdict of acquittal of all the others of a higher grade of offense. And where in such case, the accused applies for and obtains a new trial, he does not thereby waive the advantage of such acquittal. *Stuart v. Com.*, 28 Gratt. 950.

(2) General Conviction on a Count Charging More than One Offense.

Waiver Limited to Offenses Subject to No Higher Punishment.—Where more than one offense is distinctly or substantially charged in one count of an indictment and there has been a verdict of conviction thereon which has been set aside, and a new trial awarded, on such new trial the accused shall remain liable to be convicted of any offense charged in the indictment for which there is no severer penalty than for the offense of which he was convicted. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495. Compare *Briggs v. Com.*, 82 Va. 554.

(3) Conviction under One Count Acquittal under Others.

Advantage of Acquittal Retained on Counts Ignored.—Where there are several counts in an indictment, and the jury find the accused guilty on one count, saying nothing as to the others, the verdict operates as an acquittal upon the counts ignored, and in such a case, if the accused applies for and obtains a new trial, he does not thereby waive the advantage of the acquittal thus obtained. *Stuart v. Com.*, 28 Gratt. 950. See also, *Lithgow v. Com.*, 2 Va. Cas. 297. See ante, "When Verdict Is Silent as to Others," III, B, 1.

Offenses Different Though Indictments Similar.—Upon the trial of the

issue on the plea of autrefois acquit, an instruction to the jury, that if they believed, etc., that the house named in the indictment, for the burning of which the prisoner was arraigned and tried at a previous term of the court, is not the same house, nor the same burning charged in the indictment upon which he now stands arraigned, then they must find against the prisoner on the issue joined, is correct. And it makes no difference that the offenses charged in the two indictments are described as the burnings of the dwelling house of R, if the jury believe that, in reality, distinct houses and distinct burnings are referred to in the two indictments. *Page v. Com.*, 27 Gratt. 954. See post, "Identity of Offenses," IV, C, 2.

V. Bail and Recognizance.

See the title BAIL AND RECOGNIZANCE.

Bail Can Not Plead Acquittal of

Principal.—In the case of a scire facias against bail upon a recognizance in a case of felony, a plea which alleges that at the time the recognizance was entered into the principal was by law acquitted and discharged of the said several supposed offenses of which he stood charged, presents no defense for that bail; and this whether the plea is to be considered as averring an acquittal of the principal upon a trial, or his discharge by operation of law for the failure to try him within three terms of the court. *Archer v. Com.*, 10 Gratt. 627.

Surety Can Not Set Up Nolle Prosequi as to Principal.—A plea that a previous prosecution against the principal for the same offenses to which by the recognizance he had undertaken to appear, had been terminated by a nolle prosequi, presents no defense to an action against the surety on the recognizance. *Archer v. Com.*, 10 Gratt. 627.

Average.

See the title GENERAL AVERAGE.

AVERMENT.—See the title PLEADING.

In *Laughlin v. Flood*, 3 Munf. 262, it is said: "This term, **averment**, as applied to a declaration, is a technical term. It means a direct and positive allegation of a fact, made in a manner capable of being traversed. It excludes the idea of an affirmation to be made out by inference and induction only. When the parties go to issue, as to a point of fact, before a jury, and especially, one which makes the very gist of the action, it is necessary that there should be a positive affirmation on the one hand, and negation on the other. Nothing less than this will suffice, under the decisions of this court, as applied to the gist of the action.

Avowry in Replevin.

See the title DETINUE AND REPLEVIN.

Award.

See the title ARBITRATION AND AWARD, vol. 1, p. 687.

AWARDED.—Awarded in the sense of sustained, see *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

Away-Going Crops.

See the title CROPS.

Badge of Fraud.

See the titles **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, p. 825; **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

BAGATELLE.—Betting on the game of *bagatelle* at a public place is a violation of the statute, Va. Code, 1860, ch. 198, § 4, p. 806; and it is equally so if the person plays as well as bets. *Neal v. Com.*, 22 Gratt. 917. See also, the title **GAMING**.

Baggage.

See the title **CARRIERS**.

BAIL AND RECOGNIZANCE.

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I. Bail in Civil Cases.**A. PRIOR TO JULY 1ST, 1850.**

Previous to the revival of 1849, the writ of *capias ad respondendum* was the usual process in all kinds of personal actions. Though nominally a process of arrest, it was really so only where the plaintiff had a right to demand bail, either as of course—as in debt on a note in writing for the payment of money, and in the actions of covenant and detinue—or for special cause shown by affidavit, when an order would be entered requiring bail. Vol. 4, Minor's Inst. (3d Ed.), pp. 632, 654.

1. Appearance Bail and Special Bail Compared.

It will be noted that appearance bail was also known as common bail, and special bail was the same as bail to the action in Virginia. *Keerle v. Norris*, 2 Va. Cas. 219; *Gilliam v. Allen*, 4 Rand. 502.

And the mere entry of special bail, though the defendant immediately confess judgment, discharges the common bail; and that, whether the common bail enter himself special bail, or some other person be entered. *Gilliam v. Allen*, 4 Rand. 502. See post, "By Giving Special Bail," I, A, 9, a, (2).

Definition of Appearance Bail.—The condition of the appearance bail bond is, that the defendant do appear to answer the plaintiff of his plea. He must appear according to the exigency of the writ, and this appearance is effected by putting in, and justifying, bail to the action. The condition, then, of the bail bond, is complied with by putting in bail to the action, if done in due time. *Keerle v. Norris*, 2 Va. Cas.

219; *Culpeper, etc., Soc. v. Digges*, 6 Rand. 165; *Grays v. Hines*, 4 Munf. 437.

Definition of Special Bail.—Bail to the action is what is known to the statutes of Virginia by the term special bail. His undertaking is different from that of the appearance bail; it is, in actions of debt, etc., where bail is required, that if the defendant be cast in the suit, he will pay and satisfy the condemnation of the court or render his body in execution, or that the special bail will do it for him. If this kind of bail be put in, in due time, the appearance bail is discharged. *Keerle v. Norris*, 2 Va. Cas. 219; *Cloud v. Catlett*, 4 Leigh 467.

Same in Action of Detinue.—In actions of detinue, the statute directs that the recognizance shall be so changed, as to subject the bail to the restitution of the thing, or the alternative value, as the court may adjudge. * * * The bail, in detinue, undertakes that the defendant shall restore the specific thing, or pay the condemnation of the court, or render his body to prison in execution for the same, or that he will do it for him. *Cloud v. Catlett*, 4 Leigh 467-468. See post, "Condition of Bail Bond," I, A, 7, b; "Fixing Bail's Liability," I, A, 11.

Special Bail Necessary When Appearance Bail Required.—In *Bradley v. Welch*, 1 Munf. 284, the lower court held, that where appearance bail was required, the defendant could not appear at rules without first putting in special bail. Special bail was given and the case appealed by plaintiff on another point, and the higher court ignored this holding of the lower court. As to waiver of right to special bail,

see post, "When Demandable of Right," I, A, 3.

2. When Bail Not Demandable of Right.

a. Instances.

Debt against Endorsers.—In a joint action of debt brought against drawer and endorsers of a negotiable note, the plaintiff can not require bail of the endorsers as a matter of right, but must obtain bail from a judge or justice on proper affidavit, etc., and a proper showing of cause. *Hatcher v. Lewis*, 4 Rand. 154.

Debt on Bond with Collateral Condition.—Appearance bail is not required by law in actions of debt on bonds with collateral conditions, and not for the payment of tobacco or money only. *Ruffin v. Call*, 2 Wash. 181; *Nadenbush v. Lane*, 4 Rand. 413.

Such a bond is not one for the payment of money. *Henderson v. Hepburn*, 2 Call 238.

And in such cases it is error to enter a judgment by default against the sheriff for not returning appearance bail. *Ruffin v. Call*, 2 Wash. 181.

And a negotiable note is not, as to the indorser, a note for the payment of money within the meaning of the act of 1804 allowing bail as a matter of right on a note in writing for the payment of money or tobacco. *Metcalfe v. Battaile*, *Gilmer* 191; *Hatcher v. Lewis*, 4 Rand. 152, 156.

Trover.—Trover was one of the actions in which, by the act of 1777, appearance bail was not required. *Williams v. Campbell*, 1 Wash. 153.

For the Penalty of a Statute.—Under the act of assembly (1787, cap. 67), which was the law applicable to such action, both by the commonwealth and by the United States, no bail (appearance) was requirable in an action of debt by the latter for the penalty of a statute. *United States v. Mundel*, 6 Call 245.

Where there were two writs of *caapias ad respondendum*, upon only

one of which bail was requirable, and the marshal demanded bail upon both, the demand was unauthorized and the defendant justifiable in refusing it. *United States v. Mundel*, 6 Call 245.

b. Bail Required for Good Cause Shown.

Rule for Special Bail during Progress of Trial—Must Show Good Cause.

When an action has been brought, of such nature that the plaintiff could not of right demand bail, and there has been no direction by a judge or justice for bail to be taken, the court may notwithstanding, under the act in 1 Rev. Code, ch. 128, § 50, rule the defendant to give special bail. *Hawthorn v. Hunter*, 8 Leigh 411, citing *Hatcher v. Lewis*, 4 Rand. 152.

But before this rule is made, good cause must be shown; and this can only be done by affidavit, verifying the justice of the plaintiff's action, and showing probable cause to apprehend that the defendant will depart from the jurisdiction of the court, and the burden of proof is on plaintiff. *Hawthorn v. Hunter*, 8 Leigh 411, citing *Hatcher v. Lewis*, 4 Rand. 152, as settling this question.

No alteration has been made in this matter by the statute abolishing appearance bail. Supp. to Rev. Code, ch. 208, p. 266. *Hawthorn v. Hunter*, 8 Leigh 411.

Immaterial That Defendant Resides in Another County of the State.

Where a suit is brought in a court of competent jurisdiction, and the defendant is held to bail by a justice of the peace, on the ground that he intends to remove out of the commonwealth, supported by full and proper affidavit, it is error in the court to dismiss the suit, although it appears that the defendant is a resident of another county in the state. *Ashby v. Kiger*, 3 Rand. 50.

Affidavit to Obtain Bail—In Writing—Filing.—It would seem that an affidavit before a justice to found an order

requiring bail, ought to be in writing. *Quære*, whether such affidavit ought to be filed with the process. *Hawkins v. Gibson*, 1 Leigh 476. See post, "By Attacking Sufficiency of Affidavit," I, A, 9, a, (3); "Procedure for Discharge of Bail," I, A, 13, c.

3. When Demandable of Right.

Debt for Still Duty.—Bail was requireable as of right in an action of debt by the United States for the unpaid duty on a still. *United States v. Mundel*, 6 Call 245.

But the Right May Be Waived.—Where a defendant is permitted to appear and plead without giving special bail, and the plaintiff takes issue on the plea and joins in the demurrer without making any objection, the right to make such objection is waived by the plaintiff, and the appearance bail is discharged. *Culpeper, etc., Soc. v. Digges*, 6 Rand. 165; *Grays v. Hines*, 4 Munf. 437; *Gilliam v. Allen*, 4 Rand. 502.

And even when the plaintiff may of right demand bail, if he does not require it by indorsement according to the statute (1 Rev. Code 499), the defendant has a right to appear without giving special bail, unless required by the court, for good cause shown. *Hatcher v. Lewis*, 4 Rand. 154. See post, "Indorsement of Attorney That Bail Is Required," I, A, 4.

And, where appearance bail was required, special bail must also have been given. *Bradley v. Welch*, 1 Munf. 284. See ante, "Appearance Bail and Special Bail Compared," I, A, 1.

4. Indorsement of Attorney That Bail Is Required.

See ante, "When Demandable of Right," I, A, 3.

Effect of Unauthorized Indorsement.—The indorsement of the true species of action on the writ being required by law in order that the sheriff may see whether bail is to be demanded or not, he must be the judge himself, and the indorsement by the

attorney for the United States that appearance bail is required would not justify the United States marshal in requiring bail, when not authorized by the nature of the action. *United States v. Mundel*, 6 Call 245.

And where the defendant refused to give the bail demanded by the marshal, which he was not authorized to demand, as above stated, and resisted the marshal, who meant to imprison him for want of bail, the resistance was lawful, and an indictment therefor not sustainable. *United States v. Mundel*, 6 Call 245.

5. Need of Indorsement of True Species of Action.

See ante, "Indorsement of Attorney That Bail Is Required," I, A, 4.

Trover being one of the actions in which by the act of 1777, appearance bail is not required, where the plaintiff did not indorse on the writ the true nature of the action, as required by said act under penalty of having his suit dismissed with costs, the court may, on inspection thereof, dismiss on motion made during the term next after an office judgment has been entered, but not afterwards. *Williams v. Campbell*, 1 Wash. 153.

In such case there is no pretense for entering judgment against sheriff, either for want of bail bond returned, or for insufficient bail, he not being bound to take bail, and it not appearing that he had notice of the judgment; the court ought, before executing the writ of inquiry, to have set aside the judgment. *Williams v. Campbell*, 1 Wash. 153.

6. General Principles Touching Bail.

a. Requiring and Receiving Bail a Judicial Act.

The requiring and receiving bail is a judicial act. The clerk has no power to make the entry, unless directed by the court, or assented to by the plaintiff's counsel, even where the appearance bail is offered as special bail. In no case can he make the entry of his

own mere motion. *Gilliam v. Allen*, 4 Rand. 502; *Dunlops v. Laporte*, 1 Hen. & M. 22, distinguished.

Special Bail—Entry at Clerk's Table—When Allowable.—Special bail can not be entered at the clerk's table, unless it is directed by the court, or assented to by the plaintiff's counsel; even where the appearance bail is offered as special bail. *Gilliam v. Allen*, 4 Rand. 498.

b. Bail Bond Should Be Made a Part of Record.

Where a judgment was entered and confirmed by the clerk at rules against a defendant and another person as "security for his appearance," it was reversed because it did not appear, by the record, that the appellant was bail for the defendant, there being no bail bond, or copy thereof, which the law requires should be returned with the writ, and filed with the same in the clerk's office. *Quarles v. Buford*, 3 Munf. 487; *Shelton v. Pollock*, 1 Hen. & M. 423.

If the sheriff returns a writ executed, and the name of the appearance bail, but does not return the bail bond, or copy thereof, to the clerk's office together with the writ, judgment ought not to be entered against the defendant and bail, but against the defendant and the sheriff. *Shelton v. Pollock*, 1 Hen. & M. 423.

c. Judgment against Sheriff for Apparent Failure to Return Appearance Bail.

Relieved against for Surprise.—Where a sufficient bail piece was offered by the appearance bail, but rejected by the clerk under a mistake as to the law, the judgment entered against the sheriff in consequence, the clerk having entered a plea of payment for him, is relievable against in equity on the ground of surprise, the counsel having also agreed, though the court knew it not, that the bail piece might be filed. But the court said that the lower court might, and most certainly

would, have corrected the mistake at any time, if it had been moved to do so, and the party was ill advised to apply for a supersedeas as he did, instead of doing so, but his negligence was excused by the agreement of counsel and the mistake which followed. *Smith v. Wallace*, 1 Wash. 254.

As to nonliability of deputy for failure to take bail on mesne process, see the title SHERIFFS AND CONSTABLES.

d. Necessity for Appearance of Defendant.

It is error to refuse leave to the defendant in an attachment, to enter special bail and plead, without appearing in person. *Smith v. Pearce*, *Gilmer* 34. See *Fisher v. Riddell*, 1 Hen. & M. 330. See post, "By Giving Special Bail," I, A, 9, a, (2).

e. Special Bail as Affecting Rights of Assignee of Note.

There is no obligation on the assignee of a nonnegotiable note to pursue the special bail of the maker, in a suit against him, before the assignee can sue his assignor. *Caton v. Leitch*, 5 Rand. 31. See the title ASSIGNMENTS, vol. 1, p. 779 et seq.

f. Effect as Evidence against Principal.

Two suits were instituted on the same day, in behalf of the same plaintiffs. The writ in each case was against A. B. and C. D., but indorsed to be served on A. B. only. In one case bail was required; in the other not. The declarations included both A. B. and C. D. as defendants. The appearance bail, in the case in which bail was required, entered into a recognizance as special bail for them both. This can not be presumed to have been without latter's consent and is of weight in determining the question whether C. D. was properly made defendant. *Wrenn v. Thompson*, 4 Munf. 377.

g. Entry of Appearance Bail as Special Bail after Plea.

After the appearance bail has de-

fended the suit and pleaded, the defendant may, at a subsequent term, be admitted to appear, give as special bail the same person who was appearance bail, file a plea and go to trial. *Dunlops v. Laporte*, 1 Hen. & M. 22; *Mann v. Drewry*, 5 Leigh 302.

7. Execution and Sufficiency of Bail Bond.

a. Penalty.

How Penalty of Bond Fixed.—In those cases where bail is demandable of right, the penalty of the bail bond is fixed by the sum claimed in the writ, being usually double that sum. *Oxley v. Turner*, 2 Va. Cas. 334.

In the cases where bail is directed by the judge, or justice, on proper affidavit being made, it is his duty to ascertain the penalty of the bond. *Oxley v. Turner*, 2 Va. Cas. 334.

Penalty Blank.—A bail bond which is returned to the clerk's office, but which specifies no sum to be paid by the obligor to the obligee, is a mere nullity. *Harrison v. Tiernans*, 4 Rand. 177; *Shelton v. Pollock*, 1 Hen. & M. 423.

b. Condition of Bail Bond.

See ante, "Appearance Bail and Special Bail Compared," I, A, 1.

Time and Place of Appearance.—The condition of a bail bond need not designate the time and place of appearance. They sufficiently appear from the writ. *Payne v. Britton*, 6 Rand. 101.

What Unnecessary in Detinue.—Where, by recognizance of special bail in detinue, taken by a justice in the country, the bail is made to undertake, that in case the principal shall be cast, he shall restore the chattels sued for, or the alternative value thereof (without adding "as the court shall adjudge"), or pay and satisfy the condemnation of the court, or render his body in execution, etc., or that the bail will do it for him, it is a good recognizance of special bail, according to the statute, 1 Rev. Code, ch. 128, § 53,

and the words quoted from the statute refer to the alternative value as fixed by the court, and are not necessary. *Cloud v. Catlett*, 4 Leigh 462.

Bail Piece Mentioning Only One Defendant—Not Defective.—It is no objection to a bail piece entered into by one defendant with the appearance bail that it does not mention the name of the other defendant on whom the writ had not been served. *Smith v. Wallace*, 1 Wash. 254.

c. Signature.

Bond Must Be Signed by Bail.—Where the name of a person is in the body of a bail bond, but the bond is not signed by him, it is error to take judgment against him. *Goode v. Galt*, *Gilm.* 152.

Name Omitted from Body of Bond—Validity Unimpaired.—A bail bond executed by the principal and the bail, though the name of the bail is not inserted in the body of the bond (there being a blank left for his name), which, in other respects, is regular, on which the plaintiff proceeds and recovers judgment against the bail as well as principal, which stands unreversed, is the bond of the bail, though his name is not inserted in the body of it. *Raynolds v. Gore*, 4 Leigh 276.

And even if it were a defective bond, the plaintiff having a judgment on the bond against the bail, in full force, could not maintain an action against the sheriff for returning a defective bail bond. *Raynolds v. Gore*, 4 Leigh 276.

Necessity for Return of Bond.—It was held, that there could be no judgment against the appearance bail, whose name was returned as such by the sheriff, unless he also returned the bail bond, or copy thereof, to the clerk's office together with the writ. *Shelton v. Pollock*, 1 Hen. & M. 423.

d. Variance from Writ.

A bail bond which recites a writ at the suit of A. B., administrator, etc., while the writ is at the suit of A. B.,

executor, etc., is not an error for which a judgment against the bail and the defendant will be reversed. *Payne v. Britton*, 6 Rand. 101.

e. Obligee.

Proper Designation of Sheriff.—A bail bond given to the sheriff of a county, without naming the county, is good. *Payne v. Britton*, 6 Rand. 101.

f. Force of Sheriff's Return.

Governs on Question of Whether a Bond Was Taken, When Inconsistent Therewith.—Where the sheriff's return on a writ in an action of covenant is "executed and committed to jail for want of bail," and also a bond is returned therewith, purporting to be a bail bond, there should be no judgment against the bail therein, but against the defendant only, for the return should govern where there is inconsistency. *Henry v. Green*, 4 Munf. 227, citing *Quarles v. Buford*, 3 Munf. 487.

g. Joint and Several Bail Bonds.

Where, in a joint action of debt against three obligors, three persons severally undertook, by several recognizances, as special bail for each defendant, they were under no joint obligation or responsibility to the plaintiff, and he could not proceed against them jointly by *scire facias*. *Garland v. Ellis*, 2 Leigh 555. See post, "Fixing Bail's Liability," I, A, 11.

8. Waiver of Objection to Bail's Sufficiency.

Where plaintiff in an action of debt did not except to the person offered as appearance bail, but afterwards objected to his admission as special bail, on the ground that no proof was exhibited as to his sufficiency, though not urging any specific objections to his sufficiency, the lower court overruled the objection, because (as stated by the reporter), the plaintiffs had not excepted to him as appearance bail, and therefore were bound to receive him as special bail. The opinion of the

court of appeals was that the *superseas* asked by plaintiff was refused without difficulty, assigning no reasons. It would seem that it may have merely intended to hold that it was an admission of sufficiency so far as to relieve the party offering him as special bail from any further proof thereof, and to shift the burden of proof to the plaintiff to show ground of objection. *Dunlops v. Laporte*, 1 Hen. & M. 23, cited with approval in *Hatcher v. Lewis*, 4 Rand. 156.

This would have been ample ground for the refusal of the *superseas*, and is the view taken of the decision by the later case of *Gilliam v. Allen*, 4 Rand. 503.

Quære, as to whether, by failing to object to the sufficiency of one as appearance bail, the plaintiff is concluded from objecting to the same party's sufficiency under all circumstances when offered as special bail. Opinion expressed that he would not be so concluded. *Gilliam v. Allen*, 4 Rand. 503, distinguishing *Dunlops v. Laporte*, 1 Hen. & M. 22.

Where Two Persons Go Bail.—

Where, as in this case, there were two persons taken as appearance bail, though it should be said that by failing to except, the sufficiency of these two, as special bail, is admitted, it can not follow that the sufficiency of one of them is admitted. *Gilliam v. Allen*, 4 Rand. 503.

See, as to waiver of recourse against sheriff, the title *SHERIFFS AND CONSTABLES*. See ante, "Judgment against Sheriff for Apparent Failure to Return Appearance Bail," I, A, 6, c.

9. Discharge of Bail.

a. Of Appearance Bail.

(1) By Appearance of Defendant.

The condition of the appearance bail bond was, that the defendant do appear to answer the plaintiff of his plea. He must appear according to the exigency of the writ. *Keerle v. Norris*, 2 Va. Cas. 219; *Culpeper, etc., Soc. v.*

Digges, 6 Rand. 165; Grays v. Hines, 4 Munf. 437.

If a defendant was let to bail, and on the return day of the writ, he surrendered himself in custody, it would discharge the bail. *Henry v. Stone*, 2 Rand. 455.

All that was required of the appearance bail was that the defendant should appear. *Keerle v. Norris*, 2 Va. Cas. 219. If the surrender of the principal in custody on the return day would not discharge the bail, he might never be able to so discharge himself. For example, if he died before return day. *Henry v. Stone*, 2 Rand. 455, 462. Such surrender, though not an appearance, would have the effect of an appearance. See Rev. Code, 1792, ch. 67, §§ 20, 23, ch. 66, § 32; *Henry v. Stone*, 2 Rand. 455, 463; *Edmonds v. Green*, 1 Rand. 44, 3 Rand. 161.

If the defendant, in debt on a bond, appear and plead, without giving special bail; and the court (without ruling him to give such bail) set aside the office judgment against him, his appearance bail is thereby discharged. *Grays v. Hines*, 4 Munf. 437; *Culpeper, etc., Soc. v. Digges*, 6 Rand. 165; *Gilliam v. Allen*, 4 Rand. 502.

Appearance by Attorney and Confession.—Where defendants appear by attorney and confess the plaintiff's action, the appearance bail is thereby discharged, and no judgment ought to be rendered against him. *Fisher v. Riddell*, 1 Hen. & M. 330. See *Smith v. Pearce*, 1 Gilmer 34.

(2) By Giving Special Bail.

Discharges Appearance Bail without Plea.—If, after office judgment against the defendant and bail, the appearance bail, or any other person, becomes special bail, the judgment against the said appearance bail may be set aside, without the defendant's pleading to issue; and the judgment stands confirmed against the defendant, although set aside as to the bail. *Keerle v. Norris*, 2 Va. Cas. 217; *Gilliam v.*

Allen, 4 Rand. 502. See *Henry v. Stone*, 2 Rand. 455; *Edmonds v. Green*, 1 Rand. 44, 3 Rand. 161. And where special bail had been given, though without appearance, it was error to enter any judgment against the appearance bail. *Edmonds v. Green*, 1 Rand. 44, 3 Rand. 161; *Smith v. Pearce*, Gilmer 34.

Entry of Order Relieving Appearance Bail.—The clerk ought to make an express entry in the order book, that the judgment is set aside as to the bail; but an omission to do so will not charge the bail, and the entry of special bail by the appearance bail, does virtually set aside the judgment against the said appearance bail. *Keerle v. Norris*, 2 Va. Cas. 217.

(3) By Attacking Sufficiency of Affidavit.

When Too Late.—After judgment by default, two years having elapsed since writ of inquiry, defendant appearing to have left state, it is too late to seek the discharge of the appearance bail on the ground that no sufficient affidavit had been filed to authorize its requirement. Indicated, that it would be too late after the writ of inquiry. *Hawkins v. Gibson*, 1 Leigh 476.

For proper proceeding for discharge, see post, "Pleading and Practice," I, A, 13. And see also, post, "Fixing Bail's Liability," I, A, 11.

(4) By Erroneous Return of "In Custody."

When a sheriff has arrested a defendant, and taken appearance bail, and makes a return that the defendant is committed to jail, he loses his remedy against the bail on the bail bond. *Henry v. Stone*, 2 Rand. 455.

b. Of Special Bail.

(1) By Surrender of Principal.

Surrender of Principal to Sheriff without Return of Receipt to Clerk—Effect.—If the special bail, before or after judgment, surrender the principal to the sheriff, his discharge is complete by the surrender, whether he re-

turn the receipt forthwith to the clerk or not; and if any injury, from an omission so to return it, result to the plaintiff, his remedy is by action against the bail, the clause of the statute as to the return of the receipt being merely directory. *Cooke v. Beale*, 1 Wash. 313.

When Surrender to Be Made.—See post, "Steps Necessary," I, A, 11, a.

"The act of 1819, 1 Rev. Code, p. 502, relating to the proceedings in civil cases, provides, that special bail shall be discharged by the surrender of the principal, in court, or to the sheriff, at any time before the appearance day of the first scire facias returned 'executed,' or of the second returned 'nihil.'" *Kyles v. Ford*, 2 Rand. 2.

Surrender before Return Day of Second Sci. Fa.—The surrender of the principal made before the return day of the second sci. fa. was in good time. At first, the bail was allowed to discharge himself by bringing in the body before, or upon, the return day of the first scire facias; afterwards greater liberality prevailed, and the indulgence was extended to the return day of the second writ. *Bogle v. Fitzhugh*, 2 Wash. 213.

Where the scire facias was made returnable to an improper day, it should have been quashed, in which case the surrender of the principal by the bail before such return day was in good time, although after the day to which it should have been returnable, the writ being void. *Bogle v. Fitzhugh*, 2 Wash. 213.

And There Must Be a Proper Interval between Them.—Where two writs of sci. fa. against special bail were successively issued, with defective returns on both, the court should not have permitted the amendment of both returns, but only the first, quashing the second writ, for the defendants had the right to surrender their principal until two writs of sci. fa. should have been severally issued and returned

nihil, with a proper interval between them, and the permission to the sheriff to amend could not, by relation to the time of making the returns, deprive them of this right. *Lee v. Chilton*, 5 Munf. 410.

Surrender of Principal on Return Day of Sci. Fa. Too Late.—When a scire facias against special bail is returnable at rules on the first Monday of the month, the return day is the appearance day, and the process being returned executed, a surrender of the principal on the return day is not in time to discharge the bail, under the statute. 1 Rev. Code, ch. 128, § 54. *Branch v. Webb*, 7 Leigh 371. See post, "Fixing Bail's Liability," I, A, 11.

Surrender of One of Two Defendants No Discharge of Bail.—If special bail be bound in a recognizance for two defendants, the surrender of one only of the defendants is not a full performance of the undertaking of the bail, and no bar to the sci. fa. against him. *Higginbotham v. Browns*, 4 Munf. 516.

Where Afterwards Discharged No Bar to Ca. Sa. or the Judgment.—And the surrender of a defendant by the bail, before or after judgment, and his discharge from custody, without being charged in execution, is no bar to a ca. sa. against him, or satisfaction of the judgment, whether such discharge from custody was by the plaintiff's order or not. *Higginbotham v. Browns*, 4 Munf. 516.

To Whom Surrender Might Be Made.—By the act of 1792, ch. 66, § 31, the surrender might have been made to the sheriff. *Ross v. Randolph*, 5 Call 306.

At What Court Surrender Might Be Made.—And by that clause and ch. 67, § 59, of the same act, it would seem that surrender might have been made at a monthly court, as well as at a quarterly session. *Ross v. Randolph*, 5 Call 306.

Quere, Whether Exhibition of Bail Piece Is Necessary.—It seems that a special bail's surrender of his principal to the sheriff is effectual, without his exhibiting a bail piece or other written evidence of his being bail; if the surrender be made in the county, in the court of which he was accepted and entered as special bail in open court, and it appear that the fact was known to the sheriff, who nevertheless refused to accept the surrender and hold the principal in custody. The court did not decide the case on this point, but merely expressed the impression that under the actual circumstances of the case, the exhibition of a bail piece was unnecessary. *Evans v. Freeland*, 3 Munf. 119. See note by reporter that "it appeared in evidence that the sheriff was influenced by improper motives in refusing the surrender."

(2) In Detinue.

If the principal in detinue either restored the specific thing, or paid the alternative value, or rendered his body to prison in execution for the same, the special bail was discharged. He had to do one of these three things. *Cloud v. Catlett*, 4 Leigh 467.

c. By Act of God or of the Law.

Even in civil cases, in which the undertaking of the bail is different from what it is in criminal, and is to some extent a security for the debt, he may be discharged by the act of God or of the law. *Caldwell v. Com.*, 14 Gratt. 698, 702. See post, "Breach of Bail Bond," I, A, 10; "Discharge or Exoneration of Bail," II, C.

10. Breach of Bail Bond.

Imprisonment of Principal in Another State No Excuse for the Breach.—Plea by the special bail that the principal was, at the time of the issuance of the ca. sa. against him, confined by legal process in Philadelphia, which confinement existed at the time the bail was entered (though this would

seem to be immaterial as he went out of the state voluntarily), is unavailing. *Ross v. Randolph*, 5 Call 296.

It is doubtful even if such imprisonment creates such an impossibility of surrendering the principal as might excuse in a proper case, for the bail might have paid the debt and released the principal, or bailed him. *Ross v. Randolph*, 5 Call 296.

What Plea Should Allege.—It should cover the whole time in which surrender might have been made, up to the day of the issuance of the ca. sa., for it must answer the whole matter contained in the plaintiff's allegation. *Ross v. Randolph*, 5 Call 307. See ante, "By Act of God or of the Law," I, A, 9, c.

11. Fixing Bail's Liability.

As to scire facias on a recognizance of bail, see the title SCIRE FACIAS. See also, ante, "By Surrender of Principal," I, A, 9, b, (1).

a. Steps Necessary.

In actions of debt, etc., where bail is required, the bail is never considered as fixed for the debt, unless the debtor has failed both to pay and to render his body. *Cloud v. Catlett*, 4 Leigh 467.

The emanation of a ca. sa., and a return to that writ of non est inventus, is necessary to forfeit the recognizance and fix the bail in legal contemplation, and is an indispensable prerequisite to the commencement of proceedings by debt or scire facias. *Green v. Thomas*, 1 Pat. & H. 458; *Cloud v. Catlett*, 4 Leigh 467.

The apparent conflict in the English authorities is explained by Tyler, J., by the fact that in England there were, strictly speaking, two returns to a ca. sa., the one of non est inventus made in a public book in the sheriff's office whereby the ca. sa. is then "returned" in the sense spoken of in the clementary writers and the bail fixed; and the other the return of the writ itself,

with the sheriff's endorsement thereon, to the *custos brevium*, a mere matter of form and unnecessary to fix the bail. But in our practice we have nothing corresponding to the former return. *Green v. Thompson*, 1 Pat. & H. 427, 447.

Quære, if the sheriff's endorsement of *non est inventus*, without actual return of the writ so endorsed, to the clerk, is sufficient to fix the bail. *Green v. Thompson*, 1 Pat. & H. 458.

What Return on Ca. Sa. Sufficient to Entitle to Recourse against Special Bail.—To entitle a judgment creditor to recourse against special bail, it is sufficient that a *ca. sa.* against the debtor has been directed to the sheriff of the county where the action was brought and judgment recovered, and returned by him *non est inventus*, though the debtor resides in another county. *Branch v. Webb*, 7 Leigh 371.

"For the bail has undertaken to render his body to prison in its execution, and all that he has a right to demand, is the notice, which the issue of the *ca. sa.* gives, that the body is proceeded against, and that he must fulfil his engagement." *Branch v. Webb*, 7 Leigh 371, 380.

Invalid Discharge in Bankruptcy—Ca. Sa. Rightfully Issued.—A debtor and his rightful bail moved to quash a *ca. sa.* against the debtor (and thereby avoid the bail's liability), on the ground that before it issued, and since judgment, the debtor took the oath of insolvency at suit of another creditor, and that *ca. sa.* issued without the order of the court. Except the justice's warrant for the debtor's release, reciting that he had complied with the law for the relief of insolvents, the jailor's receipt for his body to the special bail in the other debt, the warrant bringing him before the justices and the schedule subscribed by him, no evidence was adduced that the debtor was ever charged in execution by any of the creditors mentioned

in the warrant of discharge, and hence he was not duly discharged and the *ca. sa.* was rightfully issued. *Turner v. Harris*, 1 Rob. 475.

What Necessary in Detinue.—But it is necessary, to charge the special bail in detinue, that the execution against the principal should be superseded as to the specific thing and given for the alternative value, and that a *ca. sa.* should be sued out against the principal, without effect. *Cloud v. Catlett*, 4 Leigh 462. Though if these proceedings be omitted, it is matter of defense for the bail, of which he can avail himself only by plea; *dissentiente Tucker*, P. *Cloud v. Catlett*, 4 Leigh 462. See ante, "Appearance Bail and Special Bail Compared," I, A, 1; "Discharge of Bail," I, A, 9. And see *Catlett v. Russell*, 6 Leigh 355, approving principal case.

b. Where Defendant Dies.

Where the Defendant (in Covenant) Dies.—If the defendant in an action of covenant die, after judgment by default against him and the bail for his appearance, and before a writ of inquiry executed, the plaintiff can not have a *scire facias* against the bail, but only against the executors or administrators of the defendant. *Saunders v. Gaines*, 3 Munf. 225. (Note by Reporter.) "The bail in such case appears to be discharged altogether, as no mode of proceeding against him is given by law; the writ of inquiry, being against the defendant and the bail, can not be executed as to the bail alone, and judgment entered against him thereupon, separately from the defendant (see *Wallace v. Baker*, 2 Munf. 334); neither can he be included in the judgment against the executors or administrators, because the judgment against them is *de bonis testatoris* or *intestati*, and that against the bail *de bonis propriis*, which two different modes of recovery would be incongruous, and can not be joined in one judgment. But where the bail

has defended the suit and pleaded, if the defendant die at any time pending the suit, I apprehend the bail is not discharged; because the act of assembly declares 'he shall be subject to the same judgment and recovery as the defendant might, or would be subject to if he had appeared, and given special bail.'"

"And if the defendant die between the verdict on the writ of inquiry, and the judgment thereupon, it seems that judgment is to be entered against him and the bail, in like manner as if he were living. See Revised Code, 1st vol., p. 110, the latter part of the 20th section." *Saunders v. Gaines*, 3 Munf. 225.

"Where the bail, having defended the suit, and pleaded while the defendant was living, waives his plea after the defendant's death, I presume the writ of inquiry is to be awarded, and judgment entered against the bail alone; because, in that case, it can not be entered against the defendant, as in *Wallace v. Baker* (2 Munf. 334)." *Saunders v. Gaines*, 3 Munf. 225 (note by reporter).

c. Liability Limited by Penalty.

Where Verdict Is Larger than Penalty—Judgment.—The bail, however, is only responsible for the amount of the penalty of his bond, and the judgment, where verdict is for more than the penalty, ought to be rendered against the defendant and bail, for the penalty, and against the defendant alone, for the residue of the said damages. *Oxley v. Turner*, 2 Va. Cas. 334. See ante, "Penalty," I, A, 7, a.

d. Judgment.

Office Judgment — Record — Bail Bond.—A clerk's entering and confirming a judgment, at rules, against a defendant, and another person, as "security for his appearance," is not sufficient to make such person liable as appearance bail; but a copy of the bail bond should be inserted in the

transcript of the record, for want of which, the judgment should be reversed. *Quarles v. Buford*, 3 Munf. 487.

Where the judgment was by default for want of appearance, consequently the writ and bail bond are parts of the record. *Shelton v. Pollock*, 1 Hen. & M. 423; *Quarles v. Buford*, 3 Munf. 487; *Ming v. Gwatkin*, 6 Rand. 551. See ante, "Bail Bond Should Be Made a Part of Record," I, A, 6, b.

Judgment by Default Must Include Principal.—Where the defendant to a suit has not pleaded, but his appearance bail has, a judgment stating, "that the attorney for the defendant withdraws his plea, etc., and therefore that the plaintiff recover against the defendant," must be understood as a judgment against the bail only (without including the principal), and is therefore erroneous. *Lee v. Carter*, 3 Munf. 121. See *Wallace v. Baker*, 2 Munf. 334.

Interest on Interest.—Upon a scire facias against bail, it is error to give a judgment for the aggregate amount of principal, interest, and costs of the first judgment, with interest thereon. *Bowyer v. Hewitt*, 2 Gratt. 193.

12. Equitable Relief to Bail.

Denied Where Defense Available at Law.—Bail can not be relieved in equity against a judgment at law by default, without assigning some good cause why he did not defend himself at law. *Brown v. Toell*, 5 Rand. 543.

So, upon a scire facias against special bail, he obtained a bail piece, arrested his principal, surrendered him to the jailor, and took the jailor's receipt for his body, and gave notice thereof to the attorney of the plaintiffs, they not residing in the county. Notwithstanding all this, there was an office judgment upon the scire facias against the bail, and he not appearing to defend the case at the next term, the office judgment was confirmed. Equity will not relieve the bail, he hav-

ing been guilty of laches in not making this defense at law to the sci. fa. *Allen v. Hamilton*, 9 Gratt. 255.

So, in debt upon a bill penal, if, through a mistake of the clerk, the writ be issued for dollars when it should be pounds; and (the plaintiff's declaration being filed, conformably with the bill penal), judgment by default be entered against the defendant and his appearance bail, for so many pounds; the bail, being informed of the mistake before he signed the bail bond, and having made no defense at law, is not entitled to relief in equity. *Carter v. Cockrill*, 2 Munf. 448.

Surprise and Inability to Defend.—But where the plaintiff, induced by the defendant's promise to give security for the debt, gives a written order to the clerk to dismiss suit, and on defendant's failure to fulfill his promise countermands same, but meanwhile defendant absconds and the court discharges the bail, and plaintiff on appeal secures reversal of order discharging the bail and a judgment is entered there (in circuit court), against defendant and bail, on a bill filed by the bail, showing that the defendant had just set-offs against the debt, which, if he had not been precluded, by the course of the proceedings at law, from defending the suit, would have been shown and have extinguished the debt, he is entitled, on the ground of surprise and inability to make his defense at law, to an injunction against the judgment, and an account. *Carr, J.*, dissenting on both grounds, on the authority of *Carter v. Cockrill*, 2 Munf. 448; *Brown v. Toell*, 5 Rand. 543, which last he considered directly in point. *Mann v. Drewry*, 5 Leigh 296.

And a person returned as appearance bail, who denies that he ever executed the bail bond, is not precluded from obtaining relief in equity, by his failing to appear and plead non est factum at law, after being informed that his name was subscribed to such bond; for

if, in fact, he did not execute the bond, he had regularly no day in court, and was therefore not bound to take any step for his relief in the action at common law, and as the remedy at law was at least doubtful. *Spotswood v. Higgenbotham*, 6 Munf. 313.

Remedy at Law Doubtful.—In a case where the remedy at law was considered doubtful when the party applied to a court of equity, it would be too strict to deny him admittance into that court for relief. *Spotswood v. Higgenbotham*, 6 Munf. 313.

Parties to Injunctions.—The officer who returned the writ and bail bond, ought, as well as the plaintiff at law, to be made a party defendant to a bill of injunction filed by the person returned as bail, who denies that he ever executed the bond; for the officer is interested in the question in controversy, and should be a party, that final and complete justice may be done. *Spotswood v. Higgenbotham*, 6 Munf. 313.

In such case, in the same suit in chancery, a decree may be rendered in favor of the plaintiff at law (though defendant in equity), against such officer, if justice should require it. *Spotswood v. Higgenbotham*, 6 Munf. 313.

Equity Loath to Deprive Plaintiff of His Advantage.—It is a general rule, liable to very few exceptions, that where a right to claim satisfaction of his debt from the appearance bail has inured to the plaintiff by operation of law, without any agency or participation on his part, as is the case here where judgment was entered in due course against the appearance bail—it not appearing that he had ever had himself entered as special bail—no tribunal has a right to take from him his advantage, though the bail claims to have taken all proper steps to have himself entered special bail, and that the nonentry was due to misprision of the clerk. *Gilliam v. Allen*, 4 Rand. 498, approving *Dickinson v. Sizer*, 4

Rand. 113, where the appearance bail, who had become special bail before a judge in the country and delivered the recognizance to a lawyer who promised but neglected to deliver it to the clerk and have proper entry made, was refused relief against the judgment which in consequence went against him and the defendant for whom he was appearance bail. That case distinguishes *Smith v. Wallace*, 1 Wash. 254, and was decided by two judges, Coalter, J., dissenting, saying that to refuse to grant relief would be to overrule *Smith v. Wallace*, 1 Wash. 254. For holding in that case see ante, "Judgment against Sheriff for Apparent Failure to Return Appearance Bail," I, A, 6, c.

13. Pleading and Practice.

a. Law Governing as to Bail.

Action by United States for Penalty—State Law Governed as to Bail.—In an action of debt in the state court for penalty incurred under a law of the United States, the law of Virginia concerning the requisition of bail in such cases, is, under the act of congress (§ 34 of acts of the first congress), referring to the laws of the states as rules of decision in the United States courts unless otherwise provided by the constitution, laws or treaties of the United States—there being no such provision at that time (1795)—the law which should govern. *United States v. Mundel*, 6 Call 245.

b. Action Defended by Bail.

Right to Make Rejoinder.—Appearance bail, becoming special bail, should be allowed to prove that the similitur to a replication was added by the clerk, without his authority and against his consent; and in such case, the bail should be allowed to rejoin, demur, etc. *Nadenbousch v. McRae*, Gilmer 228.

Appearance Bail May Withdraw His Plea, Defendant Appearing.—After the appearance bail has defended the writ

and pleaded, the defendant may, at a subsequent term, be admitted to appear, give as special bail the same person who was appearance bail, file a plea and go to trial, the appearance bail being permitted to withdraw his plea. *Dunlops v. Laporte*, 1 Hen. & M. 22; *Mann v. Drewry*, 5 Leigh 302, dissenting opinion of Carr, J. See *Keerle v. Norris*, 2 Va. Cas. 220.

Appearance Bail—Plea Waived—Judgment.—If an office judgment be set aside and the suit defended by the appearance bail, and he afterwards waives his plea, judgment is to be entered against the defendant as well as the bail. *Vanmeter v. Fulkimore*, 1 Hen. & M. 329; *Wallace v. Baker*, 2 Munf. 334; *Lee v. Carter*, 3 Munf. 121.

c. Procedure for Discharge of Bail.

Rule Proper Proceeding to Discharge Bail.—The procedure for appearance bail seeking to be discharged from his obligation on ground that justice's order requiring bail was not based on proper affidavit, should be a rule to show cause why the bail should not be discharged, and could not be by motion. *Hawkins v. Gibson*, 1 Leigh 476. See ante, "By Attacking Sufficiency of Affidavit," I, A, 9, a, (3); "Fixing Bail's Liability," I, A, 11.

Non Est Factum by Person Returned as Appearance Bail.—A plea of non est factum, in behalf of a person returned as appearance bail, who denies that he ever executed the bail bond, is regular and proper. *Spotswood v. Douglas*, 6 Munf. 312. See ante, "Breach of Bail Bond," I, A, 10.

As to injunction by bail, see the title INJUNCTIONS.

14. Special Bail to Replevy Attached Effects.

See the title ATTACHMENT AND GARNISHMENT, ante, p. 70.

B. SINCE JULY 1ST, 1850.

1. In General.

It will be observed, of course, that many of the general principles touch-

ing bail, laid down by the cases decided under the law of bail as it existed before 1850, not having been abrogated expressly or by necessary implication in the change which then took place, are still in force, and as good law as they ever were. But it were vain to repeat them here, even if it were possible in every case to say authoritatively which are still good law until the courts shall have passed thereon. So, reference should be made to the foregoing head in connection with what now follows.

Bail in Civil Cases Since 1850—Construction of Code and Statutes Supplemental Thereof.—The Code, which went into effect a few months before the passage of the act of 1851, had abolished bail in civil cases as a consequence of the abolition of the writs of *capias ad respondendum* and *ad satisfaciendum*; and instead of the benefits afforded by the writ of *ca. sa.*, had very much extended the lien of the *fi. fa.*; and to make that extended lien effectual, had provided means of compelling the judgment debtor, by attachment if necessary, to discover and surrender his estate. Va. Code, ch. 188, p. 716-719. But the debtor could not be so compelled, unless he were within the jurisdiction of the state; and it might happen that after being sued, he might remove from the state, and thus evade the law. The legislature designed to remedy this defect by the act of March 31st, 1851; and for that purpose restored the right to sue out a *capias*, and require bail on affidavit verifying the cause of action, and showing probable cause for believing that defendant would quit the state unless forthwith apprehended. They did not intend to restore the writ of *ca. sa.* in such cases, nor require that the bail should be bound to render the body of the principal in execution for the debt. *Levy v. Arnsthall*, 10 Gratt. 641.

They did not intend to change the

law in regard to executions, but merely to insure the personal appearance of the debtor after judgment, in order that the lien of the *fi. fa.* might be enforced. Therefore the obligation of bail, as it formerly existed, was so varied as to conform to the existing law. *Levy v. Arnsthall*, 10 Gratt. 641.

"In regard to bail, we know that, in a large class of actions it was demandable of right, and no terms were laid upon the plaintiff in demanding it. He gave no security, and was personally answerable for damages only in an action for maliciously demanding it, without sufficient cause. And in all other personal actions it was demandable by an order of a judge or justice, 'upon proper affidavit, verifying the justice of the plaintiff's action, and showing probable cause to apprehend that the defendant will depart from the jurisdiction of the court, so that process of execution can not be served upon him.' 1 R. C. 1819, 499, § 44. There can be no doubt as to the true construction of that section. The same may be said of the bail law of 1852, adopted after the Code of 1849 took effect, and embodied in the Code of 1860, forming §§ 33-38 of ch. 151, pp. 652-3. B. § 33 the affidavit is required to show, 'that there is probable cause for believing that the defendant is about to quit this state,' etc.; and by § 36, the court in which the case is pending is authorized, after reasonable notice, to discharge the defendant from custody, etc., on being satisfied, not that the defendant was not about to quit the state, but 'that there was not probable cause for so believing.'" *Clafin v. Steenbock*, 18 Gratt. 842, 849. See *Pulliam v. Aler*, 15 Gratt. 54.

The present law on the subject of bail in civil cases is embraced in §§ 2991-2997, inclusive, of the Code of Virginia, and in ch. 106, §§ 30-37, inclusive, of the West Virginia Code.

Probable Cause.—"Probable cause for a proceeding under the statute

(Code, 1873, ch. 148, § 33) holding a defendant to bail and arresting and detaining him until the bond required by the law has been given or until he is otherwise legally discharged, is a bona fide belief by the plaintiff (or his agent acting for him) in the existence of the facts essential under the law for such a proceeding, founded on such circumstances within his knowledge at the time the proceeding is taken, as would warrant a man of ordinary caution, prudence and judgment, under the same circumstances, to entertain such belief." *Forbes v. Hagman*, 75 Va. 168, 180. See *Spengler v. Davey*, 15 Gratt. 381; *Claffin v. Steenbock*, 18 Gratt. 842, 855. It is said in *Hawthorn v. Hunter*, 8 Leigh 411, that no change was made in this matter by the statute abolishing appearance bail. See ante, "Bail Required for Good Cause Shown," I, A, 2, b. See the title FALSE IMPRISONMENT.

2. Defendant Arrested by His Bail Is in Custody.

By the act of April 16, 1852, Sess. Acts, ch. 92, § 4, p. 77, which authorizes the plaintiff to file interrogatories to a defendant in custody, and authorizes the court upon notice to the plaintiff or his attorney, to discharge a defendant from custody, applies to a defendant in custody of his bail, as well as a defendant in jail. *Levy v. Arnsthall*, 10 Gratt. 641; *State v. Peck*, 32 W. Va. 611, 9 S. E. 921; *Trimble v. Shaffer*, 3 W. Va. 621.

If, after defendant has been arrested under an order pursuant to §§ 30, 31, 32, ch. 106, W. Va. Code, he gives the bond required, he is relieved from the necessity of going to jail but is still regarded as in custody of his sureties under their covenant that he will be in the county, etc., to answer interrogatories, etc. *State v. Peck*, 32 W. Va. 606, 9 S. E. 919, citing *Levy v. Arnsthall*, 10 Gratt. 641; *Trimble v. Shaffer*, 3 W. Va. 621.

And he may be discharged from such

custody if the plaintiff should fail to file interrogatories within a reasonable time after he is notified by the defendant to do so. *Levy v. Arnsthall*, 10 Gratt. 641; *Trimble v. Shaffer*, 3 W. Va. 614, 621.

Under Act of March 31, 1851—Bail's Right to Surrender Principal.—The act of March 31, 1851, Sess. Acts, 1850-1851, p. 36, which authorizes a plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety; and it is the right of the surety to surrender his principal. *Levy v. Arnsthall*, 10 Gratt. 641; *State v. Peck*, 32 W. Va. 611, 9 S. E. 921; *Trimble v. Shaffer*, 3 W. Va. 621. On evidence of such surrender, see post, "Discharge by Surrender of Principal," II, C, 6.

"The bond prescribed by the act of March 31, 1851, is essentially a contract of bail. A writ of *capias* is given under which the defendant is to be arrested and committed to jail, unless bond with security be given for his appearance at a certain time and place, and on a certain contingency, to do and perform certain acts prescribed by law. If the bond be given, he is in effect 'bailed to his sureties upon their undertaking that he shall be in place;' and he may well be supposed 'to continue in their friendly custody instead of going to jail.'" *Levy v. Arnsthall*, 10 Gratt. 641, 646.

Bail's Right to Custody of Principal.—"Our statute has never prescribed any regulations in regard to the right of the bail in criminal cases to the custody of his principal. And yet nobody ever doubted the existence of that common-law right in such cases." *Levy v. Arnsthall*, 10 Gratt. 641, 645.

"But this in nowise varied the relation of principal and bail, or the right of the bail to the custody of the principal. That is a common-law right, which attaches to the relation of bail wherever it exists, whether created by

the common or the statute law, unless there be something in the latter to take it away." *Levy v. Arnsthall*, 10 Gratt. 641, 644.

As to effect of failure to comply with all the requirements of the statute, see the title TRESPASS.

3. Breach of Bail Bond.

Failure to Answer Interrogatories a Breach.—Where the defendants had given bail, conditioned according to law, to obtain their release from arrest on a ca. sa., their failure to answer interrogatories filed before a commissioner within the time specified in the summons therefor, is a breach of the bail bond. *Trimble v. Shaffer*, 3 W. Va. 614.

The liability of each of the parties to the bond is fixed by the failure of the principals to comply with its conditions. *Trimble v. Shaffer*, 3 W. Va. 614.

And this though they were absent from the county when summons issued and were never served therewith, for the absence from the county at the time the summons issued was in itself a breach of the condition of the bond. *Trimble v. Shaffer*, 3 W. Va. 614; *State v. Peck*, 32 W. Va. 606, 9 S. E. 919.

And it is immaterial that the suit had been removed to the United States court and no decree had ever been entered in the state court. *State v. Peck*, 32 W. Va. 606, 9 S. E. 919. On evidence of breach, see post, "Breach of Recognizance," II, E.

As to bail's remedy over against principal, see Va. Code, 1887, § 2893; W. Va. Code, ch. 101, §§ 3, 4.

II. Bail in Criminal Cases.

A. WHEN BAIL SHOULD BE GRANTED.

1. Before Conviction.

a. Jurisdiction to Admit to Bail.

Federal Prisoner.—A state judge will not admit to bail one regularly committed for prosecution in a U. S.

court, for an offense cognizable therein. *Ex parte Pool*, 2 Va. Cas. 276.

(1) By Justice.

In a Felony Case.—A justice of the peace, before whom is brought a prisoner charged with a felony, has power to bail him, where only a slight suspicion of guilt falls on the party; and a recognizance taken before such justice, conditioned for the appearance of such prisoner before the examining court, is good, and a recovery may be had thereon, if the party makes default. *Tyler v. Greenlaw*, 5 Rand. 711.

Authority of Justice to Grant Bail after Trial by Examining Court.—A justice of the peace has no general authority to admit to bail after an examining court has sent the prisoner to the superior court, for trial. If the examining court refuses to bail, or is silent, the justice has no right to admit to bail; though any judge of the general court may. In taking a recognizance the justice can only rightfully act as the agent of the examining court, in execution of its judgment, and after it has judicially decided that the prisoner is bailable, and fixed the amount of bail. *Hamlett v. Com.*, 3 Gratt. 86.

Justice's Authority, When Special, Must Appear on Face.—The recognizance of bail taken by a justice, of a prisoner sent on for trial by the examining court, must show on its face that the examining court had entered of record that the prisoner was bailable; and had fixed the amount in which bail should be taken, for the authority of the justice, on which the validity of the recognizance depends, being special, must appear. *Hamlett v. Com.*, 3 Gratt. 82; *Saunders v. Com.*, 3 Gratt. 214. See post, "What Recognizance Should Show," II, B, 1.

Limitation on Justice's Authority in Granting Bail.—A justice had no power under 1 Rev. Va. Code, ch. 169, § 2, to bind the party in a recognizance to do more than answer the particular charge of which he was accused. His demand-

ing and taking a recognizance of a more general character was without authority, and therefore void. *Bias v. Floyd*, 7 Leigh 646.

Unauthorized Condition Void.—

Upon complaint of breach of the peace before a justice of the peace, he can not recognize the party accused to appear before the circuit court to answer the charge, and such condition is void. *Com. v. Bartlett*, 1 Leigh 586.

In West Virginia.—The authority of a justice to take a recognizance from a person charged with a crime is to be found in §§ 6, 9, ch. 156, W. Va. Code. *State v. McCown*, 24 W. Va. 625.

"The authority conferred on a justice to admit to bail is subject to many limitations. In the first place no authority is conferred on a justice to admit any person to bail, if he be charged with an offense punishable with death. Secondly, if the offense, with which the accused is charged, is punishable by confinement in the penitentiary, a justice may let him to bail under some circumstances but not under all. Thus he can not admit such person to bail, if bail had been previously refused by any judge, justice or court; and if the accused is in jail by an order of commitment fixing the amount in which he can give bail, or if an order has been made by a court or judge fixing the bail such person is to give, in either case no justice can admit the accused to bail in a less sum than is specified in such order. And lastly, though no such order has been made in a case of felony not punishable with death, the justice may admit to bail; but in such case he is expressly forbidden to admit such accused person to bail in a sum less than five hundred dollars." *State v. McCown*, 24 W. Va. 625, 631. See Va. Code, 1887, §§ 3960, 3961.

Thus, where a justice admits to bail a person accused of an offense punishable by confinement in the penitentiary, in a sum less than five hundred

dollars, the recognizance so taken by the justice was null and void, and the surety in it can not be held liable. *State v. McCown*, 24 W. Va. 625.

If the state may treat such a recognizance as void because taken by a justice without authority, as it may, it is difficult to conceive a reason why the surety of the accused may not also treat it as a nullity. If it be void as to the state for want of authority in the justice to take it, it must for the same reason be held void as to the surety in the recognizance. *State v. McCown*, 24 W. Va. 625, 632.

On Appeal from Mayor.—The requirement that any one convicted before a mayor of a city, town or village, under ch. 47, W. Va. Code, of a violation of an ordinance thereof, and sentenced to imprisonment or a fine of \$10 or more, shall be allowed an appeal as a matter of right, only upon entering into a recognizance before the justice for his appearance before the circuit court on the first day of the next term thereof to answer for the offense, with which he stands charged, and not to depart thence without the leave of the court, is no greater restriction upon his liberty, than what is required in every other case, where a party charged with any misdemeanor is examined thereof before a justice, whose duty requires him, if there is probable ground to believe the accused guilty of the offense, with which he is charged, to compel him to enter into a recognizance to appear at the next term of the circuit court, to answer an indictment, if one be found against him. This requirement is reasonable and just and is necessary to the peace and security of the community. *Beasley v. Town of Beckley*, 28 W. Va. 81, 88.

(2) By General and Circuit Courts.

The general court had original concurrent jurisdiction with the circuit superior court, and with the judge thereof in vacation, to admit the pris-

oner to bail for good cause to it shown. *Com. v. Semmes*, 11 Leigh 665.

And any judge of the general court might do the same. *Hamlett v. Com.*, 3 Gratt. 86.

While by § 6, ch. 156, W. Va. Code, authority is conferred on a circuit court or a judge thereof to admit any person to bail, no matter what the crime may be of which he is accused, and an unlimited discretion is given the circuit court or a judge thereof to fix the bail in all cases at any sum the court or judge may deem proper. *State v. McCown*, 24 W. Va. 625, 631. See Va. Code, 1887, §§ 3960, 3961, 3080.

(3) By Court of Appeals.

It would seem that the supreme court of appeals can admit to bail on habeas corpus. *Ex parte Eastham*, 43 W. Va. 637, 27 S. E. 896. See doubt expressed as to felony in *Quarrier's Case*, 5 W. Va. 49.

And it is intimated in *Ex parte Hill*, 51 W. Va. 536, 41 S. E. 903, that in a proper case the court of appeals would grant bail upon a habeas corpus seeking bail alone, it having original jurisdiction of that writ which has been long used as a process to obtain bail.

And again (obiter), that the court has power, when it has before it a habeas corpus seeking discharge on the claim of unlawfulness of imprisonment, and refuses discharge, to grant bail in a proper case. *Ex parte Hill*, 51 W. Va. 536, 41 S. E. 903. See W. Va. Code, 1899, ch. 111, § 6, expressly recognizing that court's power in the latter case either to discharge, or remand, or admit to bail. The corresponding section of the Va. Code, § 3034, as amended by acts of 1895-1896, omits this reference to the power to admit to bail, which it contained prior to that amendment. See § 3040.

(4) By Conservator of the Peace Generally.

"It is within the power of every conservator of the peace, to recognize a person who has committed an outrage

on the peace of society, to appear before the next court to answer an indictment to be preferred against him, and to recognize the witnesses also to appear and testify." *Wortham v. Com.*, 5 Rand. 669.

b. Bail in Capital or Murder Case.

West Virginia.—The general rule is that a capital case is not bailable, except under strong showing of no probable cause to charge the accused, and in a murder case where the prisoner acknowledges the homicide, the rule is nearly or quite universal. The almost universal practice in West Virginia is to refuse bail in murder cases. *Ex parte Eastham*, 43 W. Va. 637, 27 S. E. 896. The court was evenly divided on the question of granting bail. See *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, where it is said that the exercise of its discretion to refuse bail, could not be error in the trial court.

c. What Evidence to Be Considered.

When a prisoner, who has been remanded for trial by the examining court to the superior court, on a charge of felony, and against whom a bill of indictment has been found by the grand jury, applies to the superior court to be let to bail, on the ground that there is only a slight suspicion of guilt against him, that judgment, and the finding of the bill, are not conclusive evidence against the application, but the court may examine other evidence. But it is a question for the exercise of the sound discretion of the court, and if the court is satisfied that there is material evidence for the commonwealth that is not before the court, was not before the examining court, or spread on the record, the court ought not to sustain the motion. *Com. v. Rutherford*, 5 Rand. 646. See *Quarrier's Case*, 5 W. Va. 48, citing *Com. v. Semmes*, 11 Leigh 665; *Archer's Case*, 6 Gratt. 705.

d. On Acquittal of One of Several Similar Indictments.

Prisoner Bailable.—Where twenty-

four indictments were preferred against the prisoner for aiding and abetting a bank officer to embezzle, and for larceny of twenty-four several sums of money, at several times, as several and distinct offenses; and prisoner was brought to trial on one of the indictments, and acquitted, it appearing that the indictments were founded on a single criminal transaction, and though the acts charged in the indictments might be prosecuted as several offenses, yet they might all have been included in one indictment. The acquittal of the prisoner in one case, which it is fair to presume was the strongest, furnishes such presumption of his innocence in the others, as entitles him to be bailed. *Green v. Com.*, 11 Leigh 677.

But a prisoner, having been examined by the county court, was remanded for trial for the offense of feloniously passing two counterfeit half eagles, one of them to J. C. and the other to W. M., and two indictments found against him, in one of which he is charged with passing one of the counterfeit coins to J. C. on October 13, 1842; in the other with passing the other coin to W. M. on the same day. Upon a trial of one of the indictments, the jury find the prisoner not guilty, but his acquittal in that case does not entitle him to be let to bail in the other. No reasons given, and *Green's case*, relied on by petitioner, decided two years before, ignored. *Summerfield v. Com.*, 2 Rob. 768. It would seem that in the principal case the offenses were not sufficiently intimately connected, for the acquittal of the accused in one to furnish any presumption of his innocence in the other, as they probably could not have been embraced in the same indictment. Hence the decision.

e. Illness as Ground for Bail.

It is good cause for admitting to bail a prisoner confined in close jail upon an indictment for murder, that he is laboring under a present painful, severe, and dangerous disease contracted

since his confinement, caused by his imprisonment and likely to be so aggravated by a continuance thereof as probably to terminate fatally. *Com. v. Semmes*, 11 Leigh 665. See ante, "Bail in Capital or Murder Case," II, A, 1, b.

A prisoner indicted for a felony, will be let out on bail, when there is strong ground for the opinion that continued confinement would cause the disease under which the prisoner labors, to determine fatally. *Archer's Case*, 6 Gratt. 705.

f. Failure to Indict for Offense for Which Remanded.

An examining court having acquitted of murder and remanded the prisoner to the superior court to be tried for manslaughter, it is lawful for the superior court to indict for murder, and the prisoner, being so indicted, is not entitled to be bailed on the ground of no indictment being found against him for the manslaughter. *Com. v. Strother*, 1 Va. Cas. 186, 188; *Sorrel's Case*, 1 Va. Cas. 253; *Bailey's Case*, 1 Va. Cas. 258.

2. After Conviction.

After conviction of felony there can be no allowance of bail by the court of appeals or a circuit court, except for some cause extraordinary, not growing out of, but independent of, the criminal act, as for sickness, pending a writ of error, and before actual commitment to the penitentiary. The party must be laboring under a present, painful, severe, and dangerous disease, either caused or aggravated by his imprisonment, and there must be strong probable reason, not mere fear, but based on facts, to apprehend that continued imprisonment will be fatal, or at least cause permanent grave injury to health. *Ex. parte Hill*, 51 W. Va. 536, 41 S. E. 903, citing *Semmes Case*, 11 Leigh 665; *Archer's Case*, 6 Gratt. 705.

B. FORM AND SUFFICIENCY OF RECOGNIZANCE.

Definition.—A recognizance is a con-

tract of record like a statute staple, and all the books call it a "contract." *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

Recognizance Necessary.—"Section 4092, Code of Virginia, provides that a court or judge letting a person to bail shall require a recognizance to be given." *Cannon v. Com.*, 96 Va. 573, 575, 32 S. E. 33.

1. What Recognizance Should Show.

Generally.—When a recognizance is taken, it should show on its face that the condition it contains is to do some act, for the performance of which such an obligation may be properly taken, and that the court or officer before whom it is taken has authority to act in cases of that general character. *Cannon's Case*, 96 Va. 576, 32 S. E. 33, citing *Archer v. Commonwealth*, 10 Gratt. 638. See Va. Code, 1887, § 4093.

Recital of Special Circumstances Unnecessary.—Where a recognizance has a condition to do some act for the doing of which such an obligation may be properly taken; and the court or officer taking it had authority of law to act in cases of that general description, the recognizance is valid though it does not recite the special circumstances under which it was taken. And in declaring upon such a recognizance it is not necessary to aver the existence of the particular facts which show that the court or officer had authority to take it. *Archer v. Com.*, 10 Gratt. 627. See ante, "By Justice," II, A, 1, a, (1).

That It Was Entered into in Proper County.—See *Wood v. Com.*, 4 Rand. 329, where it is said that where nothing appears upon the recognizance of its being entered into in the county to which the justices taking it belonged, that fact is an important one and can not be supplied by averment.

Intelligible Abbreviation of Name of County in Caption Sufficient Identification.—But where the justice in putting the name of his county in the caption

uses a contraction, obviously intended for his county, though it is not stated in the body of the recognizance, of what county the justice was, yet as it states that he was a justice of the said county, that refers to the county named in the caption, and is sufficient. *Gedney v. Commonwealth*, 14 Gratt. 318.

Recognizance on Stay of Execution.

—"Section 4051, after providing for a stay of execution of a sentence of a court where a person is convicted of an offense punishable by death or confinement in the penitentiary, in order that such person may apply to this court for a writ of error, provides that 'in any other criminal case, wherein judgment is given by any court, and in any case of judgment for contempt, to which a writ of error lies, the court giving such judgment may postpone the execution thereof for such time and on such terms as it deems proper.' This is the second section of chapter 198 of the Code, and is the only section in that chapter, and the only statute, under which by any possible construction, a recognizance can be taken. Therefore, a recognizance taken under this section must substantially comply with the conditions of § 4093." *Cannon v. Com.*, 96 Va. 573, 575, 32 S. E. 33.

Recognizance Stands Alone on Demurrer.—Upon a demurrer to a scire facias sued out on a forfeited recognizance, the entry of default can not be looked to in aid of the recognizance. The recognizance must stand alone upon a demurrer. *Cannon v. Com.*, 96 Va. 573, 32 S. E. 33; *Wood v. Com.*, 4 Rand. 329.

2. Penalty.

Where the statute expressly provides that a justice shall not admit to bail a person charged with an offense punishable by confinement in the penitentiary, in a less sum than \$500, such a recognizance taken for a less sum is null and void, and the

surety in it can not be held liable. *State v. McCown*, 24 W. Va. 625. See ante, "Liability Limited by Penalty," I, A, 11, c.

3. Oblige—Description.

Recognizance to "Commonwealth" of West Virginia—Valid.—A recognizance given in a criminal proceeding in this state, reciting that proceeding, and conditioned for the appearance of the accused to answer it before a circuit court of this state, is valid, though payable to the "commonwealth" of West Virginia. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

4. Condition.

a. Place of Appearance.

Although the condition of a recognizance does not specify the courthouse of the county as the place at which the prisoner is to appear, and the declaration on the recognizance avers that such was the condition, yet on noli tuel record pleaded, judgment ought to be rendered for the plaintiff, because the statute points out that as the only place where the examination shall be had. *Tyler v. Greenlaw*, 5 Rand. 711.

b. To Answer Offense Charged.

No Reference to Offense Charged—Void.—A recognizance taken by a county court from a principal and sureties with a condition that the principal shall "personally appear in this court on the first day of the next term and surrender himself into custody and not depart thence without the leave of this court," is a void recognizance because the condition is not a substantial compliance with § 4093 of the Va. Code, which prescribes that the condition, when it is taken of a person charged with a criminal offense, shall be, that he appear "to answer for the offense with which such person is charged." It is not "substantially sufficient" as is required by § 4100 of the Code. *Commonwealth v. Fulks*, 94 Va.

585, 27 S. E. 498; *Bias v. Floyd*, 7 Leigh 640.

And a recognizance in a criminal case with condition to appear before the court on the first day of its next term, and "not depart without the leave thereof, to answer the judgment of this court," is not in compliance with § 4093 of the Va. Code, and is void for uncertainty. *Cannon v. Com.*, 96 Va. 573, 32 S. E. 33.

But where the condition of recognizance of one accused of a felony was for his personal appearance "to answer the charge against him," it was held sufficient, no formal language being prescribed for a recognizance. *Allen v. Com.*, 90 Va. 356, 18 S. E. 437, citing *Archer v. Com.*, 10 Gratt. 627; *Bolanz v. Com.*, 24 Gratt. 31. In the last case the condition was for his appearance "to answer the indictment; and not to depart, etc.," and was good.

"The Code, 1887, § 4093, has prescribed no set form of words to be adopted when the parties are recognized in open court, and § 4100 specially enacts that 'no action or judgment on a recognizance shall be defeated or arrested by any defect in the form of the recognizance if it appears to have been taken by a court or officer authorized to take it and be substantially sufficient. The language of the Code is: 'The condition, when it is taken of a person charged with a criminal offense, shall be, that he appear before the court, judge or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offense with which such person is charged * * *; and * * * shall not depart thence without leave of the court.'" *Allen v. Com.*, 90 Va. 356, 358, 18 S. E. 437.

"Here the language of the order of the court, for in practice the recognizance is not usually written out in

full when it is merely a renewal recognizance taken during the term of the court, while certainly general, is sufficiently definite, as it points to the only offense with which the prisoner stood charged." *Allen v. Com.*, 90 Va. 356, 358, 18 S. E. 437.

Interlineation Should Be Stricken Out—Effect.—After a recognizance had been taken, words were interlined by the justice, specifying the charge against the accused, without which it would have been invalid, and the scire facias upon the recognizance described it as though the interlined words had formed a part of it originally. Upon a rule for the purpose, the recognizance may be amended by striking out the interpolated matter, and then, upon a plea of no such record to the scire facias, judgment will be given for the defendants, because of the variance between the recognizance as amended and the recognizance as described in the scire facias. *Bias v. Floyd*, 7 Leigh 646.

5. Recognizance for Infant.

An infant prisoner being admitted to bail, his sureties were required to enter into the recognizance of bail, without his joining therein himself. *Com. v. Semmes*, 11 Leigh 665.

6. Recognizance—Joint or Several.

A recognizance may be joint and several or merely several. It is usually several, binding each cognizor in a specific sum. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

C. DISCHARGE OR EXONERATION OF BAIL.

1. Power of Courts over Recognizances.

Our courts, at common law, possessed and exercised a power of discharging recognizances before the same were adjudged to be forfeited. The statute has extended this power, and provided that "when, in an action of scire facias on a recognizance, the penalty is adjudged to be forfeited, the court may, on application of a defend-

ant, and in a county or corporation court, with the consent of the attorney prosecuting, remit the penalty, or any part of it, and render judgment, on such terms and conditions as it deems reasonable." Code, ch. 211, § 10, p. 785. *Caldwell v. Com.*, 14 Gratt. 707. See Va. Code, § 4099, as amended, and W. Va. Code, 1899, ch. 162, § 9.

The courts of this state, by analogy to the practice in England, have certainly the power to spare the recognizance, at least at any time before the sci. fa. awarded. *Com. v. Craig*, 6 Rand. 732.

2. Impossibility of Performance.

Excuse for Breach.—If the court, at a subsequent term after default of principal had been recorded, was satisfied by competent evidence, that the cognizor was disabled by his wounds from attending the court, it is reasonable and just that his misfortune should not be visited upon him, and his sureties; particularly, as by his appearance afterwards, the ends of public justice will be answered; and in such case, the court ought not to award any sci. fa. against them on a rule for that purpose. *Com. v. Craig*, 6 Rand. 733; *Caldwell v. Com.*, 14 Gratt. 698, 706.

"In all cases where the condition of a bond or recognizance is possible at the time of making the condition, and before the same can be performed it becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved." *Caldwell v. Com.*, 14 Gratt. 698, 702.

"The principal is considered to be in the custody of the bail; and the law undoubtedly gives to the bail great power in arresting the principal and surrendering him in discharge of the recognizance. But that power is not invincible. It may be overcome by the act of God, as for instance the death of the principal; or by the act of the law, as in this case." *Caldwell v. Com.*, 14 Gratt. 698, 702.

But, while it is true that the bail may be excused for his default in performing the condition of the recognizance, when it becomes impossible of execution by the act of God or of the law, or of the cognizee, it is not competent for the accused to absolve himself or his bail by accepting office under the government of the United States. *Bolanz v. Com.*, 24 Gratt 31.

Performance Rendered Impossible by Act of the Law.—The prisoner's confinement in the penitentiary under sentence for another felony, having rendered it impossible for him to appear at the court to answer a charge of felony at the time prescribed by the recognizance, it constitutes a good defense for the bail to the scire facias against him. *Caldwell v. Com.*, 14 Gratt. 698.

How Defense Made.—And the defense may be made by plea; but it may also be made by petition or motion, where no objection is made thereto. And the facts being agreed by counsel for the bail and the attorney for the commonwealth, the question of law may be decided by the court. *Caldwell v. Com.*, 14 Gratt. 698.

Evidence.

Principal Incompetent to Prove Inability to Attend—Interest.—The principal in a recognizance of bail entered into by him, with sureties, for his appearance to answer an indictment, was not a competent witness in behalf of his sureties, who were seeking a discharge from their liability by proof of the principal's inability to attend. This was on account of interest. *Com. v. Craig*, 6 Rand. 731.

But Affidavits Admissible.—In showing cause, to wit, the inability of the principal to attend and surrender himself in time, against a rule for a sci. fa. against them, affidavits are admissible, without requiring the presence of the witnesses in court, if the court be satisfied that they have been fairly taken, the motion being addressed to

the sound discretion of the court, and there being yet no suit depending in which witnesses could be required to attend by compulsory process. *Com. v. Craig*, 6 Rand. 731.

3. Duress as Ground for Exonerating Bail.

The jurisdiction and authority of the court by whose order he was detained in custody being shown, the officer detaining him in custody would be protected by the order. And a recognizance entered into (before a court of competent authority) for his ease and to procure his enlargement from custody, could not be regarded as obtained by duress. *Archer v. Com.*, 10 Gratt. 627. But the opinion disclaims the intention to hold that under a proper state of facts, of which duress of imprisonment might be predicted, it might not be pleaded that the recognizance was given to procure the enlargement of the principal from an unlawful custody. *Archer v. Com.*, 10 Gratt. 627.

4. Immateriality of Accused's Guilt.

Plea of Former Acquittal.—The bail has no legal concern in the acquittal or condemnation of his principal, the condition of the recognizance being, not that the principal shall make good his defense, but that he shall appear and answer to it, and he can not avoid his liability on the recognizance, arising from the principal's failure to comply with its condition, by showing that the principal was armed with a defense which, if he had appeared and presented it, would have protected him against further prosecution for the offenses with which he was charged. *Archer v. Com.*, 10 Gratt. 632.

In the case of a scire facias against bail upon a recognizance in a case of felony, a plea which alleges that, at the time the recognizance was entered into, the principal was by law acquitted and discharged of the said several supposed offenses of which he stood

charged, presents no defense for the bail. And this whether the plea is to be considered as averring an acquittal of the principal upon a trial had, or his discharge by operation of law for the failure to try him within three terms of the court. *Archer v. Com.*, 10 Gratt. 627; *Green v. Com.*, 1 Rob. 731, distinguished, on the ground that in that case the recognizance was not entered into after the discharge, claimed to have been brought about by operation of law by the expiration of three regular terms of the court without a trial, but was taken during the third term. The right to a discharge was held to become complete upon the adjournment of that term, and that court's power to discharge the prisoner having terminated therewith, he was entitled to be discharged from the custody of his bail. In the principal case the recognizance was entered into after the alleged right to discharge had accrued, while the court's power in the premises was still in full force, to discharge the prisoner if he was entitled thereto. See post, "Discharge of Accused from Bail's Custody," II, D.

But that the prisoner had been tried on the indictment and acquitted, would strongly have addressed itself to the discretion of the court, and would have justified the exercise of that discretion in favor of the petitioner, asking for exoneration and discharge on that account from the obligation of a forfeited recognizance. *Caldwell v. Com.*, 14 Gratt. 698, 702.

Plea of Nolle Prosequi.—A plea that a previous prosecution against the principal for the same offenses to which by the recognizance he had undertaken to appear, had been terminated by a nolle prosequi, presents no defense to the action. *Archer v. Com.*, 10 Gratt. 627.

5. Plea of Nonaction of Judge.

The condition of the recognizance being that the principal shall make his personal appearance on the first day

of the next term of the court, and not depart thence without the leave of the court, a plea that the principal did appear on the first day of the term of the court to which he was recognized, but that the judge who presided on the said first day of the court would not sit in his case or make any order therein, does not present a defense for the bail. *Archer v. Com.*, 10 Gratt. 627.

6. Discharge by Surrender of Principal.

See Va. Code, §§ 4101, 4102; W. Va. Code, 1899, ch. 162, §§ 11, 12.

Section 11, ch. 162, W. Va. Code, gives surety right at any time to take his principal and surrender him to certain officials there specified, and its operation is to discharge the surety upon such surrender of his principal to the custody of the law. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

And the bail may arrest the principal and surrender him by common law, and he may, though not necessarily, get a bail piece, under W. Va. Code, ch. 156, § 8, for his arrest. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

Certificate of Surrender Not Sole Evidence Thereof.—If a surety in a recognizance surrenders his principal to a justice, the failure of the justice to give a certificate of the surrender will not prevent the use of other evidence to prove the surrender. The certificate is not the sole evidence. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930. Though made of a criminal recognizance, this statement would seem to be of general application.

D. DISCHARGE OF ACCUSED FROM BAIL'S CUSTODY.

Being Discharged of the Crime.

Where, upon the adjournment of a certain term of court, a prisoner became entitled, by operation of law, to be forever discharged of the crimes with

which he stood charged, the number of terms allowed by law for his trial having passed, and on the last day of that term had entered into a recognizance for his appearance at the next term; he was entitled, upon a habeas corpus, to be discharged from the custody of his bail, which ought no longer to be allowed after the law has discharged him of the crimes. *Green v. Com.*, 1 Rob. 731. See *Archer v. Com.*, 10 Gratt. 627, distinguishing this case. See also, ante, "Immateriality of Accused's Guilt," II, C, 4.

The adjournment of the court, which made his right to this discharge complete, deprived it of its capacity to order the discharge to which the prisoner became entitled. *Green v. Com.*, 1 Rob. 731.

E. BREACH OF RECOGNIZANCE.

Departing without Leave of Court.—Where a recognizance provides that the accused shall appear, etc., * * * and "not depart without the leave of the court," the prisoner did not fulfill the condition by merely appearing and pleading, for this provision was inserted for the express purpose of keeping him there to answer any other information that might be exhibited against him before he received his discharge, and from this liability he can not discharge himself and sureties by any mere act of his own. *Allen v. Com.*, 90 Va. 358, 18 S. E. 437; *Archer v. Com.*, 10 Gratt. 639.

Evidence of Default of Appearance.—Record.—If the accused fail to appear before a court as required by a recognizance, his default must be entered of record, and that record is the only admissible evidence of the fact. There need be no calling of the sureties to produce their principal, or any entry of their default. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

For a recognizance is a contract of

record like a statute staple, and the surety must keep watch on his principal, without warning or notice from the creditor, as he has undertaken to guarantee his promise. *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

Default of Bail Need Not Be Entered of Record.—"Our Code requires only that the failure of the principal to appear be entered of record. We can not add to the statute that the default of the surety to produce his prisoner be also entered. If it ever was the common law here that the default of the bail be entered, it has never been our practice." *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

The jurisdiction to forfeit a recognizance of bail was originally only in the court by which the recognizance was taken. *Com. v. Walton*, 1 Va. Cas. 142. See note to case to effect that by the act of January 24, 1804, provision was made for the transmission of recognizances from the courts where they were taken to the courts where the prisoner was to be tried. See Va. Code, 1904, §§ 684, 684c, 4096, 4097.

Procedure against Several Cognizors.—Where a recognizance of bail is entered into in the usual form, by several cognizors, in a certain sum each, they may be proceeded against together by one scire facias, but it must treat the recognizance as several, and the judgment must be several. *Caldwell v. Com.*, 14 Gratt. 698; *Gedney v. Com.*, 14 Gratt. 318; *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930.

As to bail's right, against principal, to exoneration, see the title CONTRIBUTION AND EXONERATION.

F. BAIL BOND AS SUBJECT OF FORGERY.

See the title FORGERY AND COUNTERFEITING.

Bail Commissioners.

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BAILMENTS.

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CROSS REFERENCES.

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I. Definitions and Distinctions.

A. GENERAL DEFINITIONS.

Locatio Operis Faciendi.—A bailment of wheat to be converted into flour, is called, in the books, locatio

operis faciendi, and undeniably exists in the case of a single bailment, and where the flour of the same wheat is to be received in return. But the character of the transaction is not lost, when,

for general convenience, the wheat delivered at the mill, by many customers, is agreed by a common usage, or otherwise, to be put into a common stock, and when it is further agreed, that the return is to be made out of the common mass of flour. *Slaughter v. Green*, 1 Rand. 9.

Pledge.—A pledge is a bailment of goods by a debtor to his creditor, to be kept by him until his debt is discharged. *First Nat. Bank v. Harkness*, 42 W. Va. 156, 24 S. E. 548. See also, the title PLEDGE AND COLLATERAL SECURITY.

Depositum.—See the title DEPOSIT.

Depositum is the gratuitous taking of a thing on deposit for the benefit of the bailor. *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 610.

Mandatum is the gratuitous carriage of a thing from place to place for the benefit or accommodation of the bailor. *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 610.

B. DISTINGUISHED FROM OTHER TRANSACTIONS.

1. Sale.

"It is said to be a recognized distinction between bailment and sale that where the identical thing delivered is to be returned, though in an altered form, the contract is one of bailment, and the title to the property is not changed. Where there is no obligation to return the specific article, and the receiver is at liberty to return another thing of equal value, he becomes debtor to make the return, and the title to the property is changed, the transaction is a sale." *Reherd v. Clem*, 86 Va. 374, 10 S. E. 504; *Barnes, etc., Lock Co. v. Bloch Tobacco Co.*, 38 W. Va. 158, 18 S. E. 484.

"In *Powder Co. v. Burghart*, 97 U. S. 110—where logs are delivered at a sawmill, to be manufactured into boards; or leather to a shoemaker, to be made into shoes; rags into paper; olives into oil; grapes into wine. wheat

into flour—if the product of the identical articles delivered are to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat, or flour, or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered rests in the manufacturer." *Reherd v. Clem*, 86 Va. 379, 10 S. E. 504.

In *Barnes, etc., Lock Co. v. Bloch Tobacco Co.*, 38 W. Va. 158, 18 S. E. 482, it was held, that the principle of law which declares that where the identical property bailed is not to be returned, but only its equivalent in value, the transaction is a sale and not a bailment, does not apply to that class of bailments known as consignment for sale, as in that class of bailments the title remains in the bailor until the entire terms of the contract are fulfilled and the bailment is terminated.

Consigned Goods.—See the title FACTORS AND COMMISSION MERCHANTS.

"Ordinarily, if goods are 'consigned' for sale, it is a bailment, and not a sale to the consignee. The goods do not become his property or liable for his debts," "even though consigned on a del credere commission." *Barnes, etc., Lock Co. v. Bloch Tobacco Co.*, 38 W. Va. 158, 18 S. E. 484.

The fact that the goods consigned were invoiced at a stated price does not itself constitute the transaction a sale, unless the terms of the consignment be such as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods. *Barnes, etc., Lock Co. v. Bloch Tobacco Co.*, 38 W. Va. 158, 18 S. E. 484.

Wheat Delivered at Mill.—Where wheat is delivered at a mill to be ground, upon an agreement that the

millor shall return to the farmer a given quantity of flour for so many bushels of wheat, the miller is a bailee and not a purchaser; and therefore, if the wheat be consumed by accidental fire, the miller will not be responsible for it. This conclusion will not be altered by an understanding between the parties, that the miller is not bound to return flour made from that identical wheat, but flour of a certain quality made from any wheat in the mill. *Slaughter v. Green*, 1 Rand. 3.

3. Deposit with Bank.

See the title BANKS AND BANKING.

A deposit of money in bank is a loan, and not a bailment. *Robinson v. Gardiner*, 18 Gratt. 509.

3. Trust.

Equity Jurisdiction.—Bailment is not such a trust as gives a court of equity jurisdiction. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

Deposit of Iron.—A company made an agreement to sell to another company a quantity of iron, which the latter company refused to accept because it did not comply with the contract, but agreed to take the iron and aid the former company in disposing of it, and at the same time agreed to allow it to remain in their yards free of expense to the former company; and after the lapse of a number of years the latter company claimed to know nothing about the iron. It was held, that this was a bailment and that no express trust would arise from this state of facts. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

II. Validity of Contract.

A. IN GENERAL.

Mutual Assent.—A depositum or mandatum is a bailment solely for the

benefit of the bailor. Bailments of this class are commonly founded in contract and express undertaking. A mutual assent is always needful, whether evinced by words or acts; and no one can become responsible, even as a gratuitous bailee, where goods are surreptitiously put in his carriage, or thrust upon his person, without his knowledge or consent, though if, upon ascertainment of this fact, he went on with the trust, this might bind him. *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 610.

Promise to Care for Property.—A count averring that the property bailed was delivered to the defendant and that they promised to take care of it and return it to the plaintiff, sufficiently shows an acceptance of the bailment by the defendant. *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 609.

Bailment in Fraud of Creditors.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

It seems, that, in the case of an absolute sale and delivery of chattels, and an immediate redelivery thereof by vendee to vendor, upon bailment, for a limited time, on valuable consideration, both transactions being in fact fair, such bailment of vendee to vendor is not inconsistent with the sale, so as to make the sale fraudulent per se. *Sydnor v. Gee*, 4 Leigh 535.

Proof of notice of the loan, or of a deed of trust, from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away with the effect of possession obtained by reason of said pretended loan and remaining more than five years in the present holder's hands, without demand of possession on the part of the lender. *Gay v. Moseley*, 2 Munf. 543.

B. HIRE OF SLAVES.

For a full treatment of this subject, see the title SLAVES.

III. Rights and Liabilities of Parties.

A. BAILOR.

Right to Recover Possession.—

Simply intrusting the possession of a chattel to another as depository, pledge or other bailee, or even under a conditional executory contract of sale, is insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition of it by the person so intrusted. *Ballard v. Burget*, 40 N. Y. 314; *Ullman v. Biddle*, 53 W. Va. 417, 44 S. E. 280. See also, post, "Parties," IV, B.

The finder of a bank note, has, as against a bailee without reward, to whom he delivers it to be kept for such finder, such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee. *Tancil v. Seaton*, 28 Gratt. 601.

B. BAILEE.

1. In General.

A bailee of chattels has a right of possession in them, and he may maintain an action of detinue against one who unlawfully withholds them from him. *Boyle v. Townes*, 9 Leigh 158.

2. Power to Dispute Bailor's Title.

The general doctrine is well established, that in ordinary cases the bailee can not dispute his bailor's title. But there are numerous exceptions thereto, as where it can be shown that the bailor fraudulently obtained possession of the goods; or they have been recovered from the bailee by suit or paramount title; or he has been notified by the true owner, before the suit was instituted, not to deliver them to him, and like instances. *Tancil v. Seaton*, 28 Gratt. 601; *Kelly v. Patchell*, 5 W. Va. 585.

3. Right to Compensation.

For Storage of Goods.—T. stores

goods with R., and nothing is said as to the compensation which R. is to receive for their storage. The law implies a contract that R. shall be paid a reasonable compensation therefor, unless there be something in the relation of the parties or the circumstances of the case which precludes the idea of such compensation, in which case there would be an implied agreement or understanding that no such compensation was to be paid. *Rea v. Trotter*, 26 Gratt. 585. See generally, the title WAREHOUSES AND WAREHOUSEMEN.

Services of Physician Attending

Slave.—Hirer of a slave pays physician for attending on the slave while he is hired. He is entitled to have the amount repaid him by the owner of the slave. *Isbell v. Norvell*, 4 Gratt. 176. See generally, the title SLAVES.

4. Liability for Loss of Property.

a. In General.

By Robbery.—If a person to whom a sum of money has been entrusted for safekeeping is robbed of it, he is not liable to the person who entrusted him with it for the money. *Danville Bank v. Waddill*, 31 Gratt. 469. See also, *Tancil v. Seaton*, 28 Gratt. 601.

By Accidental Fire.—A bailee is not responsible for the loss of the property in his possession by accidental fire. *Slaughter v. Green*, 1 Rand. 3.

Where wheat is delivered at a mill to be ground upon an agreement that the miller shall return to the farmer a given quantity of flour for so many bushels of wheat, if the wheat is consumed by an accidental fire, the miller will not be responsible for it. *Slaughter v. Green*, 1 Rand. 3. See also, *Reherd v. Clem*, 86 Va. 374, 10 S. E. 504.

b. Hirer of Slaves.

See also, the title SLAVES.

Employment in Dangerous Work.

—If a hired slave is put by the hirer to a dangerous employment, in viola-

tion of the contract of hiring, and is seriously injured whilst thus employed, the hirer is liable for the damages, notwithstanding the slave may have been negligent or imprudent, or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury. *Harvey v. Skipwith*, 16 Gratt. 393.

5. Diligence Required of Bailee.

Bailee without Reward.—In Gratuitous bailments slight care only is required of the bailee, and he can not be made liable unless he is guilty of fraud or gross negligence. *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 610.

A gratuitous bailee is only liable for gross negligence. *Carrington v. Ficklin*, 32 Gratt. 670.

A gratuitous bailee is not bound to use as great care and diligence in the keeping of a bank note entrusted to his care as he would if he were a bailee with compensation; and if the note was stolen from his possession, he will not be liable for it, unless the loss was the result of gross negligence on his part. *Tancil v. Seaton*, 28 Gratt. 601.

Contractual Liability.—In *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 609, the court held, that where a bailee having a gratuitous bailment for the sole benefit of the bailor, changed his liability by contract and became an insurer of the property bailed, he would be bound by the contract, and the court would enforce the liability. The court in deciding this case said: "The law permits a party to make any contract he pleases, and when it is not illegal or contrary to public policy, it will be enforced according to its terms. The general rule, however, in the construction of special contracts of this kind, is not to expound the contract unfavorably to the bailee beyond the obvious scope of its terms."

"In 2 Bl. Comm. 452, the author

says: 'If a bailee undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own;' that is, he is bound to ordinary diligence." *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 610.

Bailee for Hire.—See the titles BANKS AND BANKING; CARRIERS; DEPOSIT; PLEDGE AND COLLATERAL SECURITY.

6. Power of Bailee to Sell.

A consignee of goods may dispose of them in the way of trade; but he can not pawn them for his own benefit, so as to divest the property of the consignor. *Skinner v. Dodge*, 4 Hen. & M. 432. See generally, the title FACTORS AND COMMISSION MERCHANTS.

Mere possession without more of a chattel by a bailee for storage will not be ground for inference of authority to sell so that a bona fide purchaser can buy from him good title against the owner. *Ullman v. Biddle*, 53 W. Va. 415, 44 S. E. 280.

7. Duty to Return Property or Value.

It is the duty of a bailee who has possession of property to restore it to the owner when lawfully demanded. *Boyle v. Townes*, 9 Leigh 158.

A sick man receives a sum of money in bank notes which he hands to his wife for safekeeping until he should get well enough to put them in bank; and he dies a few days after. After his death his executor applies to the widow for the bank notes which she refuses to deliver to him, saying she intends to keep them. He sues her in assumpsit for the money, and the declaration contains only the common counts. It was held, the action was well brought, and he is entitled to recover. *Lawson v. Lawson*, 16 Gratt. 230.

The plaintiff deposited with the defendant a certain amount of manufactured tobacco which was received by the defendant into his warehouse on

storage for a compensation to be paid by plaintiff and defendant agreed in consideration of such compensation to keep the same in storage on the account of plaintiff and subject to his orders until it should be demanded and then agreed to deliver it to the plaintiff or his order. It was held, that if defendant failed to keep the tobacco and deliver it up, he thereby became liable to pay the plaintiff the damages sustained by such breach of the contract, although before the demand of the plaintiff he had sold plaintiff's tobacco as well as his own because of his apprehension that the Union forces were about to occupy said town and would search his house and seize said tobacco, and said forces did, after their occupation of said town, search defendant's house for tobacco. *Rea v. Trotter*, 26 Gratt. 585. See generally, the title **WAREHOUSES AND WAREHOUSEMEN**.

3. Conversion by Bailee.

See generally, the title **TROVER AND CONVERSION**.

Bailee Pledging Property.—A bailee pledging another's property without authority is guilty of conversion, and both bailee and pledgee are liable in trover, whether the pledgee knew the real state of the title or not. *Patton v. Joliff*, 44 W. Va. 88, 28 S. E. 741. See generally, the title **PLEDGE AND COLLATERAL SECURITY**.

Conclusive of Right to Sue at Law.—Where a company converted iron which it held as a bailee to its own use by sale or use, it was held, that it did not impress the transaction with the character of a trust, but was conclusive of a right to sue at law. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 796.

Acceptance of Compensation Not a Waiver of Conversion.—The acceptance by the owner of the slaves of the hires up to the time of their death, having been after the institution of the action to recover their value, and

whilst the said action was vigorously prosecuted, was not a waiver in law of the conversion. *Harvey v. Epes*, 12 Gratt. 153.

Taking Slaves to County Not Specified in Contract.—Contractors on a railroad hire slaves for a year to work on the road in the county of A. They take them to the county of C, and employ them on the road in that county; and whilst there they take sick and die. It was held, this removal of the slaves from the county of A, and working them in the county of C, is not of itself a conversion of the slaves to their own use by the contractors, whereby they became immediately responsible to the owner for the value of the slaves in the event of their death, whether occasioned by such wrongful act or not. *Harvey v. Epes*, 12 Gratt. 153.

But if the death of the slaves was occasioned by the wrongful act of removing them and working them in the county of C, then the said act, in connection with the death of the slaves, was a conversion of them by the contractors to their own use, and made them liable for the value of the slaves, either in case or trover. *Harvey v. Epes*, 12 Gratt. 153.

Accidental Loss May Become Conversion.—The accidental loss of a hired slave, occurring in the wrongful employment of the slave, amounts to such a conversion by the bailee, as will sustain an action of trover by the owner. *Spencer v. Pilcher*, 8 Leigh 565. See also, the title **SLAVES**.

IV. Procedure.

A. NATURE OF ACTION.

Action Arises Out of Contract.—In an action for goods lost by a bailee, it is generally optional with the plaintiff to declare against the bailee in form *ex contractu*, or in tort, but in whatever form he may frame his declaration the action is still one of contract, wherever the liability of the defend-

ant in fact arises out of a contract. *Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 609.

Action of Tort.—The hirer of a slave placed him at work, which was dangerous, in violation of the contract of employment, and the slave was injured. It was held, in an action by the owner against a hirer for the injury to the slave, that the stating of the contract in the count and injury as having been done in violation of the contract, did not prevent the count being in tort. *Harvey v. Skipwith*, 16 Gratt. 393.

Assumpsit.—An action of assumpsit will lie to recover the value of tobacco which has been deposited with the defendant, and which he refuses to return on demand. *Rea v. Trotter*, 26 Gratt. 585.

B. PARTIES.

Right of Bailor to Maintain Action.—A man who has delivered goods to a carrier or other mere bailee, and so parted with the actual possession, may maintain trover for a conversion by a stranger; for the owner has still possession in law against a wrongdoer; and the carrier or other mere bailee is no more than his servant. But where property is bailed for a term, the bailor, having no right of possession, can not maintain trover against a stranger for converting the property during the term. *Harvey v. Epes*, 12 Gratt. 166. See generally, the title TROVER AND CONVERSION.

Bailee May Maintain Action.—A bailee of chattels may maintain detinue for them upon his right of possession as bailee. *Boyle v. Townes*, 9 Leigh 158.

C. PLEADINGS.

Misjoinder of Actions.—Where there are two counts in a declaration in detinue, one counting on a right of property in the plaintiff, and the other on a right of possession in him as bailee; it was held, that there is no misjoinder

of action. *Boyle v. Townes*, 9 Leigh 158.

A person appointed curator and receiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property; but if he brings detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator, etc., being surplusage. *Boyle v. Townes*, 9 Leigh 158.

D. EVIDENCE.

Burden of Proof.—In an action brought by a finder of a bank note against a person with whom he had placed the note for safekeeping, and who refuses to return the note upon demand, the burden of proof is on the plaintiff to show that the note declared on was a genuine note and of the value claimed. *Tancil v. Seaton*, 28 Gratt. 601.

Entry in Books.—An entry on the books of a party, made by his clerk, who is not then to be found, together with the oath of the party as to the quantity of the articles charged, though admissible as evidence in the case of a sale and delivery of goods, is not proper to charge another party with articles, delivered to the master of his vessel for safekeeping. *Kerr v. Love*, 1 Wash. 172. See also, the title DOCUMENTARY EVIDENCE.

Admissions of Bailee.—Subsequently to a bailment of a slave for hire, the bailee, being about to carry the slave with him on a voyage down the Ohio and Mississippi rivers, acknowledges to third person, that he has no authority to do so, and that he will be liable in case the slave be lost; it was held, such admissions of the bailee are competent evidence against him, in an action brought by the owner to recover damages for the loss of the slave, who was drowned in the course of the voy-

age. *Spencer v. Pilcher*, 8 Leigh 566. See also, the title DECLARATIONS AND ADMISSIONS.

Receipt for Goods.—In an action of assumpsit by T. against R. to recover the value of goods stored by T. with R., the receipt of R. for the goods is competent evidence for T., and an account of the sales of the goods copied from the books of R. with his assent and in his presence, and acknowledged by him to be correct, is competent evidence for T., as original and not secondary evidence. *Rea v. Trotter*, 26 Gratt. 585. See the title RECEIPTS.

Where a receipt for wheat delivered in mill as ambiguous as to whether a sale or bailment was intended, and there was evidence to support the theory that a sale had been made at a price to be fixed at any time by the seller; it was held, error to restrict the jury to the terms of the receipt for its interpretation. *Reherd v. Clem*, 86 Va. 374, 10 S. E. 504.

E. QUESTION OF LAW OR FACT.

Negligence.—The question of negligence on the part of bailee, as a general rule, is a question of fact, and not of law. *Carrington v. Ficklin*, 32 Gratt. 670.

It is only in that class of cases where a party has failed in the performance of a clear legal duty, that when the facts are undisputed, the question of negligence is necessarily one of law. *Carrington v. Ficklin*, 32 Gratt. 670.

F. DEFENSES.

Failure to Deliver Slave.—Upon an action on a bond given for the hire of two slaves, one of whom was never delivered to the hirer, the obligor is entitled, under a special plea filed under the act of April 16, 1831, Sup. Rev. Code, p. 157, to a credit to the amount of the hire of the slave not delivered. *Ishell v. Norvell*, 4 Gratt. 176.

BALANCE.—A will gives pecuniary legacies indicating no other fund for their payment, and there is no other personalty for their payment, and then directs a farm to be sold "and after paying all my debts, the balance to go to my daughter, Ella Spicer, except" certain other after named legacies. Ella Spicer takes as residuary legatee, and all the legacies are to be paid out of the proceeds of the farm. The court said: "There is nothing to pay them except the home farm, and after giving these legacies he says the balance of it shall go to Ella Spicer. To what can the word balance relate but to those antecedent legacies? I do not suppose that it means balance after excluding debts alone. It can not mean that in order to get at its meaning we shall go forward and finding legacies given afterwards to Mary Wiseman and the four grandchildren say that the word balance means the balance after paying debts and these latter legacies, because when he used that word balance his mind had not yet come to them, but it had dealt with the legacies to Avaline Whitten and Delilah Houchins." *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255. See generally, the title WILLS.

BALANCE IN BANK.—A balance in bank has been held to be a chose in action. *Koss v. Kastelberg*, 98 Va. 278, 36 S. E. 377. See generally, CHOSE IN ACTION.

BALLOT.—See the title ELECTIONS.

In *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 841, it is said: "While the terms ballot and 'vote' are sometimes confused, and while they may sometimes be used synonymously, the ballot is, in fact, under our form of voting, the instrument by which the voter expresses his choice between two candidates or two

propositions; and his vote is his choice or election between the two, as expressed by his **ballot**; and when his **ballot** makes no choice between any two candidates, or on any question, then he casts no vote for either of these candidates or on the question."

A **ballot**, prepared and perfected under the provisions of § 34, ch. 3, W. Va. Code, 1899, is one of the columns on the **ballot** sheet, described in said section, so changed as to suit the wishes of the voter, and is a list in one of such columns of the names of all the persons for whom the voter desires to vote, with the designation of the office he desires each of them to fill, and every other column on the **ballot** sheet must be defaced in the manner prescribed in said section. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. See also, *Morris v. Board of Canvassers*, 49 W. Va. 268, 38 S. E. 500.

Secret Ballot.—A vote by **ballot ex vi termini** implies a secret **ballot**. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483.

Ballot Boxes.

See the title ELECTIONS.

Ballot Commissioners.

See the title ELECTIONS.

BANK.—In *Chapman v. Coal and Coke Co.*, 54 W. Va. 196, 46 S. E. 262, it is said: "The word **bank** is defined in standard dictionaries as 'the face of a coal vein in process of being mined;' 'the surface immediately about the mouth of a mine;' also 'to form, or lie in **banks**.' In geology a thin layer or stratum or rock is called a seam. The same term is applied to coal. Vein of coal, coal bed, and coal seam are used as equivalent terms." See generally, the title MINES AND MINERALS.

Bank Checks.

See the titles BANKS AND BANKING; BILLS, NOTES AND CHECKS.

Bank Deposits.

See the title BANKS AND BANKING.

Banker's Lien.

See the title BANKS AND BANKING.

Banking Customs.

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CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; ASSIGNMENTS, vol. 1, p. 745; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 1, p. 799; CONFLICT OF LAWS; CONSTITUTIONAL LAW; CREDITORS' SUITS; EXECUTIONS AGAINST THE BODY; EXECUTORS AND ADMINISTRATORS; FRAUDULENT AND VOLUNTARY CONVEYANCES; HOMESTEAD EXEMPTION; PARTNERSHIP; RECEIVERS.

As to preferences by insolvent debtors, see the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 1, p. 799; FRAUDULENT AND VOLUNTARY CONVEYANCES. As to winding up insolvent corporations, see the titles BUILDING AND LOAN ASSOCIATIONS; CORPORATIONS. As to insolvent decedents' estates, see the title EXECUTORS AND ADMINISTRATORS.

I. Bankruptcy.

A. GENERAL CONSIDERATION.

The word "bankrupt," as used in the bankrupt act of 1898, includes "a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt." Act, July 1, 1898, ch. 541, § 1.(4); 30 Stat. 544.

Authority of Federal Decisions on Questions of Bankruptcy.—The decisions of the supreme court of the United States upon questions arising exclusively under the bankrupt law of the United States, must be accepted as

authority binding on a state court on such questions. *Jeffress v. Clark*, 1 Va. Dec. 407. See also, *Beall v. Walker*, 26 W. Va. 744; *Ferrell v. Madigan*, 76 Va. 195.

B. BANKRUPTCY PROCEEDINGS.

1. Jurisdiction.

Bankrupt Courts Are of Limited Jurisdiction.—A court sitting in bankruptcy under the bankrupt act is limited to the terms of the act, and must exercise only the powers granted, and as such is a court of special and limited jurisdiction; and it is well settled that a judgment by that tribunal, without authority or jurisdiction, or which exceeds or lies without the

power of the court, is necessarily void, and may be shown to be so in any subsequent or collateral proceeding. *Richardson v. Seevers*, 84 Va. 259, 266, 4 S. E. 712. See the title JURISDICTION.

Decree Fixing Lien on Land of Person Not the Bankrupt.—A United States district court sitting in bankruptcy has no jurisdiction over the land of a person not the bankrupt, which lands have not been surrendered and against which the bankrupt has no claim; and where the bankrupt court enters a decree fixing and attaching a lien upon such land the decree is void and may be so treated whenever and wherever called in question. *Richardson v. Seevers*, 84 Va. 259, 4 S. E. 712.

2. Inventory of Property.

Statement Charging Property Surrendered with Trust.—Where a petitioner in bankruptcy appends to the inventory of his property a declaration that one parcel of land, though standing in his name, had been bought with trust money, such declaration is unauthorized by the federal statute, and constitutes no notice of such trust to purchasers at the sale under the bankruptcy proceedings. *Moorman v. Arthur*, 90 Va. 455, 456, 18 S. E. 869.

3. Proof and Allowance of Claims.

Claims Secured by Lien.—A creditor of a bankrupt having a lien on his real estate has two courses open to him, either of which he may adopt. He may decline to appear in the bankrupt court, and he will be unaffected by any proceeding in that court, unless the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to proceed in the bankrupt court, prove his debt there and rely upon his security. *Spilman v. Johnson*, 27 Gratt. 33. See post, "Sales Free of Encumbrances," I, D, 3, b, (2).

If the lien creditor elects to proceed in the bankrupt court, this is a waiver of his right to institute any proceeding at law or in equity which is in any

way inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings; and he can not afterwards go into a state court to subject property sold by the assignee of the bankrupt to satisfy his judgment on any ground of error which might have been rectified in the bankrupt court, or by appeal from the order or decree of that court. *Spilman v. Johnson*, 27 Gratt. 33; *Tate v. Hull*, 2 Va. Dec. 161.

Claim Secured by Lien on Property Conveyed before Bankruptcy.—A judgment creditor of a bankrupt whose judgment is a lien upon any estate bona fide sold and conveyed by the bankrupt, before the bankruptcy, may claim and secure in the proceeding in bankruptcy, his portion of the estate of the bankrupt by virtue of his judgment, without accounting or giving credit for anything on account of the lien of his judgment upon the estate so sold and conveyed. *McAden v. Keen*, 30 Gratt. 400.

Although a judgment creditor of a bankrupt whose judgment is a lien upon any estate bona fide sold and conveyed by the bankrupt, before the bankruptcy, may have claimed and received in the bankruptcy proceedings his portion of the estate of the bankrupt, he may, by a suit in equity, enforce the lien of his judgment upon the estate bona fide sold and conveyed before the act of bankruptcy, for the recovery of any balance of the judgment which may remain unsecured in the proceeding in bankruptcy; although he may not, in the bankruptcy proceeding, have asserted or given any notice of the lien of his said judgment upon the estate so sold and conveyed. *McAden v. Keen*, 30 Gratt. 400.

4. Effect of Bankruptcy Proceedings.

a. On Proceedings in State Courts.

(1) Bankruptcy of Plaintiff.

Where the sole plaintiff who originally brought a suit in his own name is declared a bankrupt, his assignee

in bankruptcy must be made a party before there can be further proceedings in the suit. In such case the suit does not abate in the strict meaning of that term, but becomes so defective that there can be no further proceedings in the absence of the assignee. *Zane v. Fink*, 18 W. Va. 693. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Where a suit was brought by two persons as partners, and subsequent to the institution of the suit both partners became bankrupts, the suggestion and admission on the record, that both partners were bankrupts, necessarily arrested further proceedings in their names. "They became, by their bankruptcy, civiliter mortui, and could no longer sue, either for themselves or another. All their rights of property, legal and equitable, had passed, by assignment and by operation of law, to their proper assignees, in whose name alone could the suit be prosecuted." *Cannon v. Wellford*, 22 Gratt. 195, 198.

A bankrupt can not appear as a party plaintiff in a suit, except by his assignee. *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113.

Action for Personal Injuries.—In an action for slander a plea that since the commencement of the action the plaintiff has been adjudicated a bankrupt, is not a good plea as the right of action in such case does not pass to the assignee in bankruptcy. *Dillard v. Collins*, 25 Gratt. 343.

(2) Bankruptcy of Defendant.

(a) Suits on Provable Claims.

Stay of Pending Proceedings.—No suit on a provable debt can be prosecuted to judgment against a bankrupt, until the question of his discharge is determined; but such suit, on application of the bankrupt, shall be stayed to await the determination of the court of bankruptcy on the question of his discharge. *Blair v. Carter*, 78 Va. 621;

Mason v. Warthens, 7 W. Va. 532. See also, *Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 443. See post, "Claims Merged in Judgment before Discharge," I, E, 1, b, (3).

A suit on a provable debt may, however, by leave of the bankrupt court, be proceeded in for the purpose of ascertaining the amount which ought to be proved in the bankruptcy proceedings. *Blair v. Carter*, 78 Va. 621.

Pending Attachment Proceedings.—

The stay of proceedings against the bankrupt provided by the bankrupt act applies to cases where the personal liability of the debtor is sought to be fixed and ascertained by final judgment, pending the determination of the question of his discharge, and not to judgments against property attached, or the proceeds thereof, where the attachment lien accrued prior to the filing of the petition in bankruptcy. The object of the stay is to enable the bankrupt to obtain and plead his discharge in bar of a personal recovery against him. But the discharge, barring all personal liability, would not discharge property attached, or prevent the proceeds thereof from being applied by the court under the attachment liens. *Mason v. Warthens*, 7 W. Va. 532.

The failure to apply for a stay of a pending action to await the discharge of the defendant therein, will not prevent the bankrupt from setting up his discharge to prevent the issue of execution on a judgment recovered against him after the commencement of proceedings in bankruptcy and before his discharge. *Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 443.

Right of Bankrupt to Prosecute an Appeal.—Where, pending a suit by judgment creditors against their debtor to set aside a deed of trust and subject the property to the payment of their debts, the debtor becomes a bankrupt on his own petition and claims his exemption and homestead out of the

surplus after satisfying the debts secured by the deed of trust, the debtor may appeal from a decree dismissing his application for a homestead and distributing the fund. Although by his adjudication as a bankrupt all his estate generally is vested in his assignee in bankruptcy, yet he continues to have such an interest in his estate on account of his claim to exemption and homestead as entitles him to prosecute an appeal. *Barger v. Buckland*, 28 Gratt. 850. See the title APPEAL AND ERROR, vol. 1, p. 418.

Bankruptcy Pending Appeal.—Where, pending an appeal, the appellees are adjudicated bankrupts and obtain their discharge, the appellate court in reversing the judgment, will, upon petition of the bankrupts, make it a part of the judgment of reversal that execution shall not issue thereon without a previous order to that effect made by the court below after notice to the bankrupts. *Exchange Bank v. Knox*, 19 Gratt. 739.

(b) Suits to Enforce Liens Acquired before Bankruptcy.

Pending Suits.—Subsequent proceedings in bankruptcy to which the lien creditor is not made a party, do not divest a state court of jurisdiction of a suit pending therein for the enforcement of a lien, the rule being that the court which first takes jurisdiction of the parties and the subject matter retains it. *Francisco v. Shelton*, 85 Va. 779, 8 S. E. 789; *Sively v. Campbell*, 23 Gratt. 893. See also, *Barr v. White*, 30 Gratt. 531. See post, "Sales Free of Encumbrances," I, D, 3, b, (2); "Liens," I, E, 1, b, (5).

Bankruptcy after Sale but before Confirmation.—Where in a proceeding in a state court to subject land to the lien of a judgment, there has been a judicial sale of the land, and after the sale, but before confirmation, the defendant is declared a bankrupt, the state court having possession of the case and having made a decree therein

before the bankruptcy of the defendant, he or his assignee can proceed only in that court to maintain their rights. *Barr v. White*, 30 Gratt. 531.

Enforcing Attachment Lien Acquired before Bankruptcy.—The bankrupt act of 1867 (U. S. Rev. Stat., § 5044) did not vacate the lien of an attachment acquired more than four months prior to the commencement of proceedings in bankruptcy nor did it prevent the attachment creditor from prosecuting his claim to judgment in the state court and availing himself of the attachment to obtain satisfaction of his debt out of the attached property. *Gibbs v. Logan*, 22 W. Va. 208. See also, *Mason v. Warthens*, 7 W. Va. 532.

Power of Bankrupt Court to Stay Subsequent Proceedings.—The bankrupt court has the right and the power to enjoin the prosecution of any suit instituted after the adjudication in bankruptcy in a state court to enforce any previous lien against the bankrupt's property, as it has the right to administer fully upon the estate of the bankrupt, liquidating and settling all liens, or ordering the property sold subject to the liens. *Beall v. Walker*, 26 W. Va. 741. See also, *Gibbs v. Logan*, 22 W. Va. 208.

But as the state court, except for the proceeding in bankruptcy, has jurisdiction to enforce a lien against the land of a debtor, if that jurisdiction is not ousted by the interference of the bankruptcy court, or proper pleading in the cause by the assignee or a creditor of the bankrupt, the state court may lawfully proceed to enforce the lien. *Beall v. Walker*, 26 W. Va. 741.

The assignee should be made a party to a suit brought in a state court to subject land of the bankrupt to the lien of a judgment acquired before bankruptcy. *Beall v. Walker*, 26 W. Va. 741.

Where, in a proceeding in a state

court to subject land to the lien of a judgment, there is a judicial sale of land and confirmation thereof, and after the sale but before confirmation the defendant is declared a bankrupt, and the assignee, knowing of the proceedings in the state court, does not make himself a party thereto, and it not appearing that the state court knew of the bankruptcy of the defendant, the decree of the state court is valid in the absence of the assignee. *Barr v. White*, 30 Gratt. 531.

Where in a creditor's suit to subject lands to a lien of a judgment, the defendant debtor becomes a bankrupt pendente lite, and his assignee is not made a party to the suit, but is counsel in the case and one of the commissioners to sell the land, the failure to make the assignee a party is no objection to the sale of the land. *Merchants' Bank v. Campbell*, 75 Va. 455.

Property Sold Subject to Liens.—

When the bankruptcy court orders the property sold subject to the liens, there is no reason why the state court should not proceed to enforce the liens. *Beall v. Walker*, 26 W. Va. 741. See post, "Sales Subject to Encumbrances," I, D, 3, b, (1).

b. On Liens, Preferences and Fraudulent Conveyances.

(1) Liens Acquired within Four Months of Bankruptcy.

The bankrupt act of 1867 (U. S. Rev. Stat., § 5044) avoided any attachment of the bankrupt's property made on mesne process within four months next preceding the commencement of the bankruptcy proceedings, but not any such attachment made more than four months before the bankruptcy. *Cirode v. Buchanan*, 22 Gratt. 205; *Weisenfeld v. Mispelhorn*, 5 W. Va. 46; *Gibbs v. Logan*, 22 W. Va. 211. See also, *Mason v. Warthens*, 7 W. Va. 532; *Beall v. Walker*, 26 W. Va. 741.

(2) Preferences Given within Four Months of Bankruptcy.

What Constitutes a Preference.—"A

person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Bankrupt Act, 1898, § 60 (a); *Johnson v. Witt Shoe Co.*, 103 Va. 611, 50 S. E. 153.

Grounds for Avoiding Preferences.

—Under the bankrupt act of 1898, a preference is voidable by the trustee, if it be given within four months before the filing of a petition, or after the filing of the petition and before the adjudication in bankruptcy; and, if the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference. *Johnston v. Witt Shoe Co.*, 103 Va. 611, 619, 50 S. E. 153.

Mere Suspicion of Insolvency Insufficient.—To avoid a preference made by an insolvent to a creditor within four months before bankruptcy, the creditor must have had more than a mere suspicion that his debtor was insolvent. He must have had knowledge of some fact or facts calculated to produce a belief of insolvency in the mind of an ordinarily intelligent man. *Johnston v. Witt Shoe Co.*, 103 Va. 611, 612, 50 S. E. 153.

Preference Given Prior to Passage of Act.—A preference given prior to the passage of the bankrupt act of 1898 is not affected thereby. See *Millhiser v. McKinley*, 98 Va. 207, 35 S. E. 446.

(3) Fraudulent Conveyances Made within Four Months of Bankruptcy.

Under the bankrupt act of 1898, § 67 (e), a conveyance of property by a person adjudged a bankrupt, made

within four months prior to the filing of the petition, with the intent on his part to hinder, delay or defraud his creditors, is void as against the creditors, except as to purchasers in good faith and for a present fair consideration. *Johnston v. Witt Shoe Co.*, 103 Va. 611, 50 S. E. 153. See post, "Conveyances in Fraud of Creditors," I, D, 2, a, (6), (b).

C. EXEMPTIONS.

See the title **HOMESTEAD EXEMPTIONS**.

By What Court Allotted.—Where in a suit by judgment creditors to subject their debtor's land to the payment of their debts, the defendant debtor, while the suit is pending, is declared a bankrupt and applies for a homestead under the constitution and laws of Virginia and the acts of bankruptcy of the United States, and the bankrupt court refers the case to the state court in which the suit is pending, the state court should direct that the assignee in bankruptcy of the defendant be made a party to the suit, and the court should proceed to adjudicate upon the right of the debtor to his homestead. *Barger v. Buckland*, 28 Gratt. 852.

Nonresident Bankrupt.—Since, under W. Va. acts, 1877, ch. 114, § 1, non-residents are not entitled to homestead exemption, a resident of Virginia declared a bankrupt by a United States district court sitting in that state is not entitled to homestead in land situate in West Virginia, in a suit by his creditors there, though the land had been so set apart by his assignee in Virginia, and confirmed by the bankrupt court there. *Gibbs v. Logan*, 22 W. Va. 208.

Collateral Attack on Decree Allowing Homestead.—The acts of courts of competent jurisdiction, having cognizance of the parties and the subject matter, can not be questioned elsewhere, hence, if the bankrupt court wrongfully allows the bankrupt the

exemption claimed by him, the remedy is not in the state courts. *Brengle v. Richardson*, 78 Va. 406; *Adams v. Logan*, 27 Gratt. 201.

Homestead in Property Fraudulently Conveyed.—Where the defendant, before going into bankruptcy, has made a deed of settlement upon his wife for certain real estate, which is afterwards set aside as fraudulent, he can then, being a householder and head of a family, claim his homestead exemption in the property embraced in the deed. *Hatcher v. Crews*, 83 Va. 371, 5 S. E. 221. But see *Gibbs v. Logan*, 22 W. Va. 208.

Liability to Liens Existing before Bankruptcy.—Liens acquired before the debtor is adjudicated a bankrupt may, after he is discharged as such, be enforced in the state courts at the instance of persons who were not parties to the bankrupt proceedings, against lands owned by the debtor before his adjudication in bankruptcy and allotted to him as his homestead in the bankruptcy proceedings. The decree of the state court for the sale of the land does not impinge the decree of the bankrupt court allotting the land to the bankrupt as his homestead, because the lienors were not parties to the proceedings wherein the latter decree was rendered. *McAllister v. Bodkin*, 76 Va. 809.

D. ASSIGNEES OR TRUSTEES IN BANKRUPTCY.

1. Appointment.

Assignees Appointed in Different Courts.—Where bankruptcy proceedings against a partnership were instituted in New York and an assignee was appointed by the bankrupt court in that state, and on the following day bankruptcy proceedings were commenced in Virginia against one of the partners, and an assignee was appointed, it was held, that the New York court having first taken cognizance of the matter as to both partners, acquired complete and exclusive

jurisdiction of the whole case, and that the assignee appointed by that court was the regular and legal assignee of both partners; and it was not competent for the Virginia tribunal, by subsequent proceedings, to oust that jurisdiction, and appoint other and different assignees. The fact that there were assets in both states, does not affect the rights of the New York assignee, as he represents the estate of the bankrupt in every state, and may collect the assets wherever found. *Cannon v. Wellford*, 22 Gratt. 195.

2. Title to Property of Bankrupt.

a. What Passes to Assignee or Trustee.

(1) In General.

All the estate, real and personal, of the bankrupt (exempted property excepted), including all the property conveyed by him in fraud of his creditors or in fraud of law, is vested by the bankrupt act in the assignee. *Parker v. Dillard*, 75 Va. 418; *Tucker v. Daly*, 7 Gratt. 330; *McAden v. Keen*, 30 Gratt. 400; *Cannon v. Wellford*, 22 Gratt. 195; *McAllister v. Bobkin*, 76 Va. 809; *Warren v. Syme*, 7 W. Va. 495; *Beall v. Walker*, 26 W. Va. 741; *Weisenfeld v. Mispelhorn*, 5 W. Va. 46. See also, *Trumbo v. Fulk*, 103 Va. 73, 48 S. E. 525; *Tichenor v. Allen*, 13 Gratt. 15.

The property of the bankrupt all passes to the assignee, which he has at the filing of his petition, and it is administered by the national courts, and no lien can be acquired thereon or enforced by any proceeding in a state court commenced after the petition is filed. *Blair v. Carter*, 78 Va. 621, 630.

Assets in Several Districts.—The fact that there are assets in different districts and in different states does not in any degree affect the right of assignees in bankruptcy. They represent the bankrupt and his estate in every state and may collect the assets

wherever found. *Cannon v. Wellford*, 22 Gratt. 195.

Assignee Appointed in Foreign Country.—If a British subject be declared a bankrupt in England, having debts due him in Virginia, his British creditors can not recover satisfaction out of such debts in the Virginia courts, for the English law will apply in such a case, and by that law the debts are transferred to the assignees in bankruptcy. *Devisme v. Martin*, Wythe 298.

The salary of the attorney general being of constitutional grant and of public official right, is not liable to an assignment in bankruptcy. *Blair v. Marye*, 80 Va. 485.

Property Fraudulently Withheld from Assignee.—Where a debtor who has purchased real estate before he files his petition in bankruptcy, to defeat his creditors, fraudulently withholds it from the assignee in bankruptcy, and has it conveyed to himself afterwards, such real estate vests, under the bankrupt law, in the assignee in bankruptcy, and it is his right and his duty to take possession of it, and, if need be, sue for and recover it from the adverse claimants, and administer it in the bankrupt court. *Jeffress v. Clark*, 1 Va. Dec. 407.

Vacation of Bankruptcy Proceedings as Defeating Title of Assignee.—Where an adjudication in bankruptcy is relied upon as defeating the title of devisees under the will of the bankrupt, the record of the proceedings of the bankrupt court, showing that a commission in bankruptcy issued in 1801 was vacated in 1830, must be read as one entire and connected suit, and is admissible in the courts of this state to show that the adjudication in bankruptcy should be disregarded, and the judgment vacating the bankruptcy proceedings can not be attacked collaterally. *Harman v. Stearns*, 95 Va. 58, 27 S. E. 601. See the title JUDGMENTS AND DECREES.

(2) Equitable Interests.

Property Held in Trust for Bankrupt.—An assignee in bankruptcy may assert his rights to the proceeds of his bankrupt's trust property sold by the trustee, in a suit wherein the ownership of the proceeds is litigated. *Smith v. Profitt*, 82 Va. 832, 1 S. E. 67.

Equitable Title to Land.—Where a vendee of land, who has not complied with the contract of purchase and received a deed for the land, becomes a bankrupt, his equitable estate in the land, which is alienable, vests by operation of law in his assignee, who may carry out the contract of purchase. *Hurt v. Jones*, 75 Va. 341.

An equity of redemption in land conveyed by the bankrupt in trust to secure debts, vests in the assignee for the benefit of the bankrupt's creditors, or if the deed is fraudulent, the whole estate vests in the assignee. *Parker v. Dillard*, 75 Va. 418.

Property Held by Bankrupt in Trust.—"No property held by the bankrupt in trust shall pass by the assignment." U. S. Rev. Stat., § 5053; *Moorman v. Arthur*, 90 Va. 455, 488, 18 S. E. 869.

(3) Contingent Interests.

A testator devised certain "lands, property, money, bills and notes" to his executors in trust for the necessary support of his daughter, and, if the whole of the funds in the hands of the executors was not consumed in the support of his daughter, the residue after her death was directed to be paid to her three sons. With part of the funds coming into their hands the executors purchased a tract of land, which purchase was acquiesced in by all parties in interest. Prior to the death of the daughter, one of her sons filed a petition in bankruptcy and included his interest in the land in his schedule. It was held, that the assignee in bankruptcy, and those claiming under the sale made by him, acquired no interest in the land, because the land, though held by trustees, was

the absolute property of the daughter as long as she lived, and the bankrupt (her son) had no interest in the land at the time of filing his petition in bankruptcy. *Watson v. Conrad*, 38 W. Va. 536, 18 S. E. 744.

(4) Rights of Action.

In General.—Under the acts of 1841 and 1867 the rights of action which were transferred to the assignee in bankruptcy were rights of action founded upon beneficial contracts made with the bankrupt where the pecuniary loss formed the substantial and primary cause of action, and for injuries affecting his property so far as they involved no claim for personal damages. *Dillard v. Collins*, 25 Gratt. 343.

Where a conveyance of land is made to one person who advances all the purchase money therefor, but who has agreed in writing to pay to another who negotiated the purchase one-half the profits arising from the transaction, and the person who negotiated the purchase subsequently becomes a bankrupt, his interest in the contract passes to his trustee in bankruptcy, and a suit to recover the interest of the bankrupt is properly brought by such trustee. *Flippo v. Lamb*, 102 Va. 475, 46 S. E. 681.

A right of action for personal injuries, such as for slander, did not, under the acts of 1841 and 1867, pass to the assignee in bankruptcy. *Dillard v. Collins*, 25 Gratt. 343.

"The assignee, in many respects, stands in the same relation towards the bankrupt's estate as that on an executor towards the personal estate of his testator. The proper and reasonable construction would seem to be, that the statute transfers all such rights of action as would be assets in the hands of an executor for the payment of debts, and no others; all which could be turned to profit; for such rights of action are personal estate. Of such, the executor is assignee in law; and the nature of the office and

duty of a bankrupt's assignee, requires that he should have them also. But rights of action for torts, which would die with the testator, according to the rule *actio personalis moritur cum persona*, and all actions affecting the person only would not pass." *Dillard v. Collins*, 25 Gratt. 343, 346.

(5) Exempt Property.

Under the bankrupt act of 1867, the legal title to the bankrupt's homestead did not vest in his assignee, and if it did so vest, eo instante the homestead has allotted to the bankrupt; the legal title reverted to him. Therefore, the assignee in bankruptcy was not a necessary party to a suit brought in a state court to subject the homestead to the lien of a judgment against the bankrupt. *McAllister v. Bodkin*, 76 Va. 809.

Nor did the assignee have a reversionary interest in the bankrupt's homestead, as by Va. Code, 1873, ch. 183, § 8, if the homestead was not aliened in the householder's lifetime, after his death it continued for the benefit of his widow and children, until her death or marriage, and after her death or marriage until the youngest child became twenty-one years of age, after which it passed to his heirs or devisees, not subject to dower, but subject to all his debts; and in no event did it pass to the assignee in bankruptcy. *McAllister v. Bodkin*, 76 Va. 809.

(6) Property Conveyed before Bankruptcy.

(a) Conveyances Made in Good Faith.

Only the estate of a bankrupt, whatever it may be, at the time of his becoming such, including any estate he may have aliened by an act fraudulent and void as to his creditors, is vested in his assignee in bankruptcy for the benefit of his creditors. And, therefore, no estate which may have been sold by him to a bona fide purchaser for valuable consideration fully paid prior to the act of bankruptcy, be-

comes so vested in the assignee. *McAden v. Keen*, 30 Gratt. 400; *Parker v. Dillard*, 75 Va. 418.

The bankrupt court has no jurisdiction over property bona fide conveyed to a purchaser by the bankrupt before he is declared a bankrupt, and hence a creditor by judgment docketed against the bankrupt, which judgment was recovered before the bona fide conveyance, may proceed in a state court to enforce his judgment against the land conveyed. *Parker v. Dillard*, 75 Va. 418.

Equitable Assignment of Chose in Action.—A principal agreed to assign to his surety for his indemnity a certain bond, but as the bond was not then present it was not delivered. Subsequently the principal committed an act of bankruptcy and was declared a bankrupt. After committing the act of bankruptcy he wrote an assignment upon the bond and delivered it to the surety who collected the money due thereon. It was held, that the surety was entitled to hold the money as against the assignee in bankruptcy. *Tucker v. Daly*, 7 Gratt. 330.

(b) Conveyances in Fraud of Creditors.

All property transferred by a bankrupt in fraud of his creditors passes to his assignee in bankruptcy. *Parker v. Dillard*, 75 Va. 418; *Elder v. Harris*, 76 Va. 187; *Jeffress v. Clark*, 1 Va. Dec. 407; *McAden v. Keen*, 30 Gratt. 400. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Right of Creditors to Avoid Fraudulent Conveyances.—The right of a creditor, at large, or by judgment, of a bankrupt, to subject to sale for payment of his debt, lands fraudulently aliened by the bankrupt prior to the adjudication in bankruptcy, or which he conceals from or fails to surrender to his assignee, passes to the assignee in bankruptcy, and can not be asserted by the creditor in his own name, even, as it seems, though the assignee's

remedy is barred by his failure or neglect to sue within the time (two years) prescribed by the bankrupt act. *Jeffress v. Clark*, 1 Va. Dec. 407.

But under the bankrupt act of 1841, it was held, that creditors, who had not proved their debts in bankruptcy, might institute suits to set aside fraudulent conveyances made by their debtor before he petitioned for the benefit of the bankrupt act, and might impeach his discharge in bankruptcy on the ground of fraud or the willful concealment of his property, where such suits were instituted more than two years after the decree of discharge in bankruptcy; and that such suits might be instituted in any court, state or federal, in which independent of the bankrupt act, a suit was maintainable against the bankrupt. *Tichenor v. Allen*, 13 Gratt. 15.

Averment of Appointment of Assignee.—Whether sound law or not that “a suit to set aside fraudulent deed made by bankrupt before his bankruptcy can only be maintained by his assignee,” there must be an averment that there was such assignee duly appointed and qualified before the matter will be considered. *Elder v. Harris*, 76 Va. 187.

Necessity for Reducing Claim to Judgment.—A creditor of a discharged bankrupt who had not proved his debt in the proceeding in bankruptcy, was entitled under Va. Code, 1849, ch. 179, § 2, p. 677, to file his bill to set aside a fraudulent conveyance made by the bankrupt and impeach his discharge on the ground of fraud or a willful concealment of his property, without having first recovered a judgment against the bankrupt. *Tichenor v. Allen*, 13 Gratt. 15.

b. When Title Vests.

Relation Back to Commencement of Bankruptcy Proceedings.—Section 14 of the bankrupt act of 1867 expressly provided that the assignment “shall relate back to the commencement of the

proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee.” *Smith v. Profit*, 82 Va. 832, 1 S. E. 67; *McAllister v. Bodkin*, 76 Va. 809; *Weisenfeld v. Mispelhorn*, 5 W. Va. 46.

c. Extent of Assignee's Interest.

Assignee Takes Subject to Liens and Equities Existing against Bankrupt.—The assignee in bankruptcy takes the estate of the bankrupt just as the bankrupt held it, subject to all liens and equities which were good against the bankrupt at the time he became such. He stands in the shoes of the bankrupt in regard to such estate except that conveyances thereof, fraudulent and void as to creditors, are void also as to him. *Cirode v. Buchanan*, 22 Gratt. 205; *Parker v. Dillard*, 75 Va. 418; *Powell v. Gilbert*, 1 Va. Dec. 218; *McAden v. Keen*, 30 Gratt. 400; *Beall v. Walker*, 26 W. Va. 741. See also, *Barr v. White*, 30 Gratt. 531; *Warren v. Syme*, 7 W. Va. 497; *Tucker v. Daly*, 7 Gratt. 330.

3. Sales and Conveyances by Assignee. **a. In General.**

The rule of caveat emptor applies to purchasers at sales made in bankruptcy proceedings. There is nothing in the bankrupt law which assures to the purchaser from the assignee under an order of the bankrupt court any better title than the bankrupt had. *March v. Chambers*, 30 Gratt. 299.

Effect against Persons Not Parties to Bankruptcy Proceedings.—Where land is sold under proceedings in bankruptcy, persons interested in the land, but not parties, are not bound by the sale, though the bankrupt was the administrator of the estate through which they claim. *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869.

Collateral Attack on Decree Approving Deed by Assignee.—A bankrupt, at a sale of his effects by his assignee, purchased land formerly owned by

him with money furnished by his wife from her separate estate. Upon his written request that the deed be made to his wife, the bankrupt court so decreed. Thereupon the assignee in bankruptcy conveyed the land to the wife for life, with remainder in fee to her children by her then husband, reported the facts with the deed to the bankrupt court, which in all respects confirmed and approved the deed and gave liberty to the wife to withdraw the deed for recordation. The wife withdrew and recorded the deed, at no time making objection thereto, and afterwards died leaving two children by her then husband and descendants of a child by a former marriage. In a partition suit brought by the latter, claiming an undivided third interest in the land, it was held, that the wife by her purchase became a quasi party to the bankruptcy proceedings and was bound by the decree confirming the deed to her, and to allow the plaintiffs to recover on the ground that the purchase money had been furnished by the wife, and that the assignee had not followed the order of the bankrupt court in making the deed to the wife, would be to allow a collateral attack to be made on the decree of the bankrupt court. *Trumbo v. Fulk*, 103 Va. 73, 48 S. E. 525.

Implied Conveyance of Easement Appurtenant to Property.—A conveyance of property to which an easement is appurtenant, and without which the easement can not be granted, made by an assignee in bankruptcy, implies the transfer of the easement with the property. *Warren v. Syme*, 7 W. Va. 475.

Recitals in Deed by Assignee.—A recital in a deed, under the bankrupt act of 1841, that a person was by the United States district court declared a bankrupt, and that the grantor was his assignee and was ordered to sell the property granted, is not evidence of the facts recited, against a person

claiming the property otherwise than under the grantor. *Warren v. Syme*, 7 W. Va. 474.

b. Encumbered Property.

(1) Sales Subject to Encumbrances.

Where any part of the real estate of a bankrupt is in dispute, or subject to any condition or lien, the assignee may sell such real estate subject to the adverse claim or lien. *Powell v. Gilbert*, 1 Va. Dec. 218; *Boulware v. Hartsook*, 83 Va. 679, 3 S. E. 289; See *v. Rogers*, 31 W. Va. 473, 7 S. E. 436.

(2) Sales Free of Encumbrances.

In General.—Where the real estate of a bankrupt is encumbered by liens or otherwise, the assignee in bankruptcy may sell it under the United States bankrupt act, either subject to the encumbrance or absolutely and free therefrom. But in the latter case he must, before selling, obtain from the bankrupt court an order for that purpose, and if he sells the property without such order he can only sell it subject to the encumbrance, and the purchaser will get no better title than the bankrupt had; that is, he will take subject to the encumbrance. See *v. Rogers*, 31 W. Va. 473, 7 S. E. 436; *Powell v. Gilbert*, 1 Va. Dec. 218.

Power of Bankrupt Court.—The bankrupt court controls the property of the bankrupt, and though such property be encumbered with liens, it may bring the lien holders into court, sell the property free of liens, and distribute the proceeds according to the respective priorities of the liens. *Blair v. Carter*, 78 Va. 621; *Powell v. Gilbert*, 1 Va. Dec. 218; See *v. Rogers*, 31 W. Va. 473, 7 S. E. 436.

A United States district court alone has jurisdiction to make an order for the sale of the land of the bankrupt free of encumbrances, and only after the lien creditors have been served with notice to appear and show cause. *Boulware v. Hartsook*, 83 Va. 679, 3 S. E. 289; *Powell v. Gilbert*, 1 Va. Dec.

218; See *v. Rogers*, 31 W. Va. 473, 7 S. E. 436.

The proper mode of proceeding to obtain an order to sell land free of liens is by petition addressed to the judge of the court of bankruptcy, properly entitled in the cause, and duly verified. As the granting the order for such sale is not a matter of course, the petition should set forth the facts to justify the application, and state what persons have liens, incumbrances, or interests in the property. Upon the hearing of such application, the court may grant an order for the sale of the property free from incumbrances, and when the sale is made the controversy is transferred to the fund which then represents the property. See *v. Rogers*, 31 W. Va. 473, 7 S. E. 437.

c. Setting Aside Sale.

Jurisdiction of State Courts.—Long anterior to going into bankruptcy, a debtor had executed a deed of trust on his real estate. Two years before bankruptcy, he sold and conveyed the same to a purchaser, who then leased it to the debtor for five years. The debtor having gone into bankruptcy, the trustee in the deed of trust united with his assignee in bankruptcy, and sold this tract and another belonging to the bankrupt together, and the original vendee from the bankrupt became the purchaser of both tracts at a price about sufficient to pay off the amount due under said deed of trust. This sale was reported to the bankrupt court, but upset bids being offered, one was accepted, and an order made by the district court that unless the amount offered by this highest bidder (who was the assignee in bankruptcy) was paid within a specified time, the land should be conveyed to the purchaser at the sale. From this order an appeal to the circuit court was taken, and it was affirmed. Thereupon, the upset bidder (the assignee) paid the amount offered by him, and received a conveyance. To none of the

proceedings in the bankrupt or circuit courts of the United States was the original purchaser made a party. A bill was afterwards filed by him in the state court to set aside the deed to the upset bidder (assignee). It was held, that the bill was properly dismissed on demurrer, as the plaintiff, who was the purchaser at the bankrupt sale, was a quasi party to the proceedings in the bankrupt court, and his remedy was to have had his purchase confirmed there, or by appeal, or bill of review in those courts. *Gregg v. Montague*, 1 Va. Dec. 470.

4. Limitation of Actions by and against Assignees.

The bankrupt act of 1867 (U. S. Rev. Stat., § 5057) limited the commencement of actions by and against assignees in bankruptcy to two years after the right of action accrued. *Cobbs v. Gilchrist*, 80 Va. 503; *Smith v. Profitt*, 82 Va. 832, 1 S. E. 67.

The policy of the bankrupt law is speedy as well as an equal distribution of the bankrupt's assets among his creditors, hence the section of the bankrupt act limiting the commencement of actions by and against assignees to two years after the right of action accrues, applies to all litigation between such assignees and any adverse claimant. *Cobbs v. Gilchrist*, 80 Va. 503.

Suits to Set Aside Fraudulent Conveyances.—The limitation of two years after the decree in bankruptcy or after the cause of suit shall first have accrued, provided in § 8 of the bankrupt act of 1841, related to proceedings by or against the assignee in bankruptcy, and not to suits by creditors, who had not proved their debts, to set aside fraudulent conveyances by the bankrupt. The only effect of this provision on such creditors was to prevent such a suit until the two years had expired. *Tichenor v. Allen*, 13 Gratt. 15. But see *Jeffress v. Clark*, 1 Va. Dec. 407.

Computation of Period.—The assignee's claim is barred by lapse of two years from maturity of his claim, and not from date of assignment. *Smith v. Profit*, 82 Va. 832, 833, 1 S. E. 67.

Suits against Purchasers from Assignees.—The federal statute limiting actions by or against assignees in bankruptcy as to property vested in them to two years, does not apply to suits against purchasers from such assignees. *Lamar v. Hale*, 79 Va. 164; *Moorman v. Arthur*, 90 Va. 453, 18 S. E. 869.

E. DISCHARGE.

1. Discharge as Release of Debts.

a. Provable Debts Discharged.

Where the estate of a bankrupt has been administered by the bankrupt court, and the bankrupt duly discharged, that discharge (with certain exceptions) is a bar to all debts which existed before the adjudication, which were proved or which might have been proved in the bankruptcy proceedings. *Blair v. Carter*, 78 Va. 621.

Under § 17 of the bankruptcy act of 1898 "a discharge in bankruptcy shall release a bankrupt from all his provable debts" except certain classes of debts expressly excepted by the act from the operation of the discharge. *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916.

Liability for a Breach of Covenant of Title.—A discharge in bankruptcy releases the covenantor from personal liability for breach of a covenant to warrant the title of land conveyed by him, but does not affect the operation of the covenant as estopping the covenantor from asserting a paramount title subsequently acquired by him. *Gregory v. Peoples*, 80 Va. 355.

"This is on the ground that, as the release is by force of the statute, and not by the act of the covenantee, or those claiming under him, no greater effect will be given to it than is warranted by the terms of the statute; and

for the further reason that existing personal liability is not necessary to work an estoppel, and consequently there is no necessary connection between the personal liability of the debtor on his covenant and the estoppel which arises therefrom." *Gregory v. Peoples*, 80 Va. 355.

b. Debts Not Discharged.

(1) Debts Created by Fraud, etc., While Acting as an Officer or in a Fiduciary Capacity.

Under the bankrupt act of 1898, § 17 (4), "a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916.

The word "fraud" as used in this section of the bankrupt act of 1898, is only applicable to debts created by the fraud of one acting as a public officer or in a fiduciary capacity. "The contention that 'fraud' should be segregated from the qualifying language, 'while acting as an officer or in any fiduciary capacity,' is without merit. Such interpretation would not only destroy the grammatical structure of the sentence, and contravene its plain meaning, but would likewise be inconsistent with paragraph two of the same section, that a creditor should have obtained a judgment in an action for fraud, in order to override a discharge in bankruptcy." *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916.

The bankrupt act of 1867, § 33, provided "that no debt created by the fraud of the bankrupt, * * * or while acting in a fiduciary character shall be discharged under this act." *Cromer v. Cromer*, 29 Gratt. 280.

A claim to exoneration by a surety upon a fiduciary bond is not a fiduciary debt within the meaning of the bankrupt act of 1867, but is a simple contract debt, provable under the bank-

rupt act and discharged by it. "There is no fiduciary relation (of necessity) between principal and surety." *Cromer v. Cromer*, 29 Gratt. 280.

Defalcation as a Public Officer.—The bankrupt act of 1867 excepted from the operation of a discharge under that act, debts of the bankrupt created by "his defalcation as a public officer." *Courtney v. Beale*, 84 Va. 692, 5 S. E. 708.

The liability of a public officer for failure to collect claims placed in his hands is not a "defalcation" within the meaning of § 33 of the bankrupt act of 1867, and is dischargeable by the officer's discharge in bankruptcy even after it is merged into judgment. *Courtney v. Beale*, 84 Va. 692, 5 S. E. 708.

"To constitute a defalcation, there must have been mala fides. In its common acceptation, the term denotes an abstraction or embezzlement of money. Abbott defines it to be 'the failure of one who has received money in trust or in a fiduciary capacity to account and pay over as he ought,' and it particularly applies, he says, to the acts of public and corporate officers. In this sense the term is used in the bankrupt act, so that the liability of a public officer created by his negligence merely—as for example, in failing to use due diligence in collecting money—is not a defalcation within the meaning of the act, and is barred by a discharge in bankruptcy." *Courtney v. Beale*, 84 Va. 692, 694, 5 S. E. 708.

A judgment against public officer on his official bond, is not even prima facie evidence of a "defalcation." *Courtney v. Beale*, 84 Va. 692, 5 S. E. 708.

The liability of a surety on an official bond of a public officer is not a debt "created in consequence of a defalcation as a public officer," within the first section of the bankrupt act of 1841, which excludes from the operation of a discharge in bankruptcy debts

"created in consequence of a defalcation as a public officer." *Saunders v. Com.*, 10 Gratt. 494.

(2) Liabilities for Fraud, or for Willful and Malicious Injuries.

By § 17 of the bankrupt act of 1898, "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916.

Claims Created by Fraud Not Reduced to Judgment.—A discharge in bankruptcy is a complete defense to an action of assumpsit brought to recover the price of goods sold before adjudication and damages for obtaining such goods by fraud and false pretenses, as § 17 of the bankrupt act of 1898, excepts from the operation of a discharge only judgments in actions for frauds or obtaining money by false pretenses, and does not except claims created by fraud or false pretenses. *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916. But see act of February 5, 1903, ch. 487 (32 Stat. L. 798), by which § 17 is amended so as to except from the operation of a discharge, "liabilities for obtaining property by false pretenses or false representations."

"By the plain language of the paragraph (Bankrupt Act, 1898, § 17), the demand will be barred by a discharge in bankruptcy, unless reduced to judgment, and unless the judgment, read in connection with the pleadings in the case, shows that it was recovered in an action for fraud, or obtaining property by false pretenses or false representations, or willful and malicious injuries to the person or property of another." *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916.

Constructive fraud as well as actual fraud was held to be within § 33 of the bankrupt act of 1867 which provided

that no debt "created by the fraud" of the bankrupt should be discharged. *Jones v. Clark*, 25 Gratt. 642.

Where a person purchased from an executor, at a large discount, bonds given to the executor for the purchase price of land sold by him in his representative capacity, it was held, that the purchaser was guilty of constructive fraud in so purchasing, and that in an action brought against him for the amount of the bonds, his discharge in bankruptcy was no defense. *Jones v. Clark*, 25 Gratt. 642.

(3) Claims Merged in Judgment before Discharge.

If, after the institution of bankruptcy proceedings, judgment is recovered upon a debt provable under those proceedings, such debt will be released by a discharge in bankruptcy. *Blair v. Carter*, 78 Va. 621.

Where a judgment is recovered against a bankrupt between the time of the petition and discharge for a provable debt existing at the time of the petition, whether the discharge be under the bankrupt act of 1841 or that of 1867, the judgment does not merge the original cause of action so as to constitute a new debt, but is merely a new security of the old debt, and the old debt being barred by the discharge, the judgment, including the costs, is also barred. *Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 443.

A discharge in bankruptcy may be set up in a state court to stay the issue of an execution on a judgment recovered against the bankrupt after the commencement of the proceedings in bankruptcy and before the discharge, although the defendant did not before the judgment ask for a stay of proceedings, under Rev. Stat. U. S., § 5106. *Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 443.

Lien on After-Acquired Lands.—Judgments matured against a bankrupt after his adjudication on pre-existing provable debts are not liens on his

after-acquired lands, but the bankrupt is released by his discharge from such judgment as well as from the debts on which they are founded. *Blair v. Carter*, 78 Va. 621.

(4) Debts Due State.

The state was not subject to the provisions of the bankrupt act of 1841, and a discharge of a bankrupt under this act did not discharge him from his liabilities to the state. *Saunders v. Com.*, 10 Gratt. 494.

"The same policy which protects a state from the consequences attached to laches, and denies all validity to a plea of the statute of limitations when interposed to bar a public claim, would seem to apply to a plea of discharge under a bankrupt law." *Saunders v. Com.*, 10 Gratt. 494, 496.

(5) Liens.

A discharge in bankruptcy releases the bankrupt from his debts, but does not affect the rights of creditors to any liens acquired before bankruptcy. *Powell v. Gilbert*, 1 Va. Dec. 218.

Judgment Liens.—The lien of a judgment is not defeated by the discharge of the judgment debtor in bankruptcy, and the state courts have jurisdiction to enforce the lien. *McCance v. Taylor*, 10 Gratt. 580; *Tichenor v. Allen*, 13 Gratt. 15; *Beall v. Walker*, 26 W. Va. 741; *Powell v. Gilbert*, 1 Va. Dec. 218; *Ferrell v. Madigan*, 76 Va. 195.

In such case the *elegit* sued out upon the judgment was in the usual form; and in executing it the sheriff was required to take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that which was so subject. *McCance v. Taylor*, 10 Gratt. 580.

Property Acquired after Discharge.—Lands purchased by the bankrupt after his status as a bankrupt was fixed by the filing of his petition, followed by adjudication of bankruptcy and discharge from his indebtedness, can not

be subjected to the lien of a judgment against him, recovered before the filing of his petition in bankruptcy. *Jeffress v. Clark*, 1 Va. Dec. 407.

Homestead Set Apart in Bankruptcy Proceedings.—Judgments obtained and docketed, and liens acquired before the debtor is adjudicated a bankrupt, may, after he is discharged as such, be enforced in the state courts at the instance of persons who were not parties to the bankrupt proceedings, against lands owned by the bankrupt before his adjudication and allotted to him for his homestead. *McAllister v. Bodkin*, 76 Va. 809.

Right of Discharged Bankrupt to Enjoin Levy of Execution.—A judgment debtor having obtained his discharge as a bankrupt subsequent to the recovery of a judgment, may enjoin the suing out or levy of any execution upon the judgment. *Peatross v. M'Laughlin*, 6 Gratt. 64.

2. Pleading Discharge.

Who May Plead.—The plea of discharge in bankruptcy is personal to the bankrupt. *Blair v. Carter*, 78 Va. 621.

But the vendee of a discharged bankrupt may defend his title to land acquired and sold to him by the bankrupt after his discharge, although he can do so only by setting up the bankrupt's discharge and release from the debts sought to be enforced against the land. *Blair v. Carter*, 78 Va. 621.

Manner of Pleading.—A discharge in bankruptcy must be specially pleaded and can not be set up under the issues of nonassumpsit or nil debet. *Virginia Fire, etc., Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Major v. Gibson*, 1 Pat. & H. 48.

3. New Promise after Discharge.

A moral obligation to pay a debt is never stale, and may be the consideration for a new promise to pay the debt at any distance of time after the discharge of the debt by bankruptcy. *Horner v. Speed*, 2 Pat. & H. 616.

Express Promise to Pay Necessary.

—A new promise to pay an old debt, will be sufficient to bind one discharged in bankruptcy, if it be of such a character (not casual or implied, but so express and unequivocal) as to show that the promisor intended deliberately to waive the protection of his discharge in bankruptcy, and to rebind himself legally to pay the old debt; but a mere acknowledgment of the justice of the debt, of the moral obligation to pay it, and an expression of purpose to pay it at some future time, or when able, will not have the effect, in the absence of a deliberate intention thereby to bind himself. *Horner v. Speed*, 2 Pat. & H. 616.

Necessity for Writing.—A new promise to pay a debt discharged by bankruptcy need not be in writing. *Horner v. Speed*, 2 Pat. & H. 616.

Declaring on Old Debt or New Promise.—Where a debtor has made a new promise to pay a debt discharged in bankruptcy the creditor may declare either upon the new promise or the old debt. *Horner v. Speed*, 2 Pat. & H. 616.

"For the same reason that it has been held the more eligible form of declaring on a bond and collateral conditions, is to set out the conditions and assign breaches in the declaration than to declare on the bond as a single obligation and assign breaches in the replication, it may be held that it is better to declare on the new promise wherever the defendant could rely upon his discharge in bankruptcy." *Horner v. Speed*, 2 Pat. & H. 616, per Thompson, J.

Limitation of Action on New Promise.—When a debt is discharged in bankruptcy within five years after it is incurred, and a suit is brought on a new promise to pay it, within five years after the new promise, a plea that five years have elapsed since the original cause of action, or since the discharge in bankruptcy, is bad, and

should be rejected. *Horner v. Speed*, 2 Pat. & H. 616, 617.

4. Impeaching Discharge.

Grounds for Impeaching.—Under the bankrupt act of 1841, a discharge duly granted a bankrupt could be impeached only for "fraud or willful concealment of property" by the bankrupt. *Tichenor v. Allen*, 13 Gratt. 15. See also, *Beall v. Walker*, 26 W. Va. 746.

Collateral Impeachment.—Under the bankrupt act of 1841, it was held, that a discharge in bankruptcy might be impeached for fraud or willful concealment of property by the bankrupt, in any court in which a suit might, independent of the bankrupt act, be brought against the bankrupt. *Tichenor v. Allen*, 13 Gratt. 15.

Suits by Creditors to Avoid Fraudulent Conveyances.—Under the bankrupt act of 1841, it was held, that creditors who had not proved their debts in the bankruptcy proceedings might institute suits to set aside fraudulent conveyances made by their debtor before he petitioned for the benefit of the bankrupt act, and might impeach his discharge in bankruptcy on the ground of fraud or the willful concealment of his property, where such suits were instituted more than two years after the discharge of the debtor in bankruptcy; and that such suits might be brought in any court, state or federal, in which, independent of the bankrupt act, a suit might be properly brought against the bankrupt. *McCance v. Taylor*, 10 Gratt. 580.

F. BANKRUPT PARTNERSHIPS.

See the title PARTNERSHIP.

Where partners as such were declared bankrupt, their property, both partnership and individual, was required to be administered under § 36 of the bankrupt act of 1867, in the bankrupt court; and every creditor, whether individual or social was required to prosecute his claim in that court. *Lindsey v. Corkery*, 29 Gratt.

650. See also, *Cannon v. Wellford*, 22 Gratt. 195.

Partners Severally Declared Bankrupt.—Where a partnership is dissolved, and the individual partners are declared bankrupts in different bankrupt courts, in different states, each with his own assignee, and in their schedules make no mention of partnership debts due to them or by them, a creditor of the partnership may proceed in a state court to subject the partnership effects to the payment of the partnership debts. *Lindsey v. Corkery*, 29 Gratt. 650.

II. Insolvency.

A. DEFINITIONS.

"Insolvency" as used in § 20 of the act of March 29, 1837 (Sess. Acts, 1836-37, p. 41), relating to limited partnerships, means that the partnership has not sufficient property and effects to pay all its debts. *McArthur v. Chase*, 13 Gratt. 683.

Within the meaning of W. Va. Code, 1891, ch. 74, § 2, forbidding preferences by insolvent debtors, a person is insolvent when all his property is not sufficient to pay all his debts. *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797; *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803; *Carr v. Summerfield*, 47 W. Va. 155, 34 S. E. 804. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

"Under bankrupt and insolvent acts considerable difference of opinion has existed as to the definition of insolvency. It is not a matter capable of exact definition by general rule for all cases as each case must rest on its own facts, and on the statute or purpose for which we would define it. A man might be, under such laws, insolvent if doing business in a commercial city, and not so if in a country village; and a trader might be branded as insolvent on account of a default for which a farmer would not. Insolvency, in common parlance, is the inadequacy of

one's property to pay his debts," while in another sense, for purposes of the bankrupt laws, it is that state of a person who, from any cause, is unable to pay his debts in the ordinary and usual course of trade." *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797, 798, per Brannon, J.

B. CONSTITUTIONALITY OF STATE INSOLVENCY LAWS.

State insolvency laws are constitutional so far as they provide for a discharge of debts and contracts made and entered into subsequent to their enactment. *McCarty v. Gibson*, 5 Gratt. 307. See the title CONSTITUTIONAL LAW.

C. EXTRATERRITORIAL EFFECT OF STATE INSOLVENCY LAWS.

See the title CONFLICT OF LAWS.

Effect of Discharge on Nonresidents.—The discharge of a debtor under the insolvent laws of one state can not avail such debtor against a citizen of another state, who was such at the time of the making of the contract sued on in an action brought in the latter state. *Urton v. Hunter*, 2 W. Va. 83.

Where a citizen of Maryland gave his bond in Virginia to a citizen of Virginia and afterwards in Maryland became a bankrupt, and under the laws of Maryland was duly discharged by a competent tribunal, it was held, that the discharge was no defense to a suit afterwards brought upon the bond in Virginia. *Banks v. Greenleaf*, 6 Call 271.

Where a bond was executed in Virginia while both the obligor and obligee were residents of Virginia, and afterwards the obligor removed to Maryland where judgment was recovered against him on the bond, and the obligor obtained his discharge under the insolvent laws of Maryland, it was held, that the debt having been contracted in Virginia between citizens

of Virginia, the discharge in Maryland did not bar the claim in Virginia, and that the obligee could proceed against the property of the obligor by foreign attachment. *McCarty v. Gibson*, 5 Gratt. 307.

Where Both Debtor and Creditor Are Residents of State Granting Discharge.—"It is pretty well settled that, if the parties to a contract were, when it was made, both citizens and inhabitants of the state in which it was made and to be performed, a discharge there of the debtor from the contract, though under the insolvent laws of the state, will bind the creditor and bar him from an action upon the contract in another state." *Urton v. Hunter*, 2 W. Va. 88, per Maxwell, J.

Effect of Appearance to Contest Debtor's Discharge.—Where a creditor and debtor are residents of different states the appearance by the creditor in a court of the state of his debtor's residence for the purpose of contesting his debtor's discharge under the insolvency laws of that state, does not amount to a waiver of his extraterritorial immunity from such discharge. *McCarty v. Gibson*, 5 Gratt. 307.

D. ACT FOR RELIEF OF INSOLVENT DEBTORS.

See the title EXECUTIONS AGAINST THE BODY.

1. Right to Take Benefit of Act.

A county court, or justices of the peace in the country, to whom a debtor in execution applied to have the oath of insolvency administered to him, and to be thereupon discharged, had no discretion to administer or refuse to administer the oath, but were bound to administer it, though they were of opinion, that the debtor had effects not put into his schedule to be surrendered, and which he was fraudulently concealing. *Harrison v. Emerson*, 2 Leigh 764.

Persons committed for nonpayment of fines were not entitled to the bene-

fit of the act for the relief of insolvent debtors. *Com. v. Chapman*, 1 Va. Cas. 138. But see act of December 28, 1803, which allowed one committed for non-payment of a fine to take the benefit of the act. See the title FINES AND COSTS IN CRIMINAL CASES.

2. Oath and Schedule.

To enable a debtor in execution to obtain his discharge under the insolvent debtor's act he was required to "deliver in a schedule of his estate, take an oath of a very solemn and comprehensive character which is prescribed in terms, and under the directions of the court, or persons before whom such oath of insolvency shall be taken, transfer and deliver all the personal estate contained in such schedule, and convey all the real estate to the sheriff." *Harrison v. Emmerson*, 2 Leigh 764; *Shirley v. Long*, 6 Rand. 735.

Power to Administer Oath.—A county court had not on the fifth day of September, 1809, legal and competent authority to administer the insolvent debtor's oath. *Com. v. Calvert*, 1 Va. Cas. 265.

False Oath Punishable as Perjury.—A false oath taken by an insolvent debtor, under the act "for the relief of insolvent debtors," was punishable, and was perjury at common law. *Com. v. Calvert*, 1 Va. Cas. 265. See the title PERJURY.

Omissions in Schedule.—If the schedule did not contain all the debtor's property, but he fraudulently concealed any part of it, he was liable to a prosecution for perjury, and all the estate contained in it, and any other property which was discovered to belong to the debtor was vested absolutely in the sheriff. *Harrison v. Emmerson*, 2 Leigh 764; *Shirley v. Long*, 6 Rand. 735.

3. Property of Insolvent.

a. Transfer of Title to Sheriff.

(1) In General.

Under the insolvent debtor's act all

property owned by the debtor at the time he took the oath of insolvency, whether mentioned in his schedule or not, and whether fraudulently conveyed, or still retained by him, vested in the sheriff, by operation of law. *Taylor v. Mallory*, 96 Va. 19, 30 S. E. 472; *Syrus v. Allison*, 2 Rob. 205; *Dardy v. Henderson*, 3 Munf. 115; *Shirley v. Long*, 6 Rand. 755. See also, *Jones v. Myrick*, 8 Gratt. 79.

Property Omitted from Schedule.

—Where a debtor in execution took the oath of insolvency and filed a schedule of his property, the title of the sheriff to the property of the insolvent did not arise under the schedule but under the law, which vested in him all the estate of the prisoner, as well that left out of the schedule, as that included in it. "The schedule was necessary to bind the insolvent, for he swears it contains all his estate of every kind; it was proper also as a guide to the sheriff, because the prisoner must be supposed to know best, what and where his property was; but the schedule neither gave to the sheriff any right to the property it contained nor limited his rights to its contents." *Shirley v. Long*, 6 Rand. 739; *Taylor v. Mallory*, 96 Va. 19, 30 S. E. 472. See also, *Clough v. Thompson*, 7 Gratt. 26.

Necessity for Conveyance by Debtor.

—The act of 1799 requiring a debtor in execution in order to obtain his discharge to deliver up his personal and convey his real estate to the sheriff, was held to be merely directory to the court administering the oath, and not to have the effect of repealing the act of 1769 by which the title to all the debtor's property vested in the sheriff by operation of law. *Shirley v. Long*, 6 Rand. 735; *Ruffners v. Lewis*, 7 Leigh 738.

Title to Lands.—Where a person taken in execution was discharged as an insolvent debtor the estate in lands belonging to him at the time of such

discharge was by the Revised Code of 1819, ch. 134, § 34, so completely vested in the sheriff of the county wherein the lands were situated that an action of ejectment for such lands could not afterwards be maintained on the demise of the insolvent debtor while the execution remained unsatisfied. *Syrus v. Allison*, 2 Rob. 200.

Title Vested in Sheriff of County Where Property Found.—The real estate of a debtor who took the benefit of the insolvent debtor's act vested in the sheriff of the county where it was situated, and a sale thereof by the sheriff of the county in which the oath of insolvency was taken, was without authority and void. *Clough v. Thompson*, 7 Gratt. 26; *Ruffners v. Lewis*, 7 Leigh 720.

The effects of a debtor who took the benefit of the insolvent debtor's act were vested by law in the sheriff of the county where they were found, and the right of recovering the debts due the debtor was vested in the sheriff, hence a sergeant of a corporation had no right to sue for money due to an insolvent debtor. *Darby v. Henderson*, 3 Munf. 115.

Subsequently-Acquired Property.—If a debtor, after having taken the oath of insolvency, bought a tract of land, of commissioners, under a decree in chancery, and conveyed it by deed of bargain and sale, the purchaser from him was entitled to recover in ejectment against the defendant in chancery, withholding the possession, whatever the claims of such vendor's creditors might have been. *Chapman v. Armistead*, 4 Munf. 382.

Effect on Pending Suit.—Where the plaintiff in a pending suit who was in custody at the suit of a creditor, confessed judgment and took the benefit of the act for the relief of insolvent debtors and surrendered his interest in the suit he had brought, it was held, that the action was not barred but might still be prosecuted in the

name of the plaintiff. *Peshine v. Shepperson*, 17 Gratt. 472.

(2) Property Fraudulently Conveyed.

Where a debtor in execution was discharged under the insolvent debtor's act, the sheriff was vested with all the property and rights of property of the insolvent, and as the representative of the creditors, and possessing all their legal and equitable rights he could avoid fraudulent conveyances of the insolvent and recover back the property. *Shirley v. Long*, 6 Rand. 735; *Clough v. Thompson*, 7 Gratt. 26; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Staton v. Pittman*, 11 Gratt. 103; *Tate v. Liggat*, 2 Leigh 105; *Beverly v. Brooke*, 2 Leigh 445. See also, *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 821. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

Parties to Suit to Avoid Fraudulent Conveyance.—To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees and cestuis que trust in the deeds, the sheriffs of the counties in which the lands lay, and the execution creditors interested in the property, should be parties. *Clough v. Thompson*, 7 Gratt. 26.

b. Sales and Conveyances by Sheriff.

A sheriff was authorized and required within sixty days after a debtor had taken the insolvent debtor's oath, ten days' notice having been previously given, to sell and convey the property of the debtor to any person whatever for the best price obtainable. *Shirley v. Long*, 6 Rand. 735.

Chattels Fraudulently Conveyed.—The sheriff had the right to sell and to pass by a deed, a slave or other chattel of which the insolvent debtor had made a fraudulent gift to his child (but of which he retained the possession), and the purchaser at such sale was entitled to recover the slave or other chattel although the sheriff had not possession of it at any time. *Shirley v. Long*, 6 Rand. 735.

Property Not. in Possession of Debtor.—The law did not permit a sale of the goods, chattels or estates of an insolvent debtor in the possession of a third person, until the same were recovered in the mode prescribed by the statute. *Clough v. Thompson*, 7 Gratt. 26.

If property fraudulently conveyed was not in the possession of the insolvent debtor, but of some other person, although the title vested in the sheriff, it seems that he could not sell the property in such case, but was required to proceed by summons against the person holding it, under §§ 35, 36, of the act. *Shirley v. Long*, 6 Rand. 735.

But even if the spirit of the insolvent debtor's act was violated by selling the chattels of the insolvent before they came into the possession of the sheriff, yet, as the legal title was vested in him, if he did so the sale was not void, and the purchaser was entitled to recover. The sheriff was a trustee for the creditors and for a violation of his trust he was responsible, but that did not prevent the legal title from passing to the purchaser. *Shirley v. Long*, 6 Rand. 735.

Where Incumbrances Are Outstanding.—The sheriff had no authority to sell the interest of the debtor in the estate surrendered, when it was not in a condition to be disposed of at a fair value, by reason of outstanding incumbrances, the validity and extent of which were in controversy. *Clough v. Thompson*, 7 Gratt. 26; *Norman v. Hill*, 2 Pat. & H. 676.

Sale of Schedule.—Where a variety of property was embraced in a schedule, a sale, not of the property specifically, but of the schedule itself, was

a violation of duty on the part of the sheriff; and the purchaser at such a sale, if he acquired the legal title, was, in a court of equity, treated as a trustee for the benefit of those interested. *Clough v. Thompson*, 7 Gratt. 26. See also, *Penn v. Spencer*, 17 Gratt. 94.

Sheriff's Deed—Sufficiency of Description of Property Conveyed.—A deed from a sheriff, which conveyed all "the right, title and interest, vested in the sheriff by law, in and to eight negroes, conveyed by a debtor to his children," without naming the negroes, was held to be sufficiently descriptive to pass them. The identity of the negroes being matter of proof, as soon as they were identified, the deed operated on them. *Shirley v. Long*, 6 Rand. 736. See the title DEEDS.

4. Effect of Discharge under Act.

The property of an insolvent debtor acquired subsequent to his discharge under the insolvent debtor's act, was not exempted from the payment of prior debts; it was his person only which was protected. *Payne v. Dudley*, 1 Wash. 196.

Person Committed for Nonpayment of Fine.—If a defendant, against whom a judgment had been rendered for a fine, or amercement, in a prosecution for a misdemeanor, was in custody under a *capias pro fine*, or a *capias ad satisfaciendum*, and took the oath of an insolvent debtor, surrendered his property, and was thereupon discharged, such discharge was an exoneration from all further liability on such judgment as to the said fine, or amercement. *Quinling v. Com.*, 2 Va. Cas. 494. See the title FINES AND COSTS IN CRIMINAL CASES.

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CROSS REFERENCES.

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As to gifts of bank deposits, see the title **GIFTS**.

I. Scope of Title.

It is the purpose of this title to treat the substantive law and procedure peculiar to banks as distinguished from other corporations. If a proposition is found stated in terms of banking law which applies equally well to the general subject, a specific reference will always be found to such title. For example, the proposition that a bank is a "person" within the meaning of a statute, or the necessity of averring corporate existence, or the manner in which banks must sue and be sued, are a few instances of the propositions that apply equally well to the general subject. Likewise the relation to each other of parties to bills, notes and checks is omitted, but the relations existing between the bank and such parties is included. The table of cross references should also be consulted for kindred subjects.

II. Definitions.**A. IN GENERAL.**

A bank is an institution whose object is to make gain by dealing in money. It trades in notes, bonds, bills and other securities for money, and unless restrained by charter it deals in stocks of other companies of whatever description. *Goddin v. Crump*, 8 Leigh 156, opinion of President Tucker.

B. PERSON.

See the titles **CORPORATIONS; PERSONS**.

The word "person," as used in the statute against usury, embraces banks. *Stribbling v. Bank*, 5 Rand. 132, followed and approved in *Bank v. Merchants' Bank*, 1 Rob. 589, 590; *Crafford v. Warwick County*, 87 Va. 115, 12 S. E. 147; *Crump v. Trytitle*, 5 Leigh 267.

C. "DAY" IN BANKING PARLANCE.

The "day" in banking parlance, means simply the few hours set apart by usage as banking hours. Banking hours are so far recognized by the courts that any transactions in the ordinary course of banking business, which is to be had with the bank on any day, must be had within banking hours upon that day. *First National Bank v. Payne*, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 286.

III. Branch Banks.**A. PAYMENT OF DEBT.**

See post, "Payment of Debts Due Bank and Set-Off," V, A, 3, d.

Payment of Debts to Parent Bank.

—The provision in the Code of Virginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only

while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. *Farmers' Bank v. Willis*, 7 W. Va. 31.

Notes Discounted by Branch.—In *Smith v. Lawson*, 18 W. Va. 212, it was held, that the mother bank has a right to receive payment of a negotiable note discounted by the branch.

Construction of Statute.—In *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457, it was held, that the act of March 3, 1861, authorizing payment of debts due to mother banks within the federal lines to be made to branch banks within the confederate lines, is not obligatory upon the mother banks, but is unconstitutional as to debts contracted before its passage, although payment has been made in confederate money to a branch bank.

B. RATIFICATION OF ACTS BY PARENT BANK.

The bank of D., after the war, took possession of the assets of the branch bank at P., they being much less than the indebtedness of the branch bank to the mother bank. The bank of D. did not thereby sanction and ratify the acts of the branch bank, done under the acts of March and May, 1862. *Yeaton v. Bank*, 21 Gratt. 593.

"It is shown by the facts agreed, that the operations of the branch bank had been unprofitable, those operations having been made in confederate currency; and that while the assets turned over to the parent bank were about \$10,000, the branch bank was indebted to the parent bank in the sum of \$37,000. The parent bank had the unquestioned right to appropriate the assets of the branch bank, but I can not perceive how the exercise of a

rightful act, could give its sanction to operations of its branch, done not only without the authority of the parent bank, but under an act of the legislature which was in itself invalid, so far as it could affect the parent bank. I am of opinion, upon the whole case, that the judgment ought to be affirmed." *Yeaton v. Bank*, 21 Gratt. 603.

C. PROCEEDINGS AGAINST BRANCH BANK.

The statute (acts of 1831-32, ch. 75, p. 68) enacted, "that hereafter any person or persons, body or bodies politic or corporate, having any controversy with any of the banks within this commonwealth, established by the laws thereof, which has or shall have arisen out of any transactions between such person or persons, body or bodies politic or corporate, and any one of the branches of either of the said banks, it shall be lawful for any such person or persons, body or bodies politic or corporate, desiring so to do, to institute any suit at law or in chancery, which by law could now be maintained against the said mother bank on any such controversy against any such branch bank, in any court of record in the county or corporation where the office of discount and deposit of such branch bank is established; and in all such cases it shall be sufficient to execute a summons instituting such suit, on the president, or in his absence, the cashier, of such branch bank. And any execution which may issue upon any judgment so recovered, shall be levied in the county or corporation where the judgment is obtained; and if there be no property, or if the property taken in execution be not sufficient to satisfy the same, then the execution shall be levied, for the amount due thereon, on any property of the bank in any part of the commonwealth."

Against Whom Summons Must Issue and Declaration Be Filed.—Where

an action is brought under the act passed March 19, 1832, entitled "an act authorizing suits against the branches of banks in this commonwealth in certain cases," the summons is not to be issued nor the declaration filed against the branch bank, but both must be against the mother bank by its corporate name. *Tompkins v. Bank*, 11 Leigh 372; *Mason v. Farmers' Bank*, 12 Leigh 86. See post "Pleading and Practice," XIV.

In *Hall v. Bank*, 14 W. Va. 630, it is said: "They (the branch banks) were not in themselves corporations and could not be sued as such. The mother bank was alone liable to bring suit for the contracts of the branches; though suit could be brought in the counties where the branches were located. See *Tompkins v. Branch Bank*, 11 Leigh 372."

IV. Right to Exercise Banking Functions.

A. CHARTER.

See the title CORPORATIONS.

1. Power of Legislature to Repeal, Alter or Modify.

Under the power reserved in the charter of a private banking corporation, to repeal, alter or modify the charter, the legislature may repeal the charter, but can not modify it without the consent of the corporation. But if the corporation refuses to consent to the modification, it must discontinue its business as a corporate body. *Yeaton v. Bank*, 21 Gratt. 593.

Where a bank is doing business under the general principles of law applicable to corporations, or by reason of the provisions of its charter, it is competent for the legislature to restrict it, or to take it away altogether. Of course this right of the state to alter or repeal a charter where the legislature has reserved that power is undoubted. *Robinson v. Gardiner*, 18 Gratt. 509.

Impairment of Obligation of Contracts.—"Surely it can not be held that under the reserved power of the legislature 'to alter, modify, or repeal a charter of any bank,' it has the power to change or modify an act of incorporation in such a way as to affect in a material particular, a contract which the corporation has entered into with a third party. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract. 5 Allen 247-48; 2 Gray 547; *Bank v. McVeigh*, 20 Gratt. 457." *Yeaton v. Bank*, 21 Gratt. 603. See the title CONSTITUTIONAL LAW.

Where the general assembly has reserved the right to alter or repeal the charter of a bank, the act of February 12, 1866, entitled "An act requiring the banks of this commonwealth to go into liquidation," is not obnoxious to the charge of interfering with vested rights or impairing the obligation of contracts. *Robinson v. Gardiner*, 18 Gratt. 509.

2. Acceptance of Modification or Amendment.

The power of the legislature "to repeal, alter or modify the charter of any bank at its pleasure," must be held to be limited to this extent. It may certainly repeal the charter of any bank; but it can not compel a bank to accept an amendment or modification of its character. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. *Yeaton v. Bank*, 21 Gratt. 598.

Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification, than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the

part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. These principles grow out of the nature of charters of acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the legislature on the one hand, and the corporation on the other, the former expressing its intention, by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance. *Yeaton v. Bank*, 21 Gratt. 599.

The Bank of D., located in Alexandria, within the federal lines, has a branch at P. within the confederate lines. The acts of March 29, 1862, and May 16, 1862, of the Richmond government, not having been assented to by the mother bank, though acted on by the branch at P., did not operate to amend the charter of the Bank of D. *Yeaton v. Bank*, 21 Gratt. 593.

3. Provisions of Charter Bind Third Persons.

Persons dealing with a banking corporation must take notice of, and are affected by the provisions contained in its charter. *Bohmer v. City Bank*, 77 Va. 445.

4. Collateral Attack on Charter.

The question as to whether a bank has violated its charter, can not be inquired into in a collateral proceeding. This must be done in a proceeding having that single object in view.

Crump v. United States Mining Co., 7 Gratt. 352; *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706. See post, "Forfeiture of Franchise and Dissolution," XII.

5. Proceedings to Vacate Charter.

If a bank buys land in violation of § 1163, Va. Code, a third party can derive no advantage from it. The law imposes no forfeiture for its violation, and the only effect of its transgression in that respect is to subject the bank to proceedings in behalf of the state to vacate its charter. *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6, citing *Bank v. Poitiaux*, 3 Rand. 136.

B. FOREIGN AND DOMESTIC BANKS.

1. Foreign Banks.

a. Loans and Discounts.

See post, "With Respect to Loans and Discounts," V, A, 3.

"We claim no right to interfere in the municipal regulations of foreign nations, or of our sister states. We claim no power to create corporations for carrying on banking operations beyond our own limits. But, it is our policy to prevent other nations and states, and the corporations of other nations and states, from doing that towards us, which we forbear to do towards them. It is our policy to restrain all banking operations by corporations not established by our own laws. It would not, therefore, be permitted to a bank in Ohio, to establish an agency in this state, for discounting notes, or for carrying on any other banking operations; nor could they sustain an action on any note thus acquired by them. But, there is nothing in the policy of our laws, which restrains our citizens from promoting their accommodation and interest by borrowing money from a bank in Ohio. It is not the policy of our laws to restrain one citizen of Virginia from executing to another citizen, or to a foreigner, a note payable at the bank-

ing house of a bank legally constituted in Ohio; nor to prevent such bank from taking an assignment of such note by discounting it in Ohio. We can have no doubt, but that the bank may recover by suit in Virginia, a debt thus contracted." *Bank v. Pindall*, 2 Rand. 465, 474.

Enforcement of Primary Contract.—

A bank of another state can not enforce a primary contract made in Virginia, as by discounting notes or otherwise. *Bank v. Pindall*, 2 Rand. 465.

b. Power to Sue in Foreign State.

A foreign banking corporation may sue in our courts upon a contract with them valid according to the laws of the country in which the contract was made, unless it is contrary to the policy of our laws. *Rees v. Conococheague Bank*, 5 Rand. 326, citing *Bank v. Pindall*, 2 Rand. 465, as so deciding. And, in *Taylor v. Bank*, 5 Leigh 475, Tucker, P., who delivered the opinion of the court, said: "If the object of the demurrer to the declaration was to try the right of a foreign corporation to sue, that right is settled by the case of *Bank v. Pindall*, 2 Rand. 465, in which my brother Cabell has, with his accustomed clearness, established the affirmative of the proposition, upon the soundest reason." See *Bank v. Pindall*, 2 Rand. 465, also cited in *Freeman's Bank v. Ruckman*, 16 Gratt. 132.

A banking corporation of another state may maintain an action against its debtor in the courts of Virginia. *Bank v. Pindall*, 2 Rand. 465.

Where a declaration by a foreign bank alleged that the note sued on had been assigned to the plaintiff but there was no allegation as to the place of assignment, a plea that the note was indorsed to the plaintiff in Virginia was not sufficient to raise the question as to whether the plaintiff could sue in the courts of Virginia; the note in question being nonnegotiable, and the

term indorsed therefore not being equivalent to the term assigned. *Bank v. Pindall*, 2 Rand. 465.

2. Domestic Banks.

The Farmers' Bank of Virginia, chartered in the year 1812 by the general assembly of Virginia, has been held by the supreme court of West Virginia to be a domestic corporation in that state. *Farmers' Bank v. Willis*, 7 W. Va. 31, citing *Farmers' Bank v. Gettinger*, 4 W. Va. 305.

The Farmers' Bank of Virginia, being a domestic corporation in Virginia, before the division, and having branches in the territory which became West Virginia, from the date of the division continued in law and in fact a domestic corporation of the latter state as effectually as it had been under the former state, and as such was liable to be sued, and was not liable to be proceeded against as a foreign corporation. *Farmers' Bank v. Gettinger*, 4 W. Va. 305.

V. Rights, Duties and Liabilities.

A. OF AUTHORIZED BANKS.

1. With Respect to Deposits.

a. General Deposits.

See post, "Bank's Lien," VII.

(1) Relation between Bank and Depositor.

It is well settled that a general deposit of money in a bank creates the relation of debtor and creditor between the bank and the depositor. Though we call it a deposit, it is a loan, and not a bailment. *Robinson v. Gardiner*, 18 Gratt. 512.

The relation between a bank and a depositor is that of debtor and creditor. The bank in consideration of the deposit or loan, impliedly agrees with the depositor that whenever demand is made by the presentation of a genuine check, properly indorsed, in the hands of a person entitled to receive the amount, the check will be honored

to the extent of the funds on deposit. Whenever a bank fails to fulfill this agreement with a depositor, by honoring his check when duly presented, a right of action at once accrues. *Wood v. American Nat. Bank*, 100 Va. 311, 40 S. E. 931; *Robinson v. Gardiner*, 18 Gratt. 509; *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804.

A bank, by accepting a deposit, assumes the relation of debtor to the depositor, and promises to pay the amount according to his check. This contract is between the depositor and the bank alone, without reference to the beneficial interest in the money deposited. *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804, citing *Robinson v. Gardiner*, 18 Gratt. 511.

(2) Nature of a Deposit.

In *Robinson v. Gardiner*, 18 Gratt. 509, it was held, that a deposit of money in a bank is a loan and not a bailment.

A balance in bank to the credit of a depositor is, strictly speaking, a chose in action. It is often treated, however, as ready money, and whether it is to be treated as one or the other depends upon the circumstances of the particular case. *Koss v. Kastelberg*, 98 Va. 278, 36 S. E. 377.

(3) Title to Deposit.

That a depositor has an interest in a fund deposited is sufficiently disclosed to the bank by depositing the money in his own name, though with an addition that does not change the nature of the deposit, and notifying the cashier that no other person than himself is to check on the fund. *Nolting v. National Bank*, 99 Va. 55, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

Banking business is founded on the idea of immediate availability of the funds deposited. One who deposits money in bank considers that he has that much as available as if it were cash in his pocket. The bank's prom-

ise, and its availability, are property rights which ought not to be any more liable to another's debts than the money would have been if the depositor had retained it. *Nolting v. National Bank*, 99 Va. 60, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

The tendency of courts is in favor of enforcing the contract made by the bank with the depositor. The bank's promise, and the availability of the funds, are property rights which ought not to be any more liable to another's debts than the money would have been if the depositor had retained it. *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

(4) Medium of Repayment.

When money has been deposited with a savings bank, and there has been no contract that a different rule shall prevail, such institution, when the deposit is made, ordinarily becomes the owner of the money deposited, and consequently a debtor for the amount, and under obligation to pay, on demand, not the identical money received, but a sum equal in legal value. But it seems this rule does not apply where the thing deposited is not money but a commodity. *Zinn v. Mendel*, 9 W. Va. 580. See post, "Savings Banks," XVI.

(5) Deposits by Agents and Fiduciaries.

(a) How to Be Made.

The deposit of money in bank by an agent though in his own name, yet if it was intended to be by the agent for the benefit of the principal, is not a conversion thereof to his use, so as to make him the debtor of the principal for the amount, where the same is lost. Deposits by agents should be made in the name of the principal, or in the name of the agent for principal. *Hale v. Wall*, 22 Gratt. 424.

The rule that a bank which has re-

ceived money on deposit for an agent, who has a beneficial interest therein, can not disregard that interest and apply the money to a debt due it from the agent principal, is not affected by the addition of the word "cashier" to the depositor's name. If the rule were otherwise, no attorneys, trustees or fiduciaries of any character, who have liens on the funds which they handle for their fees or for advances, could afford to deposit in banks without disclosing the details of their business. This would deter such persons from depositing and would be disastrous to the banks. *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

Deposits by Fiduciaries.—See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; TRUSTS AND TRUSTEES.

A bona fide deposit of his ward's money by guardian in his own name, provided it be shown that it was his ward's money, will protect him from liability for any loss which ensues, not by the form of the deposit, but by the general destruction of the currency and banking interests of the state. *Parsley v. Martin*, 77 Va. 376; *Barton v. Ridgeway*, 92 Va. 170, 23 S. E. 226.

"This case falls directly within the principles announced by this court in the cases of *Davis v. Harman*, 21 Gratt. 194; *Pidgeon v. Williams*, 21 Gratt. 251; and in *Cooper v. Cooper*, decided by this court within the last few weeks. Ante, p. 198. Cases in which a fiduciary has been held to responsibility for the loss of the money of his ward or of an estate, which had been deposited in his own name, have all been those in which the fiduciary fund was mingled with his own private or personal funds or used by him for his own purposes, or where the deposit was made in depreciated money as compared with the money received." *Parsley v. Martin*, 77 Va. 383.

A commissioner was appointed in November, 1861, to collect money and report it to the court at its next term. He collected the money and deposited it in a solvent bank of good commercial standing, to the credit of himself and his law partner. This account was kept for the fiduciary funds under the control of the firm and each of its members. No part of the money was used by the commissioner, nor mingled with his individual funds. No term of the court for the transaction of business was held until after the war. In the meanwhile the commissioner died, and the bank was ruined and the money lost by the results of the war, which destroyed the whole currency of the country. Held, the commissioner was not liable for the loss. *Barton v. Ridgeway*, 92 Va. 162, 23 S. E. 226. See the title REFERENCE.

(b) Rights of Principal.

A bank which has received money on deposit for an agent, who has a beneficial interest therein, can not disregard that interest and apply the money to a debt due it from the agent's principal. *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

Where the beneficial interest in a deposit is wholly in another, it is doubtful whether the beneficiary can maintain an action at law for the money. It seems certain that he can not do so, unless he shows clearly that the money belongs to him, and that he is entitled to receive it. *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

(6) Surety's Deposit.

See the title SURETYSHIP.

An insolvent bank holds judgments against principal and surety, and deposits of surety, on which it pays sixty per cent., but which third party had contracted to take at par. Surety pays

judgments with his deposits, under agreement with principal to repay the face value of the deposits so used; held, surety is entitled to receive face value of the deposits, though the general rule is that if surety discharges the debt for less than its full amount, he can only claim against principal the sum paid. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534; *Kendrick v. Forney*, 22 Gratt. 748.

Where surety pays part of such judgment with his deposits, principal, compromising balance, may have the judgment assigned to surety for fifty cents on the dollar of the amount paid by him, though the bank pays less dividend. Such agreement between surety and principal, held, not to be usurious. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534.

Bank refused to transfer surety's deposits to contractor for purchase thereof until the judgments were paid; held, this fact does not make principal's agreement to repay the amount at its face value, without consideration. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534.

(7) Payments of Notes Out of Deposits.

Where a note of which a bank is the holder becomes due and payable, if the maker has a sufficient sum deposited to satisfy the note at such time, there seems to be a conflict among the authorities as to the duty of the bank to charge the note up to the maker, as if it were a check, upon the deposit, but if, when the note becomes due and payable, the bank has not sufficient funds of the maker to satisfy the debt, it is not required to appropriate the deposit to the payment of the note, neither is it required to appropriate subsequent deposits in such case to its payment. *Bacon v. Bacon*, 94 Va. 693, 27 S. E. 576, citing 2 Morse on Banking, § 562. See *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

(8) Checks.

(a) Payment of Forged or Altered Check.

A bank is responsible to a depositor for the payment of a check which has been altered in a material particular after signature, unless the negligence or laches of the drawer has laid the foundation for the error of the bank. The depositor, however, is only chargeable with the duty of ordinary care and diligence. Merely giving a stranger a check in exchange for money is not such negligence on the part of the drawer as will excuse the bank on which it is drawn for paying the check after it has been raised to a larger amount by the drawee without authority. *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

"If a check be forged and be paid, though the payment is not good against the supposed drawer, can it be doubted, that the payee who has presented and cashed a forged check, would be compelled to refund? Now, I take him to be in the situation of the purchaser of stock under a forged power, and not more responsible to refund his ill gotten gains than the latter." *Bank v. Craig*, 6 Leigh 431, per Tucker, P.

"The rule requiring the bank to know the customer's handwriting was always confined to having a knowledge of his signature. Neither any rule of law, nor the ordinary course of business, renders it a matter of suspicion that the body of the check or bill is not written in the handwriting of the maker or drawer. Nevertheless, a false or fraudulent alteration in a material particular, made in the body of the check or bill, after signature, constitutes a forged instrument just as much as the simulating the signature itself. By such alteration the instrument is vitiated, even in the hands of a bona fide holder for value, although it might not be possible to discover the change even by a careful scrutiny. Of course it follows, as between the bank and the

depositor, that a payment by the bank is the loss of the bank; and such is the unquestionable rule, except in those instances wherein the negligence or laches of the drawer of the check has laid the foundation for the error of the bank. If by any negligence upon his part, as by so carelessly writing the check as to render it easily open to material alteration without leaving evident traces for detection, the customer has furnished the opportunity for the fraud which has deceived the bank, then he must suffer the just consequences of his carelessness by bearing the loss himself. *Morse on Banks and Banking*, § 480." *National Bank v. Nolting*, 94 Va. 265, 26 S. E. 826.

Proximate Cause.—See the title NEGLIGENCE.

"Drawing the check in favor of the stranger was not the proximate cause of the loss. The forgery was the immediate cause, and that could have been as readily perpetrated by an acquaintance. To hold that giving a check to a stranger, where no business relation existed between the drawer and himself, was sufficient evidence of negligence to excuse the bank and impose the loss upon the drawer, if the check was forged by raising it to a larger amount than it was given for, would be to release the banks from the just responsibility imposed upon them by the law as custodians of the customer's money, and expose the depositor to a risk and danger that would greatly impair the usefulness of the bank as a safe place of deposit." *National Bank v. Nolting*, 94 Va. 267, 26 S. E. 826.

Raised Check.—A bank is responsible to a depositor for the payment of a check which has been altered in a material particular after signature, unless the negligence or laches of the drawer has laid the foundation for the error of the bank. The depositor, however, is only chargeable with the duty of ordinary care and

diligence. Merely giving a stranger a check in exchange for money is not such negligence on the part of the drawer as will excuse the bank on which it is drawn for paying the check after it has been raised to a larger amount by the drawee without authority. *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826, for sequel to this case, see *Nolting v. Bank*, 99 Va. 54, 37 S. E. 804.

(b) Payment of Check Not Drawn on Funds.

"In the case of a check, the cashier is called upon to pay away the funds of the bank. If the drawer has no funds there, it is the folly of the bank's officer to pay it; whereas the payee is in no default, and therefore he should not be bound to refund, since it would be hard to turn him round to the drawer, who may no longer be solvent." *Bank v. Craig*, 6 Leigh 431, per Tucker, P.

(c) Payment of Checks to Unauthorized Agent.

If a depository receives from an agent of his principal checks drawn payable to the principal, endorsed by the agent without authority, and upon such endorsement, the depository, without fraud, pays the amount thereof to the agent out of his own funds, and thereafter collects the checks from the banks on which they are drawn, no action lies by the principal against the depository for the amount of the checks. In paying the amount of the checks to the agent the depository paid his own money, and in collecting the checks of the banks he collected as and for himself. If the checks were not properly endorsed, then he did not receive the principal's money. The mere fact of being depository without receiving the money in that capacity would not create a liability. There is no promise, express or implied, on the part of the depository to pay the principal, and without such promise no

action of assumpsit will lie. *Baltimore, etc., R. Co. v. Burke*, 102 Va. 643, 47 S. E. 824.

Where checks made payable to plaintiff company are, by its agent, endorsed and presented to the bank on which they are drawn, and by it paid, and the several amounts charged to the accounts of the respective drawers of such checks and credit received therefor by the defendant bank, there can be no recovery by plaintiff against defendant under a count for money had and received, although such agent was not authorized to endorse or collect such checks, and the bank therefore paid the money to an unauthorized person. Under the facts stated above, there was no privity between plaintiff and defendant, and the action of assumpsit for money had and received could not be maintained. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837.

(d) Notice to Stop Payment of Check.

"If one desire to stop the payment of a check, he must go to the cashier and not to the president. *Bank v. Craig*, 6 Leigh 433, per Tucker, P.

(e) Action by Depositor for Failure to Pay Check.

Measure of Damages.—See the title EXEMPLARY DAMAGES.

The failure of a bank to pay checks of a depositor properly drawn on funds on deposit, and duly presented, gives the depositor a right of action against the bank, and if such failure is willful and malicious, or is due to negligence so gross as to evince a culpable indifference to consequences and the rights of the depositor, he has the right to recover exemplary damages. But where the failure is due to the mistake of the bookkeeper, for which the president promptly apologized and offered to correct the error as far as possible, and there is an absence of any fraud, malice, oppression or other

special circumstances of aggravation the recovery will be limited to the actual damages sustained. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

"If the dishonor of a depositor's check is willful and malicious, a right to recover exemplary damages would accrue. *Birchall v. Third Nat. Bank*, 19 Cent. L. J. 390. And if the negligence of a bank is so gross as to evince a culpable indifference to consequences, and the rights of the plaintiff, it would be sufficient ground for the allowance of such damages, 1 Sedg. Dam., § 368. In *Rollin v. Stewart*, 14 C. B. 595, a verdict of £500 damages was returned against a bank for dishonoring a check for a comparatively small amount. The court intimated that it was a very large sum, but did not disturb the verdict, and the matter was finally adjusted by agreement of parties at £200. See also, *Schaffner v. Ehrman*, 15 L. R. A. 134." *Wood v. American Nat. Bank*, 100 Va. 312, 40 S. E. 931.

Where the measure of recovery in action of tort to recover for a failure of a bank to pay checks of a depositor properly drawn on funds on deposit is determined by the motive with which an act was done, all circumstances tending to show the presence or absence of such motive are admissible in evidence. *Wood v. American Nat. Bank*, 100 Va. 307, 40 S. E. 931.

An allegation in a declaration, to recover for a failure of a bank to pay checks of a depositor properly drawn on funds on deposit, that certain acts and omissions which constitute the cause of action were "wrongs repeatedly committed against the plaintiff," is a sufficient charge that they were willful and wanton, and will warrant a finding of exemplary damages. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

(9) Set-Off.

See generally, the title SET-OFF,

RECOUPMENT AND COUNTER-CLAIM.

(a) Bank's Right of Set-Off.

Where a depositor having contracted a debt to a bank, by note payable sixty days after date discounted by the bank for his accommodation, dies before the note comes to maturity, having on deposit in the bank, at the time of his death, a sum of money exceeding the amount of the note, in case his estate prove insolvent, the bank has a right, in equity, to retain the amount of his note out of the money it held for him on deposit, whether there be debts of the depositor of superior dignity to the debt he owed the bank, or not; equity, in such case, regarding the bank as the debtor to the depositor only for the excess of his money on deposit above the contents of his note. *Ford v. Thornton*, 3 Leigh 695. *Brooke, J.*, dubitante if it appear that the decedant's estate owes debts of superior dignity.

In *Nolting v. National Bank*, 99 Va. 60, 37 S. E. 804, it is said: "The banker's lien (which, where it relates to balances due on accounts, is a right to set-off, rather than a lien. *Ford v. Thornton*, 3 Leigh 695) is defined in 1 *Morse on Banks and Banking*, as 'a mere right of the bank to retain in its own possession, property, the title of which (absolute or special), is, or in the case of negotiable paper purports to be, in one against whom the bank has some demand, until that demand is satisfied.'"

"We have been referred to a number of cases in which it has been held that the right of a banker to set off the balance due a depositor on his account, against a debt of the depositor to the bank, is superior to the equities of third parties to whom the fund really belongs, unless the bank had notice of such equities. The reason is that the bank is presumed to have made advances to the depositor, on the faith of the deposit account. Those

cases do not apply to the case in hand. They were all contests between creditors of the depositor—the bank on the one hand, and the equitable claimant of the fund on the other. The depositor owed the money to one or the other. The courts protected the bank's legal possession, unless notice of the other's rights created a superior equity. Here the depositor owes neither the bank nor the bank's debtor. The money is his both legally and equitably." *Nolting v. National Bank*, 99 Va. 63, 37 S. E. 804.

Agent's Deposit against Principal's Debt.—A bank can not be said to be indebted to a principal on account of money deposited by an agent in his own name, when the circumstances are such that the principal could not recover the amount by action at law, or suit in equity. It is a debt due the agent, and the bank can not set off against such deposit a debt due to it by the principal. *Nolting v. National Bank*, 99 Va. 55, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826.

Right to Set Off Deposits Made after Maturity of Debt.—A joint note, signed by several parties, for \$6,000 was presented to a bank for discount by the principal in the note; they discounted it for \$4,000 only, and the cashier endorsed it "discounted for \$4,000 only, and should be so read." This was done without the knowledge of the sureties in the note. Held, that they were nevertheless bound, the transaction being equivalent to a discounting of the note for \$6,000 and a repayment by the principal of \$2,000 thereon; and that it not being paid at maturity, general deposits made by the principal in the note, after its maturity, could not, without his direction so to apply them, be regarded as payments on this note. *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

Surety's Deposits.—In determining value of deposits to surety, whether or

not deposits transferred by him were a valid set-off in hands of transferee against latter's indebtedness to the bank; held, to be immaterial. *Southall v. Farish*, 85 Va. 403, 7 S. E. 534.

(b) Depositor's Right of Set-Off.

In *Spillman v. Payne*, 84 Va. 435, 4 S. E. 749, a judgment creditor of a bank had deposited money with its branch subject to check, and the money was lost by the bank's failure. Held, the deposit did not discharge the judgment, and is no set-off against the assignee thereof.

In a suit by the assignee of the bank for the proceeds of notes delivered by its cashier before insolvency to one of its directors, who was also a depositor and to his surety to secure them against losses, the bank's failure being then foreseen, it was held, that such director and surety will not be entitled to set off the debt of the bank due him for deposits against the plaintiff's demand, except to the extent he may be entitled to dividends from the assignee on account of his debt against the bank. *Lamb v. Pannell*, 28 W. Va. 664.

(10) Interest on Deposits.

In *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50, it was held that a bank is not chargeable with interest on sums deposited to the credit of customers to be drawn against by check, until payment be demanded, unless upon special contract. Upon money not so deposited, however, interest may be charged.

(11) Dividends on Deposits.

When a depositor is entitled to dividends from the assignee of the bank, which have not been declared or paid by reason of the controversy in the suit, he will be entitled to be paid out of the fund recovered from his dividends on his deposit equal to those paid to the other depositors with interest on the same from the time the same would have been paid if there

had been no controversy or suit. *Lamb Trustee, etc. v. Cecil*, 28 W. Va. 653, approved and applied in *Lamb v. Pannell*, 28 W. Va. 663.

b. Special Deposits.

When money has been deposited with a bank, and there has been no contract that a different rule should prevail, the bank where the deposit is made ordinarily becomes the owner of the money, and consequently a debtor for the amount, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value. But it seems this rule does not apply when the thing deposited is not money, but a commodity. "Of course I am now speaking of common deposits in banks, such as the plaintiff made in the savings institution in this case, and not of special deposits, where the property in the thing deposited remains in the depositor, and the institution, or bank, becomes the simple bailee. It also seems, from the authorities quoted, that the general rule is, 'that an action at law must be brought by the person having the title, or right, to the thing demanded, or to the damages which are sought to be recovered for the injury.'" *Zinn v. Mendel*, 9 W. Va. 591. See also, *Dickeschied v. Bank*, 28 W. Va. 340.

Deposits of Collateral—For Specified Debt.—It is a well settled rule that collaterals deposited with a bank for one debt, or class of debts, can not be appropriated to another debt, or class of debts. So where a firm having deposited with a bank as collateral for its note to the bank, another note of the firm endorsed by third party, stipulating as follows: "If we should come under any other liability, or enter into any other engagement, with said bank, while it holds this obligation," etc. Held, construing the word or as and, the stipulation refers to any other liability or engagement of the same kind with the first mentioned note, and not

to a draft drawn on, and accepted by, said firm, and discounted for the drawer and placed to his credit. *Loyd v. Lynchburg National Bank*, 86 Va. 690, 11 S. E. 104. See post, "Bank's Lien," VII.

c. Certificates of Deposit.

The assignment of a certificate of deposit executed by a bank within the confederate lines is a new contract, founded upon a new and valuable consideration, and if made within the federal lines, is entirely disconnected with the illegal act of its making, and is to be governed by the law of the place where made. *Morrison v. Lovell*, 4 W. Va. 346, citing *Nichols v. Porter*, 2 W. Va. 13, overruled on another point in *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

A certificate of deposit executed by a bank within the confederate lines, is null and void, and in violation of the law and policy of the government of the United States forbidding commercial intercourse with rebels. *Morrison v. Lovell*, 4 W. Va. 346.

2. With Respect to Collections.

a. Ownership of Paper Placed for Collection.

(1) In General.

Daniels on Negotiable Instruments (vol. 1, § 340), under the heading, "Controversies as to the Ownership of Paper Placed in Bank to Be Collected," says: "A variety of circumstances give rise to controversies as to the right to claim paper or the proceeds of paper which was put in bank to be collected. When the holder places his paper in bank he usually does so in one of three ways: First, as a principal employing the bank as a mere agent for collection, in which case the restrictive indorsement 'For collection' is or should always be used, so that all subsequent holders may be advised of the bank's want of title. This is the form of indorsement generally used when the holder is not a customer of the

bank. Second, as an avowed seller to the bank, in which case the indorsement is in blank, and the transaction a plain one. Third, as a customer having an account with the bank, in which case the restrictive indorsement is or is not employed, according to the relations established by agreement between the parties. If the bank treats the paper as a cash deposit, and allows the customer to draw against it in anticipation of the collection, the indorsement is generally in blank." *Neill v. Rogers Produce Co.*, 41 W. Va. 37, 23 S. E. 706.

(2) As between Remitting and Correspondent Bank.

Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all negotiable paper transmitted for collection when received, and accounts were regularly transmitted from the one to the other, and settled upon these principles, and balances remitted when called for and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and the collecting bank had no notice that the transmitting bank did not own the paper, and such paper was transmitted by each of the two banks on its own account, there is a lien for a general balance of account, no matter who may be the real owner of the paper. If the receiving and collecting bank, at the time of the mutual dealings with the bank sending paper, had notice that such bank had no interest in the bills or notes transmitted, and that it transmitted them for collection merely, as agent, then the collecting bank would not be entitled to retain against the owner of such paper for the general balance of the account with such bank. *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

If the collecting bank had no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled, against the real owner, unless credit was given to the bank sending the paper, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted in the usual course of dealings between the two banks. *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 441, 8 Am. St. Rep. 101.

But if, in the mutual dealings between the two banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper, which it transmitted for collection, and had no notice to the contrary, and on the credit of such remittances, made or anticipated in the usual course of dealings between them, balances were from time to time suffered to remain in the hands of the bank sending the remittances, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to retain against the real owner of the paper, for the balance of account due from the bank transmitting such paper. *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 441, 8 Am. St. Rep. 101.

Dissolution of Collecting Bank.—

The plaintiff, a banking corporation, sent a number of checks to its correspondent, a banking firm at A., for collection; the checks being drawn upon the latter firm. Afterwards, but before the checks were received, the latter firm was dissolved by the death of one of its members. The surviving partner paid the checks by charging them to the accounts of the drawers, and gave credit for the amount thereof to the plaintiff on the books of the firm. Held, that he had no such authority, but that he should have either sent back the checks or remitted the

proceeds. And where the moneys represented by the checks were afterwards transferred by the surviving partner to an assignee for the benefit of creditors, but remained easily traceable on the books of the firm, no checks having been drawn against the credit to the plaintiff, the latter could reclaim such moneys from the assignee. *First Nat. Bank of Alexandria v. Payne*, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

(3) Check for Collection from Agent.

It is a well settled principle of law that a principal is entitled, in all cases where he can trace his property, whether it be in the hands of the agent, or of his representatives, or assignees, to reclaim it, unless it has been transferred bona fide to a purchaser of it, or assignee for value, without notice. In such cases, it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property; if it be distinguishable, and separable from the other property or assets; and has an earmark, or other appropriate identity. In accordance with this rule it was held, that a bank receiving a check for collection from an agent, with notice that it belonged to his principal, can not, after the death of the agent leaving an insolvent estate, apply the proceeds of the check to his private debt to the bank. "On the face of the check collected by the bank, it was for money that Langhorne was to receive as the agent of the appellants. The appropriation of it by Langhorne to the payment of his private debt, would have been a gross breach of trust, and the bank, or its officers, consenting to such appropriation, with full notice of the trust, would be participant in the breach of it, and chargeable as if no such appropriation had been attempted." *Overseers of Poor v. Bank*, 2 Gratt. 544, 44 Am. Dec. 399.

b. Failure to Fix Liability of Endorser.

In an action against a bank for negligence in failing to protest a note placed with it for collection, it is sufficient if the declaration avers it was so placed before its maturity, though the date of the placing is not specified. The fact that cashier handed plaintiff, in lieu of an old note which should have been protested, a renewed note, saying former was lost, and plaintiff retained latter some time, is not conclusive of plaintiff's ratification of the bank's action, but evidence from which the jury might or might not infer such ratification. *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135.

c. Authority to Receive Payment of Overdue Note.

If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested, is permitted by the owner to remain in the bank, however long or from whatever motive he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor; provided he has no notice that the bank in fact has no authority to receive the money. *Alley v. Rogers*, 19 Gratt. 366.

3. With Respect to Loans and Discounts.

See ante, "Loans and Discounts," IV, B, 1, a.

a. Banks for Lending Money.

The farmers' bank is an incorporated bank chartered by the legislature mainly for the purpose of lending money; that is its trade, and all contracts with it, must be construed according to the usages of that trade, which all are presumed to know who deal with it. Their contracts are to be explained by the usages which make a part of them, unless such usages be contrary to law. *Crump v. Trytitle*, 5 Leigh 256, per Brooke, J.

b. Discounting by Unchartered Association.

See post, "Of Unauthorized Banks," V, B.

The first section of the act of 1816, relating to unauthorized circulation, provides "that it shall not be lawful for any association or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed, within the limits of this commonwealth, for the purpose of discounting notes, bills, etc., and issuing notes, bills, etc., for the purpose of dealing, trading or carrying on business as a bank, to commence or continue the discounting of any notes or bills, etc., or the issuing of any notes or bills, drafts or bills, etc." *Com. v. Scott*, 4 Rand. 147.

The fourth section of the act of 1816 provides that "any person who may sign, countersign, or indorse, as president, manager, or cashier, or by any other name or designation, etc., any note, etc., shall be liable, on motion, etc., before any court of record, etc., to a judgment in favor of the commonwealth, for threefold the amount of any such note, etc." *Com. v. Scott*, 4 Rand. 149.

Section 1 of the act of February 24, 1816, enacts, "that it shall not be lawful for any association or company not having a charter incorporating such association or company with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed within the limits of this commonwealth, for the purpose of discounting notes, bills or other securities for the payment of money or other valuable thing, and issuing notes, drafts or bills, whether payable to order or bearer, or any other securities for the payment of money or other valuable thing, in the name, or on account, or for the benefit of any such association or company, or otherwise

for the purpose of dealing, trading or carrying on business as a bank, to commence or continue the discounting of any notes or bills, or other securities for the payment of money or any other valuable thing, or the issuing of any notes, drafts or bills, or other securities for the payment of money or other valuable thing, or such dealing, trading or carrying on business as a bank; and every member, officer or agent of any such company or association that may so commence or continue such discounting or issuing of notes, drafts, bills or other securities, or the dealing, trading or carrying on business as a bank, shall be held and taken to be guilty of a misdemeanor, and upon conviction thereof on indictment, information or presentment, shall be liable to be fined at the discretion of the jury, in a sum not less than one hundred nor exceeding five hundred dollars. And if any such company or association, or any president, manager, cashier, or other officer or agent of such company or association, shall pay out, deliver, put in circulation, or issue any note, draft, bill or other security for the payment of money or other valuable thing, purporting to promise, order, request or stipulate the payment of money or other valuable thing, or that money or other valuable thing is payable, by or on behalf of such company or association, or any person or persons as agent or agents thereof, each member, officer and agent thereof shall be in like manner liable to the same penalty." 2 Rev. Code, ch. 208, p. 111. *Com. v. Horner*, 10 Leigh 700, 710.

c. Discounting Agent's Paper.

A bank discounting negotiable paper, with knowledge that the person from whom it is taken holds it as agent only, is bound to ascertain the extent of the authority of the agent; but, in the absence of knowledge of any limitation upon the authority apparently conferred by the principal, it may rely

upon such apparent authority. *Merchants', etc., Nat. Bank v. Ohio Val. Furniture Co.* (W. Va.), 50 S. E. 880.

d. Payment of Debts Due Bank and Set-Off.

See ante, "Payment of Debt," III, A.

(1) By Depositing to Credit of Bank.

A general custom and usage, which is acquiesced in by a party, allowing him to pay his indebtedness to a bank by depositing to the credit thereof, money for the purpose in any one of several banks, but the indebtedness is not to be discharged until notice of the deposit is given to the bank where the indebtedness exists, is defeated by a special contract to pay in a particular bank so far as notice being required of the deposit in the particular bank; it being by the special contract made the agent of the creditor to receive the amount of the indebtedness. And it is immaterial whether or not the deposit was made at or before the maturity of the note upon which the indebtedness is based. *Exchange Bank v. Cookman*, 1 W. Va. 69.

(2) Payment in Bills or Notes of Bank.

In General.—A bank, as long as it is solvent, or rather, as long as it has control of its assets, is bound to take its own bills in payment of debts due to it; but when it becomes insolvent, and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligations against him for the equal benefit of all. *Farmers' Bank v. Willis*, 7 W. Va. 49.

After Bank Becomes Insolvent.—Under the act of February 12, 1866, entitled "An act requiring the banks of the commonwealth to go into liquidation," the trustee is not obligated to receive the notes of the bank in payment of debts due the bank. *Alex-*

andria, etc., *R. Co. v. Burke*, 22 Gratt. 254, citing *Exchange Bank v. Knox*, 19 Gratt. 739, reaffirmed in *Saunders v. White*, 20 Gratt. 327; *Bank v. Marshall*, 25 Gratt. 378.

In a suit in the circuit court of the United States against the Bank of the Valley, the court, on September 21, 1869, made an order that the receiver receive the notes of the bank in payment of debts due to the bank. After the decision of the cases of *Exchange Bank v. Knox*, etc., the court set aside this order. A plea of tender of these notes in payment of debts of the bank, filed in a case pending in a state court, after the rescinding of the order of the United States court, the notes having been obtained after the execution and recording of the deed of the bank and notice thereof to the defendant, is not a valid defense to the action. *Bank v. Marshall*, 25 Gratt. 378, citing *Wilson v. Spencer*, 1 Rand. 76.

"It was held by the supreme court of appeals of this state, in the case of the *Farmers' Bank v. Gettinger*, 4 W. Va. 305, that a debtor of a bank, summoned as a garnishee, could not afterwards procure the notes of the bank and pay them or set them off, in satisfaction or discharge of the debt. We can not see that the right of the assignee in trust for creditors is inferior to that of an attaching creditor." *Farmers' Bank v. Willis*, 7 W. Va. 51.

Branch Banks.—When, after the *Farmers' Bank of Virginia* has assigned its assets to trustees for its creditors, of which the debtor had notice, he acquired and tendered notes of the bank in payment of his debt before the passage of the act in 1873, which provides that debts due to the banks or their trustees or representatives, may be paid in the issue of the banks or their branches, the tender can not now by force of the statute, be treated as a payment. And a judgment rendered then, which was correct, should not now be reversed to

enable the debtor to make the payment, or otherwise have the benefit of the legislation. If he could pay the debt in that manner, without the judgment, he can pay it notwithstanding the judgment. *Farmers' Bank v. Willis*, 7 W. Va. 49.

The provision of the Code of Virginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the *Farmers' Bank of Virginia* had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. *Farmers' Bank v. Willis*, 7 W. Va. 49.

The act of May, 1862, does not in terms require the banks to receive the small notes issued under its authority in payment of debts due to it; but if it did do so in terms or by necessary implication it would be void, because it would impair the obligation of contracts, in requiring the bank to receive, not the notes which, under its charter it agreed (by accepting the conditions of the charter), to receive in payment of debts due to it but to receive a worthless currency issued by its branch without its consent, not in conformity to its charter, but in direct violation of it. *Yeaton v. Bank*, 21 Gratt. 603.

Y., a debtor before the war, of the Bank of D., at Alexandria, can not, after the war, pay his debt by notes issued under the acts of March 29 and May 16, 1862, by the branch bank at P. *Yeaton v. Bank*, 21 Gratt. 593.

Set-Off.—Under the act of February 12, 1866, requiring the banks of the commonwealth to go into liquidation, the banks, being insolvent, execute

deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. Held, that a debtor of the bank can not set off notes of the bank bought up by the debtor after the execution and recording of the deed and notice thereof to the debtor. *Exchange Bank v. Knox*, 19 Gratt. 739; *Saunders v. White*, 20 Gratt. 327; *Bank v. Marshall*, 25 Gratt. 378.

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The notes of the Bank of the Valley in Virginia, purchased and procured by garnishees after proceedings were commenced against them, can not be offset against, or paid upon, the debts due by them to the bank. *Seamon v. Bank of Berkeley*, 4 W. Va. 339.

c. Security for Loan or Discount.

(1) Right to Take.

A bank has the power to acquire a credit by bond, bill of exchange or other chose in action, and to obtain security for the payment of such credit by mortgage, deed of trust, or other security. That a bank, the main object of whose creation is to loan out money, may acquire such a credit and obtain such security, would be a plainly implied power in the absence of a plainly expressed negation of such a power on the face of the charter of the bank. And if the charter could be fairly con-

strued so as to make it consistent with the existence of such a power, it would accordingly be so construed. "Now let us examine the charter in this case and see if there be anything, and if anything what, which negatives the power of the bank to acquire such a credit or obtain such a security." *Wroten v. Armat*, 31 Gratt. 247.

(2) Enforcement of Deed of Trust.

Where a deed of trust is given to a bank to secure to the bank the payment of notes discounted by the bank, and in that deed it is expressly covenanted and agreed that upon default made in payment of the notes or any part thereof, the trustee, upon request to the proper officer of the bank, after thirty days' notice, should sell the estate therein conveyed for cash, it was held that the right of the bank to enforce the trust, upon the happening of the event mentioned, is complete so far as the property is concerned. *Cardwell v. Allen*, 33 Gratt. 160.

(3) Pledge and Collateral Security.

See the title PLEDGE AND COLLATERAL SECURITY.

Where an accommodation note has been pledged and delivered to a bank to secure collaterally its advancements made in good faith, the bank can recover against the indorser what was bona fide advanced by the holder, but the indorsers' obligation is limited to this. *Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842.

Right to Repledge.—Bankers to whom bills are pledged for the loan of money may repledge them to a third person, if the person who takes them from the bank has no notice of the character in which they are held. *Merchants', etc., Nat. Bank v. Ohio Val. Furniture Co.* (W. Va.), 50 S. E. 884.

A bank, having in its hands for safe-keeping, and for no other purpose, negotiable bonds of its customer, may pledge them to an innocent party. *Merchants', etc., Nat. Bank v. Ohio*

Val. Furniture Co. (W. Va.), 50 S. E. 884

"The case of *Fisher v. Bradford*, 7 Greenl. R. 28, in many of its features bears a strong resemblance to the case in hand. There the note had been pledged as collateral security to a bank, and it was insisted, whilst so held, it could not be negotiated to a third person, so as to give him a right of action in his own name. In answer to this objection, Weston, Judge, said: 'The bank had a special property, which, accompanied as it was by possession of the instrument, would have justified and enabled it to sue and recover thereon. But the general owner may sue, although liable to be defeated in his action if the bank, not being otherwise satisfied, thought proper to retain the note to its own use. And so may any other person, authorized to sue by the general owner, be subject to the same contingency. The arrangements between the bank and the payee afford no defense to the maker. The pledge having been given up, it is as to him as if it had never existed. He is not liable to the bank; and when he has paid and satisfied the plaintiff, he is completely discharged from the note; and no one who is or ever was interested in it can have any cause of complaint.'" *Howe v. Ould*, 28 Gratt. 8.

f. Foreign Banks.

See ante, "Foreign Banks," IV, B, 1.

A bank of another state can not enforce a primary contract made in Virginia, as by discounting notes or otherwise. *Bank v. Pindall*, 2 Rand. 465.

g. Usury.

See post, "National Banks," XVII. See the title USURY.

Bank Subject to Usury Laws.—In *Stribbling v. Bank*, 5 Rand. 132, it was held that a bank was subject to the general law relating to usury except so far as such law was modified by the special provisions of the bank's charter, Judge Coalter dissenting on

the ground that the usury laws did not apply to corporations, especially to banks. *Bank v. Stribbling*, 7 Leigh 26, is sequel to *Stribbling v. Bank*, 5 Rand. 132.

Taking Interest in Advance.—It is settled in Virginia that the taking of interest in advance, upon discounting a note at bank, is not usurious. *Stribbling v. Bank*, 5 Rand. 132; *Grigsby v. Weaver*, 5 Leigh 213; *Crump v. Trytitle*, 5 Leigh 251; *State Bank v. Cowan*, 8 Leigh 256; *Parker v. Cousins*, 2 Gratt. 372, 44 Am. Dec. 388.

A loan on accommodation paper, and a discount on real paper, stand on the same footing, as to the right of a bank to deduct the interest in advance on the whole amount of the note. *Stribbling v. Bank*, 5 Rand. 132.

At a time when the state bank of North Carolina had suspended specie payments, the defendant offered to the bank a note for discount, accompanied by an offer, in case his note should be discounted, to exchange an equal amount of northern funds for North Carolina bank notes. A bill was accordingly drawn upon a firm in Virginia, at ninety days and the same being accepted, the bill and note were both discounted, with a farther condition annexed to the note, that it should be paid in Virginia or other northern bank notes. The bank paid for the bill and note, in its own notes in part, and in part in the notes of other banks in No. Carolina, all of which were at that time under par in Raleigh, at from $3\frac{1}{2}$ to $4\frac{1}{2}$ per cent. At the time of the discount, suits were depending against the bank upon its notes, to coerce payment of them. The notes received by the defendant were, in the presence of the president and cashier of the bank, in their banking house, handed over to the acceptor, to meet his acceptance with them, and then pay the balance to the defendant; the president and cashier knowing the loss to which the defendant would be

subjected. The notes were sold in Virginia at a loss of from $2\frac{1}{2}$ to $3\frac{1}{2}$ per cent. and the bill paid at maturity in Virginia or United States bank notes. These notes were at par at the time of the discount, and the president and directors of the North Carolina bank knew at that time that their notes were not of equal value. Held, notwithstanding, the transaction is not usurious; *dissentiente*, Tucker, P. State Bank v. Cowan, 8 Leigh 256.

Renewals.—It is settled in Virginia that the including the day of payment of the first note in the second, whereby the bank receives, under each note, interest for the same day, is not usury. *Stribbling v. Bank*, 5 Rand. 132; *Crump v. Trytitle*, 5 Leigh 251; *State Bank v. Cowan*, 8 Leigh 256; *Parker v. Cousins*, 2 Gratt. 372, 44 Am. Dec. 388.

The Farmers' Bank of Va. discounted a note for \$6,000 payable on its face sixty days after date, for accommodation of the maker; it was understood, that this accommodation would be continued, indefinitely, till it should suit the interest or convenience of the bank, or of the party, to discontinue it, the bank reserving a right to discontinue it at its own discretion or pleasure, and the party also having a right to discontinue it at pleasure, and that for the purpose of so continuing it, the note should be renewed from time to time; the accommodation was, in fact, continued upon such renewed notes, from April 21, 1825, to May 4, 1826; the bank, in discounting the first note, deducted and retained to itself, the interest for sixty-four days, i. e., for the time the note had to run including the days of grace, counting the interest from the day of the date to the last day of grace, both inclusive; and in discounting the second note made on the last day of grace of the first, deducted and retained to itself, the interest for sixty-four days, counting from the day of the date of second and last day of grace of the first, to

the last day of grace of the second note, both inclusive; and so on, upon each renewed note, successively, to the end of the transaction; so that the bank, in fact, received double interest for every sixty-fourth day; and this was in conformity with the known usage of the Farmers' Bank, and of all the banks of Virginia. Held, the transaction is nowise usurious, *dissentiate* Brockenbrough, J. *Crump v. Trytitle*, 5 Leigh 251.

Calculation by Rowlett's Tables.—The calculation of interest by Rowlett's tables on the discount of a note does not make the transaction usurious. *Parker v. Cousins*, 2 Gratt. 386, citing *State Bank v. Cowan*, 8 Leigh 238.

The state bank of North Carolina discounted a note made by the defendants, in renewal of which other notes were afterwards from time to time made and discounted; and it was found by a special verdict, that the bank was in the habit of using, in its calculations of interest, Rowlett's tables of interest, which consider 360 days as a year, instead of 365, the effect of which is to make the interest for every fraction of a year somewhat more than at the rate of six per centum per annum; held, this mode of calculating interest does not make the transaction usurious. *State Bank v. Cowan*, 8 Leigh 238.

4. With Respect to Ownership of Property.

See Va. Code, 1904, § 1163.

There can be no question but that a corporation is the creature of its charter, from which it derives not only all its powers, but its very existence. It certainly has no power which its charter denies to it. But in the absence of such denial it has certain implied powers which are as complete as if they were expressly given or affirmed in the charter. One of these powers is the power to acquire estate, real or personal. *Wroten v. Armat*, 31 Gratt. 247.

The charters of the Bank of Virginia

and the Farmers' Bank, after authorizing them to purchase, hold and enjoy lands and tenements, goods and chattels to a specified value, and sell and dispose of them, provides that the land which it shall be lawful for them to hold shall be only such as shall be requisite for their immediate accommodation, etc., or acquired in satisfaction of debts, etc., and that they shall not directly or indirectly, deal in or trade in any other thing except bills of exchange, gold or silver bullion. It was held, in a bill filed by these banks for the specific performance of a contract that the defendant could not set up as a defense that the lands which the bank sold were not acquired in satisfaction of debts and were not requisite for their immediate accommodation, according to the charters, and that, therefore, banks could not acquire any title to such land and could not convey any title to the purchaser from them, or if they could, that as the purchase and sale were contrary to the policy of the law, the court of equity ought not assist them by enforcing the contract. Because the charters are only directory in this respect; they impose no penalty in terms. They do not declare the purchase by or conveyance to the banks to be void, nor vest the title in the commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, making the purchase of the land in question, the banks violated their charters, the corporation might for that cause be dissolved by a proceeding at the suit of the commonwealth, and even in that case it seems to be the better opinion that the property, if not previously conveyed to some other, would revert upon the dissolution of the corporation to the grantor, and t to the commonwealth. *Banks v.*

Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

Specific Performance by Bank.—It is no defense to a bill filed by a bank for the specific performance of a contract made with one who had agreed to give his bond and deed of trust for certain lands conveyed to him by the bank, that the charter creating the bank did not confer a right on the plaintiff to make a purchase and sale of the property in question. The creation of a corporation gives to it amongst other powers as an incident to its existence and without any express grant of such powers, that of buying and selling. But its power may be limited, restrained or prohibited, either by the charter creating the corporation, or by a general law. *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706.

Violation of Charter—Effect.—If a bank buys land outright, and in violation of § 1163, Va. Code, third persons can derive no benefit from that circumstance. The law imposes no forfeiture for its violation, and the only effect of its transgression in that respect would be to subject the bank to the proceedings in behalf of the state to vacate its charter. *Litchfield v. Preston*, 98 Va. 534, 37 S. E. 6; citing *Banks v. Poitiaux*, 3 Rand. 136, as authority. A cause of forfeiture can not be taken advantage of, or enforced against a corporation, collaterally or incidentally, or in any other mode than by direct proceeding, for that purpose, against a corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such proceedings; since it may waive a broken condition of a contract made with it as well as an individual. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 50, 3 S. E. 227, quoting from Angell and Ames on Corporations (10th Ed.), § 777, and citing *Banks v. Poitiaux*, 3 Rand. 136, to sustain the proposition. *Banks v. Poitiaux*, 3 Rand. 136, is also cited in *Fayette*

Land Co. v. Louisville, etc., R. Co., 93 Va. 286, 292, 24 S. E. 1016; *Chesapeake etc., R. Co. v. Walker*, 100 Va. 85, 40 S. E. 633.

Necessity of Seal.—A contract made by a bank for the purchase and sale of real estate is not invalid because not made under the common seals of the bank. *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706, citing *Bank v. Patterson*, 7 Cranch 299; *Legrand v. Hampden-Sidney College*, 5 Munf. 324.

5. With Respect to Subscriptions for Stock in Other Corporations.

In *Goddin v. Crump*, 8 Leigh 120, it was held, that the statute authorizing the Bank of Virginia to subscribe for stock in a company incorporated to effect a line of transportation from Ohio to the city of Richmond is valid, since the purchase of such stock is germane to the banking business.

B. OF UNAUTHORIZED BANKS.

1. In Its Civil Aspect.

Distinction between Dealings of Authorized and Unauthorized Banks.—

There is a distinction between the unauthorized dealings of an authorized bank and the dealings of an unauthorized bank, in that the unauthorized dealings of an authorized bank may be valid as against every one except the state, as where a bank which is authorized to purchase and hold only so much land as may be necessary for its immediate use and occupation purchases more than is necessary for such purpose, the title to the property in such case vests in the bank and a purchaser from the bank can not set up the fact of the bank's violation of the charter prohibition. *Banks v. Poitiaux*, 3 Rand. 136, distinguishing *Wilson v. Spencer*, 1 Rand. 76, in which case it was held that an unincorporated bank which issued notes contrary to the act of 1805 could not enforce payment of a bond given in exchange for such note.

Effect of Repeal of Act of 1816.—Although the act of February 24, 1816 (2 Rev. Code, p. 111), respecting un-

chartered banks, was suspended by the act of November, 1816 (2 Rev. Code, p. 115, 116), yet the act of 1805 (2 Rev. Code, p. 111, § 2), remained in force. *Wilson v. Spencer*, 1 Rand. 76.

"In making a further declaration, in the act of 1816, that notes, bills, etc., issued contrary to its provisions, should be null and void, it can not be inferred, that those made contrary to the act of 1805, are valid. The suspension of the former act does not necessarily carry with it, the repeal or suspension of the latter; nor did a particular provision of the act of 1816, § 7, specially prohibiting suits by the banks therein contemplated, interfere with similar prohibitions, resulting on general principles of law, from the inhibitions contained in the act of 1805. A suspension of the act of 1816, therefore, did not suspend, repeal, or interfere with, the provisions of the act of 1805; nor does a recognition contained in the suspending act, of a right in the banks, therein mentioned, to close their transactions, in conformity with the provisions of the act of 1816, annul or apply to the prohibitions contained in the act of 1805. That suspension left the banks aforesaid, on the ground they occupied, before the passage of the act suspended; but did not place them in a better situation; and, far less, as was argued, did it legalize and charter those associations. It left those banks free to arrange their matters, if they could, without suit; and unaffected by the severe and additional restraints and penalties, of the act of 1816. It did not mean to interfere with the original act, when it only purported to suspend in part another act, more effectually to suppress the circulation of notes, emitted by unchartered banks. The suspension only operated up to the point, embraced by the last act, and did not go beyond it." *Wilson v. Spencer*, 1 Rand. 76, 99, 100.

Validity of Paper Issued without Authority.—To an action of debt on a

note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action. So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action. *Hamtramck v. Selden*, 12 Gratt. 28.

Where an action of debt was brought upon a single bill, and the defendant pleaded two pleas, stating in substance that such bill was given to the president of an unchartered bank, established contrary to the provisions of the statutes in such case made and provided, and that it was given in consideration of bank notes, emitted by such unchartered bank in violation of those statutes, it was held that a judgment for the plaintiff by the lower court on a demurrer to these pleas is erroneous, and will be reversed on appeal. *Wilson v. Spencer*, 1 Rand. 76.

Conclusion of Plea.—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia but made payable out of the state, a plea that the plaintiffs are an unchartered banking company, etc., need not conclude as against the form of the statute. *Hamtramck v. Selden*, 12 Gratt. 28.

Injunction against Suit on Bond for Unauthorized Notes.—A court of equity as well as a court of law will interfere to prohibit the effect of contracts made in violation of laws enacted for the public good; and therefore an injunction will lie against a suit on a bond given for the notes of

an unchartered bank, such notes being unlawful under the provisions of the act of 1805 (2 Rev. Code, p. 111, § 2). *Wilson v. Spencer*, 1 Rand. 76.

In Pari Delicto.—The person who merely takes the note of an unchartered bank in payment may not be as culpable as the institution which issues them. Such person is not therefore precluded by the doctrine of in pari delicto from appealing to a court of equity for an injunction against an action on a bond given to secure the repayment of notes issued by an unchartered bank and loaned by the officers of such bank to the party who executed such bond. *Wilson v. Spencer*, 1 Rand. 76.

In such case the doctrine of in pari delicto will not preclude the plaintiff from appealing to a court of equity. *Wilson v. Spencer*, 1 Rand. 76.

The case of *McGuire v. Ashby*, was a suit in chancery. Ashby and Stribling, merchants, being creditors of one Murray, took a deed of trust from the latter, on a tract of land, to secure themselves. Previous to this deed, Murray had conveyed to Powell as trustee for McGuire, the same land which was included in the deed to Ashby and Stribling. The land was advertised for sale under the deed to Powell. Ashby and Stribling applied to the chancellor of the Winchester district, for an injunction to stop the sale under the deed of trust to Powell, alleging that McGuire was not the real creditor in the deed from Murray to Powell, but that it was in fact for the benefit of the unchartered bank in Winchester. The chancellor awarded an injunction which decree was affirmed by the supreme court. *Wilson v. Spencer*, 1 Rand. 76, 77.

Might Exist as Bank of Deposit or Discount.—Under the act of 1805 an unchartered bank might legally exist as a bank of deposit, and even of discount, if it did not issue its bills or notes, or bills or notes of an unchar-

tered banking company, and even the company forming that intent to issue such bills or notes would not be wholly outlawed. *Kee v. Kee*, 2 Gratt. 127, distinguishing *Spencer v. Wilson*, 1 Rand. 76, in the following language: "The case of *Spencer v. Wilson*, shows that the defense and the adjudication of its sufficiency, rested on the distinct averment and the admission or proof that the consideration of the security sued on, was the notes of an unchartered banking company. In this case there is no distinct allegation that the consideration of the specialties was the notes or bills of the unchartered company."

May Compel Accounting from Cashier.—A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, will be entertained in a court of chancery, in a suit against its cashier, for an account of his agency. *Berkshire v. Evans*, 4 Leigh 223.

Payment of Discounted Bonds by Testator.—Executors have been held justified in paying bonds of their testator to the amount of \$20,000, discounted by an unchartered banking institution for his benefit, and the consideration of which bonds was the notes of said institution; it appearing that it was probably for the advantage of his estate that they should have been paid. *Kee v. Kee*, 2 Gratt. 116, cited with approval in *Surber v. Kent*, 5 W. Va. 103. See the title EXECUTORS AND ADMINISTRATORS.

2. In Its Criminal Aspect.

Under the act of 1816, 2 Rev. Va. Code, § 3, it is unlawful for any unincorporated company to engage in banking. *Com. v. Horner*, 10 Leigh 700; *Com. v. Scott*, 4 Rand. 143; *Wilson v. Spencer*, 1 Rand. 76; *Moses v. Trice*, 21 Gratt. 562, citing *Farmers' Bank v. Reynolds*, 4 Rand. 186; *Exchange Bank v. Morral*, 16 W. Va. 551,

citing *Farmers' Bank v. Reynolds*, 4 Rand. 186.

Nature of Prohibition.—In *Commonwealth v. Scott & Thompson*, 4 Rand. 143, it was held that the act of 1816, 2 Rev. Va. Code, 111, providing that it shall not be lawful for an unorganized company to engage in banking, and that members of such company shall be guilty of a misdemeanor, is penal, and that therefore the court of appeals has no jurisdiction in the case of an information against the members. See also, construing this act, *Com. v. Horner*, 10 Leigh 700; *Wilson v. Spencer*, 1 Rand. 76.

Circulation of Notes Issued by Unchartered Banks.—The first section of the act of 1816, relating to unauthorized circulation provides "that it shall not be lawful for any association or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed, within the limits of this commonwealth, for the purpose of discounting notes, bills, etc., and issuing notes, bills, etc., for the purpose of dealing, trading or carrying on business as a bank, to commence or continue the discounting of any notes or bills, etc., or the issuing of any notes, drafts or bills, etc." *Com. v. Scott*, 4 Rand. 147.

The first section of the act of 1816 provides that "every member, officer or agent, or any such company or association, that may so commence or continue such discounting issuing, etc., shall be held and taken to be guilty of a misdemeanor, and upon conviction thereof, on indictment, information or presentment, shall be liable to be fined at the discretion of a jury, in a sum not less than \$100, nor more than \$500; and if any such company or association, or any president, manager, cashier or other officer, or agent, etc., shall pay out, deliver, put in circulation, or issue, any note, draft, bill, etc.,

each member, officer, or agent thereof, shall be, in like manner, liable to the same penalty." *Com. v. Scott*, 4 Rand. 147, 148.

The second section of the act of 1816 provides "that all the capital stock of any association or company, trading or discounting paper, or issuing notes, in violation of this act, and all the capital stock subscribed to such association or company, shall be held in trust for the benefit of the commonwealth, and it shall be the duty of the attorney general, whenever he shall be informed of the existence of any such company or association, to institute a suit in the superior court of chancery, in the Richmond district, in behalf of the commonwealth, for the purpose of recovering the capital stock aforesaid. In such suit, it shall be lawful to make all or any of the members of such company or association, or any officer, agent or manager thereof, parties defendant, and to call upon and compel them, or either of them, to exhibit all their books and papers, and an account of all such matters and things as may be necessary to enable the court to make a decree, in pursuance of this act. The members of any such association or company, made defendants in such suit, shall be held severally liable to the commonwealth for their respective proportions of the capital stock, etc., at the institution of the suit, or at the time of the decree, etc., and the court shall decree against the defendants, respectively and severally, the amount, etc., to be levied of the respective goods, chattels, lands and tenements of such defendants; provided, that no disclosure, made by any party defendant to such suit, and no books or papers exhibited by him in answer to the bill, etc., shall be used as evidence against him in any motion or prosecution against any such defendant to such suit, for the recovery of any penalty or the infliction of any punishment

prescribed by this act." *Com. v. Scott*, 4 Rand. 148.

The third section of the act of 1816 avoids all notes, etc., discounted contrary to the provisions of the act, which provides, that any person who may pay money in virtue of such note, etc., may recover it back, etc., and executors, administrators, etc., are not to be allowed for any payment made on such illegal contract. *Com. v. Scott*, 4 Rand. 149.

As to what acts of an incorporated savings institution will amount to an illegal issuing and circulating of securities for the payment of money, in a county other than that wherein the institution is located, so that a member of the institution may be prosecuted in such other county, as for a misdemeanor, under the statute of February 24, 1816, 2 Rev. Va. Code, ch. 208, § 1, see *Com. v. Horner*, 10 Leigh 700.

Counterfeiting Check and Orders of Illegal Bank.—Upon an indictment for passing a counterfeit check or order of a president of a branch of the bank of the United States, on the cashier of the bank, payable to T. R. or order, and indorsed by T. R. to bearer; held, that, whether the charter of the bank of the United States be constitutional or not, and whether the charter authorizes the issue of such checks or orders or not, the counterfeiting or passing counterfeits of such checks or orders, is felony by the statute. 1 Rev. Va. Code, ch. 154, § 4. *Hendrick v. Com.*, 5 Leigh 708. See the title FORGERY AND COUNTERFEITING.

Venue.—As to what acts of an incorporate savings institution will amount to an illegal issuing and circulating of securities for the payment of money, in a county other than that wherein the institution is located, so that a member of the institution may be prosecuted in such other county, as for a misdemeanor, under the statute of Feb-

ruary 24, 1816, 2 Rev. Va. Code, ch. 208, § 1, see *Com. v. Horner*, 10 Leigh 700.

Appellate Jurisdiction.—The court of appeals has no jurisdiction in the case of an information against the members of an unchartered bank, for a violation of the law of 1816, 2 Rev. Va. Code, 111, because that act is a penal law. *Com. v. Scott*, 4 Rand. 144.

"In the case of *Com. v. Scott*, 4 Rand. 143, the court of appeals dismissed the appeal, upon the ground that the information filed in the chancery court, on behalf of the commonwealth, under the second section of the statute to prevent the circulation of notes emitted by unchartered banks (declaring that the capital stock of the company, unlawfully issuing those notes, should be held in trust for the benefit of the commonwealth) was a criminal proceeding, over which that court had no appellate jurisdiction. A proceeding in chancery, claiming, by way of trust for the commonwealth, the forfeiture of the property of the defendants, in consequence of a breach of a penal law, and directly as a punishment thereof, was not distinguishable from a criminal prosecution in any other shape." *White v. King*, 5 Leigh 726, 738. See *Com. v. Horner*, 10 Leigh 700.

VI. Bank Notes.

See post, "Insolvency, Assignment and Receivership, XI.

A. DEFINITION AND NATURE.

See MONEY.

Bank notes are not merely the representatives of money, but in the course of business, and by common usage, are substantially treated and employed for most purposes, as actual money or cash. *Edmunds v. Diggs*, 1 Gratt. 359, 42 Am. Dec. 561. See note to *Rutherford v. Corn.*, 2 Va. Cas. 141.

In 1 Roper on Legacies 282, it is said that the word "money," unaided by the context, will include cash, bank notes,

money at the bankers, notes payable to bearer, etc., because they are not to be considered as choses in action, but money of the person in whose possession they are. But choses in action, promissory notes not payable to bearer, government stock, etc., will not pass under the word money. Most of the cases on the meaning of this phrase were reviewed by the lord chancellor in the case of *Parker v. Marchant*, 19 Eng. Ch. R. 355, where it was held, that the testator's balance at his banker's passed under the words "ready money." *Dabney v. Cottrell*, 9 Gratt. 579.

Bank notes are not money in a strict sense. They are not a lawful tender in discharge of debts and obligations solvable in money; but for most purposes in the transaction of business, and by common consent, they are considered and treated as money. "They are not esteemed," says Lord Mansfield, "as goods, securities, or documents of debt; but are looked on as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money to all intents and purposes." They are as much money as guineas themselves are, or as any other current coin that is used as money or cash. *Tancil v. Seaton*, 28 Gratt. 604, 26 Am. Rep. 380.

Action of Debt.—See the title DEBT.

By a writing obligatory, the obligors promise, on or before a specified day, to pay the obligee \$813.79 in notes of the United States bank or either of the Virginia banks, and debt is brought on this writing; held, the action can not be maintained, because debt only lies for money, and bank notes are not money for the purposes of this action. *Beirne v. Dunlap*, 8 Leigh 514. The court said: "Bank notes are not money, although they passed generally as money by common consent, and answer in some sort the purposes of money. Money is the coin issued or adopted

by the sovereign authority, and made a legal tender in payment of debts. The obligation upon which this suit is brought promises to pay 'the sum of 813 dollars, 79 cents, in notes of the United States bank or either of the Virginia banks,' on or before the first day of September, 1834. Is this a note for the payment of money, with a condition, or is it, in substance as well as form, a stipulation to pay bank paper currently passing among us as a substitute for money, and 'which is enumerated in dollars and cents as specie is?' See *Campbell v. Weister*, 1 Litt. 30. I think it is substantially a mere contract to pay bank notes to a certain specified amount, expressed in words as appropriate as any other to signify how much bank paper was to be paid, and is equivalent to an engagement to pay bank notes amounting to 813 dollars, 79 cents, or so many bank notes as on their face will nominally make that sum."

Assumpsit will lie to recover bank notes wrongfully detained by the defendant. The court said: "I think that in no case could the exercise of the right to elect between an action in tort and assumpsit be more appropriate than in this. The bank notes were received and treated by the testator as money, and as such were received and retained by the defendant, and though trover might lie to recover the notes, the law will imply a promise to pay the amount to the plaintiff." *Lawson v. Lawson*, 16 Gratt. 230. See *Tancil v. Seaton*, 28 Gratt. 601.

A bank note is not "goods" within the meaning of § 4 of the act passed December 26, 1792, entitled "An act for punishing accessories to felonies, and receivers of stolen goods." *Rutherford v. Com.*, 2 Va. Cas. 141.

B. WARRANTY.

See the title WARRANTY.

Warranty of Value.—There is no warranty of value in the sale or exchange, or the paying away genuine

bank notes. *Edmonds v. Diggs*, 1 Gratt. 359.

Warranty of Genuineness.—It seems that there is a warranty of the genuineness of a bank note, which is paid away or exchanged. *Edmonds v. Diggs*, 1 Gratt. 359.

"The court is of opinion that there is no implied warranty of the value of current money of the country, passing from hand to hand, in the course of trade, commerce and other business. This is true, not only of the money made by law a good tender in the payment of debts and performance of contracts, but is equally so in regard to the notes of banks and bankers, payable to bearer, and circulated by delivery. These are not merely the representative of money, but in the course of business, and by common usage, are substantially employed and treated, for most purposes, as actual money or cash. The circulation of them depends, not upon the responsibility of those who pass them, but upon the opinion and estimate of those who receive them. Those who circulate them are not understood as thereby giving any assurance of the credit, punctuality or solvency of the makers; in regard to all which the receiver exercises his own judgment, or relies upon that of others in whom he has confidence. There is but a single guarantee which those who circulate the money of that, or any other kind, can be understood to give, to wit, that it is what it purports to be, genuine and not counterfeit. Beyond that, in the absence of express warranty, or fraudulent misrepresentation or concealment, the receiver takes it at his own risk. There is no implied warranty, whether of title or value, in the circulation of bank notes, any more than of other money. The title to them can never be questioned in the hands of a bona fide holder; and on his part he takes them as money, for whatever they may be worth. Both parties are

equally innocent, and there is no reason or justice in throwing the loss sustained by one upon the shoulders of the other, and sending him against a third in the like predicament, and so continuing the pursuit through various stages of transitory ownership, to fix the burthen at last upon some innocent person." *Edmunds v. Diggs*, 1 Gratt. 361.

"This would occasion much harrassing litigation, arising out of inabilities of banks to meet their engagements, and embarrassing cases of partial as well as total insolvency, and even of mere depreciation from temporary suspensions of specie payments." *Edmunds v. Diggs*, 1 Gratt. 362.

C. PRESENTMENT AND DEMAND AS CONDITION TO RECOVERY.

Presentment and demand of payment are conditions precedent to recovery against a bank on notes of the bank, except where from the condition of the bank or for other causes the same would be an idle ceremony. *Farmers' Bank v. Reynolds*, 4 Rand. 186; *Bank v. Ward*, 6 Munf. 166; *Hall v. Bank*, 14 W. Va. 584.

In November, 1864, during the war, H. and S. issued a attachment in a chancery suit against the Bank of Virginia, as a nonresident for a debt of \$36,500, being notes of that bank owned by them, some of which were payable at branches of that bank in Virginia and had not been presented at such branch banks for payment. Held, the court properly decreed the payment of the whole of this \$36,500, out of the attached effects of the bank. *Hall v. Bank*, 14 W. Va. 584.

D. PAYMENT IN COUNTERFEIT BANK NOTES.

See the title PAYMENT.

If a debtor make payment to his creditor in a bank note which afterwards turns out to be counterfeit, he will still be liable for the amount so

paid, provided the note be returned to him within a reasonable time. *Pindall v. Northwestern Bank*, 7 Leigh 617; opinion of Baldwin, J., in *Edmunds v. Diggs*, 1 Gratt. 359, 42 Am. Dec. 561.

Failure to Return within Reasonable Time.—On November 19, 1824, the plaintiffs, in the course of business received from the defendant a bank note, and the defendants obtained from the plaintiffs the value thereof, upon the supposition that the note was genuine; the note was passed on by the plaintiffs, but was afterwards, on March 8, 1825, returned to them as counterfeit; they did not return it to the defendant, nor give him notice of its being counterfeit, until May, 1825, although plaintiff's place of business and defendant's place of residence were only 110 miles apart, and a mail passed between those places regularly once a week. Held, there was such negligence on the part of the plaintiffs, as precluded them from recovering. *Pindall v. Northwestern Bank*, 7 Leigh 617.

E. MUTILATED BANK NOTES.

Right of Recovery—Prerequisites.—Where a bank note is cut in two, and one-half sent by mail and lost, the holder of the remaining half has a right to demand payment at the bank, upon presentation of the half in his possession, proving ownership, and giving bond with adequate security for the indemnification of the bank. *Farmers' Bank v. Reynolds*, 4 Rand. 186, 187, 189, following *Bank of Virginia v. Ward*, 6 Munf. 166. In Virginia, no action can be maintained at law on one-half of a bank note, where the other half has been lost, because the owner can only recover by establishing his title by the judgment of a court of equity, and giving satisfactory indemnity to secure the bank against future loss from the appearance and setting up of the other half of the note. *Moses v. Trice*, 21 Gratt. 562; *Exchange Bank v. Morrall*, 16 W.

va. 551, citing *Bank v. Ward*, 6 Munf. 166; *Farmers' Bank v. Reynolds*, 4 Rand. 186, as indicating this proposition.

Indemnity.—When a bank note has been cut in halves, and one-half lost, the holder can not recover upon the other half at law, because the owner can only recover on establishing his title by the judgment of a court of equity, and giving a satisfactory indemnity to secure the bank against further loss from the appearance or setting up of the other half of such note. *Bank v. Ward*, 6 Munf. 166; *Farmers' Bank v. Reynolds*, 4 Rand. 186. These cases were cited with approval in *Moses v. Trice*, 21 Gratt. 562; *Exchange Bank v. Morrall*, 16 W. Va. 551.

The bona fide owner of a bank note, having transmitted one-half thereof by mail, which has been stolen therefrom, or is lost, can not demand payment from the bank of any part of its amount, in consequence of holding the retained half, merely; but he is entitled to demand the whole amount of the said note, on satisfying the bank of the verity of the above facts, or establishing them by the judgment of a court of equity, and giving, in either case, a satisfactory indemnity, to secure the bank against future loss from the appearance, and setting up, of the other half of such note. *Bank v. Ward*, 6 Munf. 166; *Farmers' Bank v. Reynolds*, 4 Rand. 186. These cases are approved in *Moses v. Trice*, 21 Gratt. 562; *Exchange Bank v. Morrall*, 16 W. Va. 546.

Demand.—Banks are under no obligation to seek out their creditors; they are bound to pay only on a demand for payment made at their offices of discount and deposit. And where a bank note is cut in two, and one-half sent by mail and lost, in the case of the presentation of the moiety of the note, a demand for payment must be made at the bank. *Farmers'*

Bank v. Reynolds, 4 Rand. 186; *Bank v. Ward*, 6 Munf. 166.

Evidence of Identity and Ownership.—Where a bank note is cut in two, and one-half sent by mail and lost, before the holder of the remaining half can recover, upon demand of payment at the bank, he must produce such evidence of the ownership of the note as will satisfy the bank; in other words, the half notes on which the bill is founded must be specifically and satisfactorily identified as the counterparts of the halves transmitted. *Farmers' Bank v. Reynolds*, 4 Rand. 186; *Bank v. Ward*, 6 Munf. 166.

Failure to Comply with Prerequisites

—Interest—Costs.—Where a bank note is cut in two, and one-half sent by mail and lost, the holder of the remaining half has a right to demand payment at the bank, upon presentation of the half in his possession, proving ownership, and giving bond with adequate security for the indemnification of the bank. But if these prerequisites are not complied with, and the bank is sued in consequence of refusing payment, the holder shall not recover interest or costs, although he may perform the conditions after the suit is brought. *Farmers' Bank v. Reynolds*, 4 Rand. 186.

F. FINDER OF LOST BANK NOTES.

See the titles BAILMENTS, ante, p. 223; LOST PROPERTY.

The finder of a bank note, as against a bailee without reward, to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee. *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380.

Such bailee is not bound to use as great care and diligence in the keep-

ing of the note as he would be if he were a bailee with compensation; and if the note was stolen from his possession, he will not be liable for it, unless the loss was the result of gross negligence on his part. *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380.

In such a case to entitle the plaintiff to recover, he must show that the note was a genuine note, and of the value claimed. *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380.

"As a general rule, the bailee is not allowed to dispute the title of his bailor, and we see no good reason why the depositary of a lost bank note, as between himself and the finder, should be an exception to this rule, where the owner is unknown and there is no assertion of claim on his part against the depositary." *Tancil v. Seaton*, 28 Gratt. 606, 26 Am. Rep. 380.

G. LEVY ON BANK NOTES.

See Va. Code, 1904, § 3588.

H. CRIMINAL LAW.

1. Forgery and Counterfeiting of Bank Notes.

See the title FORGERY AND COUNTERFEITING.

2. False Pretenses and Cheats.

See the title FALSE PRETENSES AND CHEATS.

3. Larceny of Bank Notes.

See the title LARCENY.

4. Receiving Stolen Bank Note.

See the title RECEIVING STOLEN GOODS.

VII. Bank's Lien.

See ante, "Set-Off," V, A, 1, a, (9); post, "Savings Banks," XVI.

A. DEFINITION AND NATURE.

The banker's lien (which, where it relates to balances due on accounts, is a right to set-off, rather than a lien. *Ford v. Thornton*, 3 Leigh 695) is defined in 1 Morse on Banks and Banking, as "a mere right of the bank to

retain in its own possession, property, the title of which (absolute or special) is, or in the case of negotiable paper, purports to be, in one against whom the bank has some demand, until that demand is satisfied." In § 334, the same writer says: "The debts must be between the same parties, and in the same right. It is not necessary that the claims should run between the nominal parties to the suit, if they are really due to and from the same funds on both sides." *Noltling v. National Bank*, 99 Va. 60, 37 S. E. 804.

B. LIEN ON STOCK.

Charters incorporating banks may provide that the bank shall have a prior lien on the shares of its stockholders for all loans or discounts to them, and all persons dealing with any such stockholders must take notice of and are bound by such provisions in the charter. *Bohmer v. City Bank*, 77 Va. 445. See post, "Stock and Stockholders," IX.

In *Bohmer v. City Bank*, 77 Va. 445, the charter of a bank provided, that "the bank shall have a lien prior to all others upon any stock held by a stockholder for any debt of said stockholder to said bank." A stockholder, indebted to the bank, borrowed money from a third person and gave him the certificate as collateral with power of attorney to transfer the stock; after becoming bankrupt the original stockholder applied to the bank to transfer the stock, but the bank refused to do so until paid its debt due from the said stockholder. Held, the act incorporating the bank, superseded the general law providing for the transfer of stock, and gave the bank the prior lien for any debt due it from a stockholder, on his stock; hence the bank had the right to be first satisfied before transferring the stock to the lender of the stockholder; nor is this lien waived by the company's leaving

the certificates outstanding. See also, *Petersburg, etc., Co. v. Lumsden*, 75 Va. 327.

C. LIEN ON DEPOSITS.

Where a bank has received money on deposit for an agent, who has a beneficial interest therein, the bank has no lien on the fund for a debt due it by the principal. To support the lien the debts must be between the same parties, and in the same right. *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804, sequel to *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826. See ante, "With Respect to Deposits," V, A, 1.

Specific and Special Deposits.—It is a well-established rule that collateral deposited with a bank for one debt or class of debts cannot be appropriated to a different debt or class of debts, in the absence of an agreement, express or implied, between the parties to that effect. And this is true even where collaterals are allowed to remain in the bank after the debt secured by them is paid. But a usage or custom of the bank, known to the depositor, to treat the collaterals as security for all loans made to the pledgor so long as the collaterals remain in the possession of the bank, may change this rule. 1 *Morse on Banks and Banking* (4th Ed.), § 325; *Loyd v. Lynchburg Nat. Bank*, 86 Va. 694, 11 S. E. 104; *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576.

D. LIEN ON SECURITIES PLEDGED TO BANK.

Where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien upon such securities for a general balance, or for the payment of other claims, in the absence of an agreement between the parties to that effect. *Bacon v. Bacon*, 94 Va. 694, 27 S. E. 576; *Loyd v. Lynchburg Nat. Bank*, 86 Va. 690, 11 S. E. 104. See ante, "With Respect to Loans and Discounts," V, A, 3.

E. LIEN OF COLLECTING BANKS.

If a collecting bank has no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled, as against the real owner, to a lien for general balance of account, unless credit was given to the bank sending the paper, or balance suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks. If, in mutual dealings between banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper transmitted for collection, and had no notice to the contrary, and upon the credit of such transmittance, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the bank making the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to a lien against the real owner of such paper, for the balance of account due from the bank transmitting such paper. *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

Where there have been for several years mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs, and accounts were regularly transmitted from one to the other, and settled upon these principles, and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance upon the paper thus trans-

mitted, no matter who may be its real owner. But if the receiving and collecting bank, at the time of mutual dealings with the bank sending paper, has notice that such bank has no interest in the paper transmitted, and that it transmits such paper merely as agent, then the collecting bank is not entitled to retain against the bank transmitting the paper for the general balance of the account with such bank. *Carroll v. Exchange Bank*, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

F. LIEN OF NATIONAL BANKS.

Under an act of congress national banks acquire no lien upon its stock either by express agreement, or by enacting by-laws so as to make it liable for the debt due the bank. *Feckheimer v. National Bank*, 79 Va. 80. See post, "National Banks," XVII.

A draft drawn by the seller against the buyer in favor of a national bank, by which it is discounted or purchased, with a bill of lading attached, passes title to the goods and draft to the bank, and gives the bank a lien on the goods. *Neill v. Rogers Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

VIII. Officers and Agents.

See generally, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

A. ACCOUNTANT.

The sureties of an accountant of a bank, are not liable for moneys taken by him from the teller's drawer, without his knowledge or consent, it appearing that the accountant is not entrusted with, or put in possession of any moneys of the bank, as accountant. *Allison v. Farmers' Bank*, 6 Rand. 204, cited in *Elam v. Commercial Bank*, 86 Va. 94, 9 S. E. 498.

Allison v. Bank Criticised.—But in *Morse on Banks and Banking*, 4th Edition, vol. 1, it is said: "In *Allison v. Farmers' Bank*, 6 Rand. (Va.), 204, a

Virginian beach held that the sureties on an accountant's bond were not liable for his theft of money from the teller's drawer, since his bond secured only his fidelity in the 'office of accountant,' and as accountant he was not put in possession of any money of the bank. This ruling seems thoroughly narrow and unsatisfactory; it was rendered only by a divided court, and has been deliberately overruled in New York in the case above cited, of *Rochester Bank v. Elwood*, 21 N. Y. 88, with the true criticism that its principle, if followed, would substantially cancel all official bonds."

B. CASHIER.

1. Definition.

A cashier is one who has charge of money, or superintends the books, payments and receipts of a bank or moneyed institution. *Durkin v. Exchange Bank*, 2 Pat. & H. 312. See also, *Bank v. Wetzel* (W. Va.), 50 S. E. 888.

2. Powers and Duties.

a. In General.

The powers and duties of a cashier, in virtue of his office, are much greater than the president's, though his office is strictly executive. *Hodge v. First Nat. Bank*, 22 Gratt. 59; *Smith v. Lawson*, 18 W. Va. 227.

The general bank law or charter requires the appointment of this officer, and if not expressly, by inevitable implication, from the quarterly examination which it directs into his receipts, disbursements and cash on hand, recognizes it to be the duty, the primary and fundamental duty—the duty incident to the office *ex vi termini*, inherent in and inseparable from it—and a duty established by the universal usage of banks—to receive the money of the bank, take care of it, disburse it under the orders of the board, and render an account and pay over when required by his superiors. *Durkin v. Exchange Bank*, 2 Pat. & H. 312.

Acts within Scope of Authority.—

The acts of a cashier, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through subordinate officers, all moneys and notes of the bank, delivers up all discounted notes and securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business. *Bank v. Wetzel* (W. Va.), 50 S. E. 888.

The cashier is simply an officer or agent of the bank and he is bound to act in good faith in the transaction of the business of the bank; and those who deal with him are affected by any bad faith or want of authority of which they have knowledge. If the transaction itself is not in the usual course of business or is one which requires specific authority on the part of the cashier to perform it, the person dealing with him will be required to show that he, in fact, had authority to do the act, otherwise it will be held to have been done without authority. *Lamb v. Cecil*, 28 W. Va. 660.

b. Necessity of Prescribing Duties of Cashier.

The charter and the by-laws of a bank required that the board of directors should prescribe the duties of its officers, and the charter also required the directors to keep a book, "in which shall be entered and faithfully recorded a journal of all their proceedings." Held, (1) These provisions were merely directory, and the prescriptions of certain duties of the cashier by the board might be inferred and presumed from evidence of acts of the board and of the cashier, and a written entry on the journal of a vote,

order, or resolution on the board, was not necessary to establish such prescription. (2) That the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the board. *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

There is nothing in the term prescribe indicative of a written rather than an oral prescription. The words mark out, or assign, would have conveyed the same meaning; and one of the words no more imported a written prescription than the other. The prescription of duty need not necessarily be in writing, in the form of an order, resolution or vote, spread on the journal, nor in any other particular form. *Durkin v. Exchange Bank*, 2 Pat. & H. 312.

"It was strenuously contended by the appellant's counsel, that the duties of the cashier should have been prescribed by the board formally, in its official capacity, and entered in the journal, and that they could not properly be prescribed in any other way. I do not see anything in the act of assembly or the by-laws referred to, to justify any such conclusion. The act simply requires the board 'to appoint a cashier and all subordinate officers, fix their compensation, define their powers, and prescribe their duties;' and § 17 of the by-laws provides, 'that the directors of the offices of discount and deposit shall appoint their respective officers, whose particular duties, not otherwise provided for, shall be prescribed by the respective directors of said offices.' There is no particular form designated in which these duties are to be prescribed, and if there were, a due prescription might be inferred from circumstances. *Angell & Ames on Corporations*, p. 230-290." *Durkin v. Exchange Bank*, 2 Pat. & H. 324.

"The cases cited, and the citations from *Angell & Ames*, are not only au-

thority for the foregoing series of legal propositions, but the case of *U. S. Bank v. Dandridge* is express authority for our holding the provisions of this charter to be directory, and not mandatory or imperative. The former special court of appeals, in 1851, decided in the same way in the case of *Carter v. Bank of Virginia* (not reported), wherein they held a bond given in the sum of \$6,000 to be good and binding upon the securities, although the by-law of the bank required a bond in the penalty of \$3,000 only." *Durkin v. Exchange Bank*, 2 Pat. & H. 311.

c. Release of Debtors of Bank.

The cashier of a bank, unless specially empowered to do so, has no authority to release, otherwise than in due course of business and on payment, the makers of notes or other debtors of banks, or to release sureties or indorsers. *Bank v. Wetzel* (W. Va.), 50 S. E. 888.

Release of Maker of Note.—In *Hodge v. First Nat. Bank*, 22 Gratt. 51, it was held that the cashier of a bank is not empowered, *virtute officii* merely, and without express authority from the board of directors, to release the maker of a note payable to and held by the bank, from his legal liability on such note.

d. Power over Specie and Negotiable Paper of Bank.

In General.—Among the powers of a cashier he has full charge, control and power of disposition over the personal property of the bank such as specie, negotiable notes or bills. *Smith v. Lawson*, 18 W. Va. 227.

Sale of Discounted Bills and Notes.

—The power to sell and transfer the discounted bills and notes of the bank does not belong to the ordinary powers of the cashier, but inasmuch as he may do so under some circumstances, a transfer made by him in the usual course of the business of the bank to a person, who has no cause to ques-

tion the propriety or good faith of the transaction, will be *prima facie* valid. *Lamb v. Cecil*, 28 W. Va. 653, approved in *Lamb v. Pannell*, 28 W. Va. 663.

Power to Pay Deposit with Discounted Bills.—Where the management of the affairs of a banking corporation is entrusted by its charter to a board of directors, unless specially authorized by the charter, the cashier of such banking corporation has no power to assign the discounted bills and notes to a depositor in payment of his deposits without authority from the board of directors. *Lamb v. Cecil*, 25 W. Va. 288; *Lamb v. Pannell*, 25 W. Va. 298.

Power to Endorse and Transfer Negotiable Notes of Bank.—The cashier of a bank has *prima facie* the authority to endorse or transfer by delivery negotiable notes belonging to the bank. *Smith v. Lawson*, 18 W. Va. 213.

It may be now regarded as settled, that the cashier of a bank has *prima facie* authority by virtue of his office to transfer negotiable promissory notes belonging to the bank in the transaction of the usual business of the bank, and his transfer of such a note to a party, who receives it in good faith, confers a valid title to the note on the transferee. *Smith v. Lawson*, 18 W. Va. 227.

The president of a bank has no inherent authority to endorse or transfer negotiable notes belonging to the bank, nor has any other officer this inherent power except the cashier. *Smith v. Lawson*, 18 W. Va. 213.

This great power and authority of transferring negotiable paper belonging to the bank is possessed by no other officer by virtue of his office, but the cashier. It is not even possessed by a clerk, who is acting as cashier in the temporary absence of the cashier, though such acting cashier would have power to do all such acts, as were necessary to carry on the usual business of the bank, such as to pay

checks and receive payment of notes and deliver them to the persons entitled to them. *Smith v. Lawson*, 18 W. Va. 228.

Must Be in Usual Course of Business.—The cashier's prima facie authority to transfer the negotiable notes of a bank will not make such transfer valid, if it be proven that the transferee knew that the transfer was made by the cashier not in the usual course of business and for an improper purpose. *Smith v. Lawson*, 18 W. Va. 214.

If the transfer by the cashier of a bank of one-third of its negotiable notes was proven to have been made to a third person in a transaction, which was plainly out of the usual course of business, and the transaction on its face showed that the transferee must have known that the cashier was assuming a power and transacting business outside of his duties as cashier and was transferring a negotiable note of the bank for a purpose for which he as such cashier had no right to transfer a negotiable note belonging to the bank, such transfer would be regarded as unauthorized, and the transferee could not be held to be a bona fide holder, even though he did give a valuable consideration for the note. *Smith v. Lawson*, 18 W. Va. 228.

Rediscounting Bills and Notes.—It is the practice for the cashier of a bank in pressing emergencies to rediscount the bills and notes of the bank to raise money to pay depositors and meet other demands of the bank. But this is only done on extraordinary occasions and when the requirements are such as do not admit of delay. It is customary, wherever it can be done, to consult the directors and obtain their consent to make such rediscounts. It is a matter which does not come within the ordinary duties of the cashier and is not one of his inherent powers; but inasmuch as it is a power which is exercised by him under some circum-

stances, a transfer of such bills and notes made by him in the usual course of the business of the bank to a person, who has no reason to doubt the propriety of the transfer or to question its good faith, will be prima facie valid and vest a good title in the transferee. The validity of the transfer in such case will be sustained upon the ground that the transferee had a right to presume that the cashier had from the board of directors either an express or implied authority to make the transfer, and not because he had by virtue of his office inherent power to do so. *Smith v. Lawson*, 18 W. Va. 212; *Lamb v. Cecil*, 28 W. Va. 659, applied and approved in *Lamb v. Pannell*, 28 W. Va. 663.

Acts Prejudicing Rights of Bank.—No attempted transfer by the cashier of the bills, notes or other securities of the bank will be valid, when it appears, either from the nature of the transaction or the facts and circumstances existing at the time and known to the transferee, that the transfer was made in prejudice of the rights and interests of the bank. *Smith v. Lawson*, 18 W. Va. 212; *Lamb v. Cecil*, 28 W. Va. 660, applied and approved in *Lamb v. Pannell*, 28 W. Va. 663.

If the cashier transfers the notes of the bank to pay his private debt, the transaction will be invalid. *Lamb v. Cecil*, 28 W. Va. 660, applied and approved in *Lamb v. Pannell*, 28 W. Va. 663.

Extending Time of Payment of Note.—A cashier of a bank has no implied power, merely by virtue of his office, to receive money for interest in advance on a note owned by the bank, and agree to extend time of payment and thus discharge an indorser from liability. *Bank v. Wetzel* (W. Va.), 50 S. E. 886.

e. Purchase of Bank Property by Cashier.

The rule of equity jurisprudence that

a party holding a fiduciary relation to trust property can not become the purchaser of such property either directly or indirectly, and if he does the sale is voidable and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage, is not confined to trustees and fiduciaries in the technical sense of those terms, but it embraces cashiers of banks. *Reilly v. Oglebay*, 25 W. Va. 42. (Obiter dictum.)

f. Power over Choses Other Than Mercantile Paper.

The cashier of a bank has no authority to dispose of or transfer by virtue of his office choses in action of the bank other than mercantile paper, though, as we have seen, he does possess inherently the power to dispose thus of mercantile paper. *Smith v. Lawson*, 18 W. Va. 229.

g. Estoppel.

Where the by-law of a bank requires the directors to prescribe the duties of the various offices, there is no particular form in which these duties are to be prescribed, and even if there were, a due prescription might be inferred from circumstances, as from evidence of acts on the part of such officer. And by the performance of certain duties in his office, he is estopped to deny that they had been prescribed by the board. *Durkin v. Exchange Bank*, 2 Pat. & H. 277, citing *Angell & Ames on Corporation*.

3. Action in Name of Cashier.

An action by A. B., cashier of a certain bank, upon a note to him as such cashier, is not an action by the bank, and although the declaration states that notice was given and protest made in behalf of the bank, such allegation is a mere surplusage, especially where the note is nonnegotiable; and hence the question as to whether the bank could deal in paper of the kind sued on does not arise in such case. *Porter v. Nekervis*, 4 Rand.

359. See post, "Pleading and Practice," XIV.

4. Accounting in Equity.

See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

The cashier of a bank, intrusted with the control and custody of its funds, will, in a court of equity be held as a trustee for the bank and may be sued by it in such court, and compelled to account for and pay any loss sustained by it, which was caused by any negligence or wrongful conversion or by any misapplication or use of any of its funds by such cashier in violation of the duties of his trust. *Merchants' Bank v. Jeffries*, 21 W. Va. 504.

A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, will be entertained in a court of chancery, in a suit against its cashier, for an account of his agency. *Berkshire v. Evans*, 4 Leigh 223.

Bill against Cashier for Settlement of Accounts—Sufficiency of Allegations.—Where a bill filed by a bank against its cashier for a settlement of his accounts as such only alleges that the defendant was such cashier; "that during his term as cashier he lent sundry sums of money to sundry irresponsible persons without the consent of the board of directors of said bank, for which he is liable personally; and that the books and papers and cash items show a large deficiency in the assets of said bank during the said cashier's term" of office; and said bill contains no averments that said bank sustained any loss by such unauthorized loans; or that the moneys so lent have not been repaid; or that said deficiency in its assets was caused by any act or negligence of such cashier, it is clearly insufficient; and a demurrer thereto ought to be sustained, because it presents no cause of action against said defendant. *Merchants' Bank v. Jeffries*, 21 W. Va. 504.

C. DIRECTORS.

See post, "Savings Banks," XVI.

1. Appointment and Resignation.

If a person appointed a director of a bank by the executive under the Va. act, March 22, 1837, Sessions Acts, p. 57, declines to accept the office or resigns, the executive is not authorized to make another appointment; but his place is to be supplied by the appointment of the directors of the bank. *Bank of Va. v. Robinson*, 5 Gratt. 174.

2. Presumption of Knowledge of Bank's Affairs.

Directors are presumed to have full knowledge of all the affairs and condition of the bank. Nor will the law permit them to plead ignorance thereof when their duty requires them to have full knowledge of all the affairs of the bank, and such plea would necessarily imply a neglect to discharge such duty. *Wolfe v. Second Nat. Bank*, 54 W. Va. 689, 47 S. E. 243.

3. Prescribing Duties of Other Officers.

The charter and the by-laws of a bank required that the board of directors should prescribe the duties of its officers, and the charter also required the directors to keep a book, "in which shall be entered and faithfully recorded a journal of all their proceedings." Held, these provisions were merely directory, and the prescriptions of certain duties of the cashier by the board might be inferred and presumed from evidence of acts of the board and of the cashier, and a written entry on the journal of a vote, order, or resolution of the board, was not necessary to establish such prescription; that the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the board. *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

"The general management of the business of the bank, and the interest

therein of the shareholders, are confided to the care of the board of directors, and there is in the act no specification of powers or duties to be exercised by the president or cashier. The election or appointment of such officers by the board is provided for by the act; which also provides that the board may define their duties. But there is nothing in the record to show whether such duties have ever been so defined. We must, therefore, regard the president and cashier of this bank as having only such powers as may be incident to their offices respectively, in their very nature, in the absence of anything in the act of incorporation to the contrary; and we must regard all other powers needful to the management of the concerns and business of the bank as residing alone in the directory." *Hodge v. First Nat. Bank*, 22 Gratt. 57.

4. Releasing Debts Due Bank.

"It is well settled that neither the president nor the cashier of a bank has authority, *virtute officii*, to give up or release a debt or liability to the bank, or make any admission which would release any party to an obligation, negotiable or otherwise, due to the bank; for such purposes the board of directors only having the power to act. *Hodge v. First Nat. Bank*, 22 Gratt. 51." *Bank v. Wetzel* (W. Va.), 50 S. E. 888.

5. Directors of Insolvent Banks.

See post, "Insolvency, Assignment and Receivership," XI.

Duties.—When the directors of a banking corporation ascertain that it is hopelessly insolvent, so that individually they are unwilling longer to aid it, their manifest duty is to close its doors at once; for continuing to do business then (as receiving deposits) is a fraud upon the public, and they should not receive any more deposits nor pay any more checks, but should proceed to execute their trust, either by making a general assignment

for the benefit of creditors, or by paying pro rata the debts of the corporation. "Whether the board of directors could then under peculiar circumstances make preference of creditors, as was done in *Burr v. McDonald*, 3 Gratt. 215, it is unnecessary to decide in this case. But the directors had no right occupying the fiduciary relation to the creditors generally, which they did, to keep the doors of the Wheeling Savings Institution open, until they could get out their deposits, and all the time from February 21, 1871, until the twenty-fifth of the said month, luring depositors to give credit to the insolvent concern, while some of them at least, including the defendant in this cause, were receiving their money from deposits thus improperly received. Before Laughlin received his money, the directors under the evidence in this cause should have closed the doors of the institution. Under these circumstances he had no right to draw his money and thus prefer himself to the other creditors, for whom he was acting as trustee. To do so was a gross breach of trust and was also fraud; and in my opinion the decree of the circuit court ought to be affirmed." *Lamb v. Laughlin*, 25 W. Va. 322.

Trustees for Creditors.—The directors of an insolvent banking corporation are trustees for the creditors. *Lamb v. Laughlin*, 25 W. Va. 300; *Trustees v. Bossieux*, 3 Fed. 817.

Right to Withdraw Deposits.—It seems that a director of an insolvent banking corporation, with full knowledge that the corporation is insolvent and must close its doors, can not withdraw his deposits from the bank. *Lamb v. Laughlin*, 25 W. Va. 301.

In an obiter dictum in *Lamb v. Laughlin*, 25 W. Va. 300, the court after an exhaustive review of many cases, laid down the rule that the directors of an insolvent banking corporation sustained a fiduciary relation to

the creditors, and therefore, when the directors and depositors know the bank is hopelessly insolvent, they may not make a rush for their deposits and delay the closing of the doors of the bank until they have made themselves safe.

In *Lamb v. Laughlin*, 25 W. Va. 300, a director of a banking corporation, knowing the institution to be insolvent, availed himself of his superior knowledge as director and withdrew all the deposits of the firm of which he was a member. The court, without deciding the point, was of the opinion that such assets constituted a trust fund for the creditors of the bank and ought to have been permitted to remain in the bank for the creditors generally; and that the defendant being a director and trustee for the creditors should be compelled to make good the amount himself.

Rights of Director Depositors.—When a director of a bank, who is also a depositor, has knowledge that the bank is probably insolvent and will likely be unable to continue its business or pay its depositors, in order to avoid the loss of his deposits, obtains from the cashier, without authority from the board of directors, discounted bills and notes of the bank equal to the amount of his deposits, the transaction will be held invalid and the assignee of the bank may recover the amount of said bills and notes from him. *Lamb v. Cecil*, 28 W. Va. 653, approved in *Lamb v. Pannell*, 28 W. Va. 663.

"It is unnecessary to decide in this case, whether or not the mere fact that Cecil was a director of the bank as well as depositor, placed him in a position less advantageous than other depositors. Nor is it necessary to determine whether or not the board of directors of an insolvent bank can assign or otherwise dispose of its securities or other assets in a manner, which will give preference to some of its

creditors over others. These questions do not necessarily arise in this case. Here the preference was attempted to be made by the cashier. Whatever may be the powers of the board of directors in making such transfer, it is certain that the cashier without positive authority from the board or stockholders, can not make such preference in favor of any depositor or creditor whether he be a director or not." *Lamb v. Cecil*, 28 W. Va. 661.

Recovery—Laches.—When a director of an insolvent banking corporation by fraud and collusion with the cashier of such institution receives from the cashier for his deposits without the authority of the board of directors, discounted bills and notes, the property of said corporation, and suit is not brought therefor until nearly five years after such transaction, the doctrine of laches does not apply. *Lamb v. Cecil*, 25 W. Va. 288.

6. Liability for Mismanagement and Neglect of Duties.

The liability of directors for losses growing out of their mismanagement of the concerns of the bank, and their negligence in the discharge of their duties, has been often the subject of judicial investigation and decision. The settled rule upon this subject is that "the directors of a bank have the general control and government of its affairs, and constitute the corporation. They are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank." *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 682, 8 S. E. 586, 17 Am. St. Rep. 84; *Trustees v. Bosseix*, 3 Fed. 817.

They must show reasonable capacity for the position they accept, and use in it their best discretion and industry, and a scrupulous conscientiousness in every matter, and obey accurately the requisitions of the

charter and of the general law. *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

Bank directors are liable to the depositors for losses resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, or from not being properly protested, or enforced by appropriate proceedings. The fact that any particular director did not know of these wrongdoings will not exonerate him, because he could not be without such knowledge except from his own negligence. *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

A bank director is personally responsible to a depositor for loss sustained by him for a dereliction of duty on the part of such director in the following particulars, to wit: Failure to hold weekly meetings as prescribed by the by-laws of the bank, it appearing that they sometimes only met semi-annually and even at greater intervals; allowing a depositing railroad company to overdraw its account to the extent of many thousand dollars, such director being the president of the company part of the time and one of the bank directors being president of the company the other part of the time in question, while the treasurer of the railroad company was the cashier of the savings bank; lending money to friends and relatives without any security; failing to cause the books of the banks to be examined at regular intervals as they were in duty bound to do. These and other facts show such negligence on the part of the directors as will make them person-

ally liable for the losses caused thereby. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

"The relation of the directors of a bank to its depositors is that of trustees to cestuis que trustent, and, as such, they are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust. *Bank v. Bosseix*, 3 Fed. 817; *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586. The requirements of the ninety-fourth equity rule as to precedent action to be taken by a stockholder before he can maintain a suit against the bank and its directors do not apply to a depositor, and no case to which the attention of the court has been directed so holds. But that a depositor can maintain a suit against a bank and its officers for losses occasioned by their fraud or negligence is sustained by both state and federal decisions. *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586; *Solomon v. Bates* (N. C.), 24 S. E. 478; *Bank v. Bosseix*, 3 Fed. 817." *Foster v. Bank of Abingdon*, 88 Fed. 604.

Mistakes of Law.—Directors of banks are not liable for excusable mistakes concerning the law, and for errors of judgment when acting in good faith. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84..

Mistakes as to what is the law serve to excuse cases where correct knowledge could be reasonably expected only from a professional man, and even in such cases, if the directors feel any doubts, they may be guilty of neglect if they fail to seek and be guided by competent legal advice. But ignorance of any fact in the bank's affairs, which it is their duty to know, can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 683, 8 S. E. 586, 17 Am. St. Rep. 84.

Allowing Misconduct of Officers and Agents.—Bank directors are liable for gross inattention and negligence, allowing misconduct on the part of agents, officers, or codirectors which could have been prevented if they had given ordinary care and attention to their duties. Such negligence is often of such a character as to amount to fraud. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, citing *Bank v. Bosseix*, 3 Fed. 817; *Jones v. Clark*, 25 Gratt. 635.

Culpable Ignorance of Bank's Affairs.—Ignorance on the part of the directors of a bank of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

"Bank directors will be held responsible to the depositors for the loss or conversion by the bank of special deposits in such bank, whenever they know of such conversion, or might have known of it by the exercise of such care and diligence as the law requires of such officers in representing the affairs of the bank. Bank directors must be considered as affected with the knowledge of such facts as appear upon the bank books." *Zinn v. Mendel*, 9 W. Va. 596.

Degree of Knowledge and Skill.—A director of a bank undertakes that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. If, through recklessness and inattention to the duties confided to him, frauds and misconduct are perpetrated by other officers and agents or codirectors, which ordinary care on his part would have prevented, he is personally liable for the loss resulting. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

Degree of Care and Prudence.—Directors are bound to manage the affairs of a corporation with the same degree of care and prudence which is generally exercised by business men in their own affairs. They must be diligent and careful in performing the duties they have undertaken, and they can not excuse any imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences. *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

Directors of a bank owe a duty to its depositors, and in the scrutiny of possible breaches of this duty the rigid rules which govern trustees have been applied. To exculpate a director, it is not sufficient that no actual dishonest action be shown, or that he can not be proved to have been influenced by interested motives. *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

Acts of Directors Viewed More Leniently.—A creditor of an incorporated moneyed institution, can not generally maintain an action at law against the directors thereof for simple nonfeasance of duty to the corporation, or fraud in the management or disposition of the money or property of the corporation. But directors of such institutions, may make themselves liable in an action at law for loss and damages, for false representations made or caused to be made by them, and perhaps acts done or caused to be done by them, with intent thereby to deceive and defraud the plaintiff, and which had the designed effect, and caused loss and damage to the plaintiff, but the false representations made or caused to be made, or acts done or caused to be done by the defendants, and relied on by the plaintiff, and the intent

thereby to deceive and defraud the plaintiff, must be averred or alleged in positive terms. *Zinn v. Mendel*, 9 W. Va. 580.

"Banking institutions, and other corporations, are essential to the welfare and prosperity of the country, and these institutions can not generally be operated, save through the agency of directors, and if the directors of such institutions were held liable at law to the creditors thereof, in damages for every act and negligence in the management and disposition of the moneys and property of the corporation, of which the corporation might lawfully complain, responsible men could not be found who would take upon themselves the perils and dangers of the position. Such a result would be most disastrous in its consequences, and should be avoided, unless its avoidance is not allowed by the common law, or some statute. I am not aware of any part of the common law, or of any statute, which authorizes such actions; no precedent for such actions has been produced to us. If there is any principle of common law authorizing such actions, it is passing strange that it has not been invoked and put in practice prior to this, in this country. Banks and other corporations have, not unfrequently, failed by reason of negligence and mismanagement of the moneys, business and property thereof, by their directors and officers, but no reported decisions of courts in this country, of which I am now cognizant, show any case in which such actions have been sustained." *Zinn v. Mendel*, 9 W. Va. 598.

Proximate Cause.—See the title NEGLIGENCE.

In order that a creditor of a bank may maintain an action against the directors for nonfeasance or fraud in the management or disposition of the money or property of the corporation resulting in damage to the plaintiff, such nonfeasance or fraud must be the

proximate cause of the loss. *Zinn v. Mendel*, 9 W. Va. 580.

D. PRESIDENT.

1. Election.

A majority of the directors of a bank constitute a board to do business; and if, in the election of a president, a majority vote, the person receiving a majority of the votes cast is duly elected. *Booker v. Young*, 12 Gratt. 303.

2. Powers, Duties and Liabilities.

a. In General.

The inherent powers of the president of a bank are extremely limited. *Hodge v. First Nat. Bank*, 22 Gratt. 58; *First Nat. Bank v. Kimberlands*, 16 W. Va. 578.

He is generally, if not always, a member of the board of directors, and chosen by the board from their own number. It is his duty to preside at meetings of the board. "Ordinarily," we are told, "the position is one of dignity, and of indefinite general responsibility, rather than of any great and accurately known power. The president is usually expected to exercise a more constant, immediate, and personal supervision over the daily affairs of the bank than is required from any other director. Usage, or directorial votes, may confer upon him special functions, and may extend his authority to correspond with the increase of active duties. But the authority inherent in the office itself is very small; indeed, it is very difficult to say precisely how or where it is much in excess of that which can be exercised by any other single director." *Hodge v. First Nat. Bank*, 22 Gratt. 58; *First Nat. Bank v. Kimberlands*, 16 W. Va. 578.

b. Power to Conduct Litigation of Bank.

The inherent powers of a president of a bank are very limited; and it has been said, that the entire collection of judicial decisions justifies the announcement of only one act as falling

within the proper inherent power of the president. This solitary power is to take charge of the litigation of the bank, employ counsel in suits against the bank, institute suits in the name of the bank and appear and defend suits against the bank. See *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Hodge v. First Nat. Bank*, 22 Gratt. 58; *Smith v. Lawson*, 18 W. Va. 228.

c. Power to Surrender or Release Claims of Bank.

The president of a bank has no authority, *virtute officii*, to surrender or release the claims of the bank against any one, and can only derive such authority from the vote of the board of directors, or from their assent, express or implied. *Hodge v. First Nat. Bank*, 22 Gratt. 61.

Certainly, neither the president nor the cashier, nor both combined, could, *virtute officii*, give up a debt or liability to the bank, or bind the bank by such an admission as is contained in "Exhibit F" aforesaid. This, I think, plainly appears from the cases cited by the counsel for the bank. In *Bank of the United States v. Dunn*, 6 Peters U. S. R. 51, it was held, that "an agreement by the president and cashier of the Bank of the United States, that the endorser of a promissory note shall not be liable on his indorsement, does not bind the bank. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money." *Hodge v. First Nat. Bank*, 22 Gratt. 59.

The president of a bank can not make any accord and satisfaction of a debt due the bank by the acceptance of any order on a third party in full satisfaction and discharge of the debt, unless he is expressly authorized so to do by an order of the board of di-

rectors. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555, citing *Hodge v. First Nat. Bank*, 22 Gratt. 58.

Release of Maker of Note Payable to Bank.—In *Hodge v. First Nat. Bank*, 22 Gratt. 51, it was held, that the president of a bank has no authority to release the maker of a note payable to the bank.

d. Power to Endorse and Transfer Negotiable Notes of Bank.

The cashier of a bank has *prima facie* the authority to endorse or transfer by delivery negotiable notes belonging to the bank, but the president of a bank has no inherent authority to endorse or transfer negotiable notes belonging to the bank, nor has any other officer this inherent power except the cashier. But the president may be authorized by the board of directors to transfer or assign negotiable notes belonging to the bank; and such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts as constitute clearly a public holding out, that he was authorized to transfer or assign the notes belonging to the bank. The inference, that such authority had been conferred, may be legitimately drawn from proof, that he was in the habit of doing acts of the same general character though applied to a different subject, and especially where such acts were the exercise of still greater power, as the assignment of other choses in action such as bonds or judgments; but such power could not be legitimately inferred from proofs that he was in the habit of receiving deposits or payments of notes, or proofs that he was authorized to receive generally deposits and payments made to the bank. The board of directors of a bank may ratify or approve a transfer of a negotiable note of a bank, which has been made by the president without authority. The acceptance and appropriation of the consideration, which

was received, when the president without authority transferred a negotiable note belonging to the bank, is an implied ratification of his act, when such acceptance and appropriation is made by the directors of the bank, after they have been informed of the unauthorized act of the president, and if the acceptance of such consideration and its appropriation have been made by the officers of the bank without the knowledge of the directors, unless the directors return the consideration, when the receipt becomes known to them, the failure and the retention of the consideration by them will be a confirmation of the act of the president. *Smith v. Lawson*, 18 W. Va. 212.

Authority from Board of Directors.

—The president of a bank may be authorized by the board of directors to transfer or assign negotiable notes belonging to the bank; and such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts as constitute clearly a public holding out, that he was authorized to transfer or assign the notes belonging to the bank. *Smith v. Lawson*, 18 W. Va. 213.

Inference of Authority.—The inference that authority had been conferred on the president to transfer a negotiable note of the bank, may be legitimately drawn from proof, that he was in the habit of doing acts of the same general character though applied to a different subject, and especially where such acts were the exercise of still greater power, as the assignment of other choses in action such as bonds or judgments; but such power could not be legitimately inferred from proofs, that he was in the habit of receiving deposits or payments of notes, or that he was authorized to receive generally deposits and payments made to the bank. *Smith v. Lawson*, 18 W. Va. 213.

Ratification by Board.—The board

of directors of a bank may ratify or approve a transfer of a negotiable note of a bank, which has been made by the president without authority. *Smith v. Lawson*, 18 W. Va. 213.

The acceptance and appropriation of the consideration, which was received, when the president without authority transferred a negotiable note belonging to the bank, is an implied ratification of his act, when such acceptance and appropriation is made by the directors of the bank, after they have been informed of the unauthorized act of the president; and if the acceptance of such consideration and its appropriation have been made by the officers of the bank without the knowledge of the directors, unless the directors return the consideration, when the receipt becomes known to them, the failure and the retention of the consideration by them will be a confirmation of the act of the president. *Smith v. Lawson*, 18 W. Va. 213.

e. Power to Receive Payment of Debt Due Bank.

In *Parker v. Donnally*, 4 W. Va. 648, it was held, that though the president of a bank has no authority to receive payment of a debt due the bank, yet such payment will not be set aside after it has been acquiesced by the bank for many years.

f. Authority from Board of Directors.

The inherent powers of a president of a bank by virtue of his office are very limited, and it is difficult to say what powers he inherently possesses, if any other than the power to take charge of litigations of the bank by employing counsel and otherwise. But a president of a bank may be authorized by its directors to do any act, which they are authorized by their charter to do, unless the act to be done can by the charter be done only by the directors themselves. Such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by

showing the existence of such facts, as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority. The inference, that such authority has been impliedly conferred, may be legitimately drawn by proving that he was in the habit of doing acts or making contracts of the same general character as the particular act or contracts which he has done or made, and that these acts or contracts, which he was in the habit of doing, though applied to different subjects, involved the same general power, except when the acts and contracts, which he was in the habit of doing or making, were so very numerous and so variant in their character as clearly to justify the inference, that he was authorized impliedly to do all acts and make all contracts, which the directors had the power to do or to make, and to confer on the president the right to do or to make. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555, citing with approval *Hodge v. First Nat. Bank*, 22 Gratt. 58.

Authority Outside Power of Directors to Confer.—Of course, if the act done by the president or other officer is such that by its character the directors could not confer on him the power to do, or be such an act as the directors themselves could not do, then no such authority could be imposed, no matter if it were shown that the officer habitually exercised such powers. This was the case in *Hodge v. First Nat. Bank*, 22 Gratt. 69, Judge Moncure then saying: "The directors of a bank can not release without consideration a debt due the bank; and a fortiori they can not empower the president so to do." *First Nat. Bank v. Kimberlands*, 16 W. Va. 580.

"Applying this law to the facts in this case, it is obvious that James C. McFarland, the president of the branch Bank of Virginia had no power

ex officio as such president to transfer the note sued on and a large number of other negotiable notes to Isaac N. Smith in consideration of the surrender of notes of the Bank of Virginia, most of which were not payable at the branch Bank of Virginia at Charleston, and which therefore, that bank was not then bound to redeem; and it is not pretended, that any express authority to make such transfer had ever been conferred on him. The only question is, whether the implied authority to make such transfer could be legitimately inferred from the facts proven in this case." *Smith v. Lawson*, 18 W. Va. 230.

Proof of Authority from Directors.

—The president of a bank or of any other corporation has, except to the very limited extent which we have above indicated, no inherent authority by virtue of his office to enter into contracts or agreements which will bind the corporation. But on the other hand it is clear that he may be authorized so to do, and it is equally clear that it is not necessary, in order to prove such authority, to produce a resolution of the board of directors conferring the authority, or to prove any action or consultation of the board on the subject, but such authority may be inferred by proving the existence of such facts as constitute clearly a public holding out, that such an agreement or contract as he has entered into was within the scope of his legitimate delegated authority and as warrant the public in so believing. *First Nat. Bank v. Kimberlands*, 16 W. Va. 579.

g. Powers Habitually Exercised by President.

Evidence of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence defines and establishes, as to the public, those powers. And this principle is equally true when applied to the president. But as the inherent power of the president is so much more limited than

that of the cashier, the evidence of this character, from which the right to exercise unusual powers can be inferred, should be much stronger in the case of the president than in the case of the cashier of a bank. *First Nat. Bank v. Kimberlands*, 16 W. Va. 581.

It may be difficult in some cases to say, when the authority to make the contract or arrangement for the corporation by its president or other officer may be fairly inferred from the proof of the president or other officer being in the habit of doing acts beyond that which were inherent in him by virtue of his office. For the doing of some such acts habitually would not justify the inference, that he had authority to make the contract or arrangement, if it differed essentially in its character from the acts not inherent in his office which he was in the habit of doing, unless the acts, he was in the habit of doing were so numerous and variant as to justify clearly the inference, that a general authority had been impliedly conferred on him to do all acts and make all contracts, which the directors had authority to make and power to confer on the president to make. If the acts, he was in the habit of doing, were not thus numerous and variant, to justify the inference, that he had authority to do the particular act or make the particular contract for the corporation, the acts so done must be of the same general character, so as to involve the same general power, though it may be applied in the particular act or contract done or made to a different subject. *First Nat. Bank v. Kimberlands*, 16 W. Va. 580.

h. Ratification of Unauthorized Acts of President.

Not only may the authority of the president of a bank to do a particular act be inferred from proof of his habitually doing such acts with the acquiescence of the directors of the corporation, but where no such acts are proven, if any act or contract of such

officer made without authority is subsequently ratified by the directors upon full knowledge of all the circumstances of the case, the corporation will be bound thereby as fully, as if the officer had been expressly authorized to do the act or make the contract. This ratification need not be shown by direct evidence that it was expressly approved by the board of directors, but such ratification may be inferred from their accepting the benefits of the act or contract. As if under the contract so made by the president or other officer money is to be paid to the corporation, and it is received by the corporation and applied to their use even without the knowledge of the directors, if it is not returned, when it becomes known to the directors that it has been applied to their use, such conduct would be a ratification of the contract of such president or other officer. *First Nat. Bank v. Kimberlands*, 16 W. Va. 581.

The directors of a bank may ratify any act done or contract made by the president without authority, which they could have authorized him to do or to make. The acceptance of the benefits of a contract made by the president for the bank is an implied ratification of such contract, and if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract, unless the money so received is returned, when its receipt becomes known to the directors. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Parker v. Donnelly*, 4 W. Va. 648.

Where it is alleged by the defendants in an action by a bank, that the contract or arrangement sued on was entered into by the president without any inherent power so to do, and without any authority to act conferred by the board of directors, but the evidence shows that the board of directors seldom met, and that the business of the

bank was mostly done by the cashier and president without consulting the board of directors, it was held, that in such case the defendants ought to have been allowed to prove such contract with the president; otherwise, they ought not, unless this contract was afterwards ratified. "It is very difficult to determine whether this evidence of the president's contract, because of this proof, ought to have been admitted, or not, as tending to show that the president was authorized to make this contract. The proof as stated is so vague and indefinite, that it is difficult to say whether it fairly tended to prove the authority of the president to make such a contract or arrangement as the defendants allege he did. Before we can wisely determine such a question, we ought to be more definitely informed as to what acts and contracts the president was in the habit of making for the corporation. If they were acts of a similar character, or involving a like exercise of power, or if they were very frequent and were very various in their character, so as to justify or permit the jury to draw the inference that he was authorized to do any acts which the board of directors could do, then this evidence or this proof alone was properly admitted by the court. If, however, the evidence was given in the indefinite manner that it is certified in this bill of exceptions, then it would not have justified the court in permitting proof of the accord and satisfaction agreed upon and made with the president of the bank to go to the jury; for such indefinite and vague testimony is not such as the jury ought to be permitted to consider, as tending to prove that these very large powers claimed had been conferred on the president of a bank, whose inherent powers are so very limited. But of course if the proposed evidence was to be followed up by proof that the contract or arrangement of the

president was subsequently ratified by the board, such evidence ought to be admitted to go to the jury." *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

i. Assumpsit to Recover Money Collected and Misappropriated.

M. was president of the O. D. bank located in the city of Alexandria, and he was a member of the firm of B. & Co. of that city. In May, 1861, M. went to Richmond, where he remained during the war; and B. & Co. removed to the same city. In January, 1863, M. collected of the treasurer of the state the interest on state bonds held by the bank in confederate money. After the war the O. D. bank may maintain an action of assumpsit against M. for the money so collected by him. *McVeigh v. Bank of the Old Dominion*, 26 Gratt. 188.

E. OFFICIAL BONDS.

1. Of Accountant.

In an action of debt upon an official bond of a bank accountant, a demurrer to the declaration was overruled although it did not state in a single instance the time or place, names or sums of the money which had been misappropriated. *Allison v. Bank*, 6 Rand. 204, cited with approval in *Elam v. Bank*, 86 Va. 92, 9 S. E. 498.

Allegations in General.—In an action of debt on the official bond of a bank accountant conditioned for the faithful discharge of the duties of his office, the declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of the defendant in his office; nor is it necessary to state the damages occasioned by the breaches. *Allison v. Farmers' Bank*, 6 Rand. 204.

Allegation of Damage.—In an action for the penalty of an official bond of a bank accountant conditioned for the

faithful discharge of the duties of his office, it is not necessary to state that in consequence of the refusal of the defendant to pay, the plaintiff sustained damages. In actions of debt, and particularly for the penalty of a bond, the damages are, in general, nominal, and none need be stated unless the plaintiff goes for damages beyond the penalty. *Allison v. Farmers' Bank*, 6 Rand. 204, followed in *Caldwell v. Farmers' Bank*, 6 Rand. 241.

In an action of debt on the official bond of a bank accountant conditioned for the faithful discharge of the duties of his office, it is not necessary for the declaration, after the assignment of breaches, to allege that the plaintiffs have been injured by the breaches; but it is sufficient if it is stated that an action has accrued to the plaintiffs to demand and have the penalty of the bond. The declaration, in stating the bond, the condition, and the breaches, states all that is necessary to entitle them to their action for the penalty. For the law implies damage from the breach; and it is not incumbent on the party to state what the law implies. *Allison v. Farmers' Bank*, 6 Rand. 204, followed in *Caldwell v. Farmers' Bank*, 6 Rand. 241.

2. Of Cashier.

Prescription of Duties.—The words, "which may be prescribed," in the official bond of a cashier of a bank, conditioned for the faithful performance of "the duties of the said office of cashier, which may be prescribed by the board of directors," were held, under the circumstances, to mean the same as if the words had been "the duties which have been, are now, or may hereafter be prescribed by the board of directors." The words "which may be prescribed," were intended to enlarge and not to limit the responsibility of the obligors. *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

Continuing Liability.—A bond given

by a cashier of a bank to secure the faithful performance of his duties, if in its terms there are no limits as to duration, is broad enough to cover a continuing liability under the statute providing that the officers and directors after the first year shall be such as may be prescribed by the by-laws and shall be appointed or removed as said by-laws may provide; for the election of a cashier to an office which he already holds, and would hold without election, must be regarded as a manifestation of the will and intent of the directors that he should hold for another year. The court said that "unless we are to charge these sureties, who were also directors, with a gross violation of duty in not demanding a new bond, that they must have construed the bond as continuing." *Elam v. Bank*, 86 Va. 92, 9 S. E. 498.

It has been held that the official bond of a bank cashier conditioned for the faithful performance of "the duties of the said office of cashier, which may be prescribed by the board of directors," extends to all duties theretofore prescribed, as well as those thereafter to be prescribed; that it is intended to be more comprehensive even than a bond conditioned for good behavior or for the performance of the duties of the office, without saying more; either of which conditions, will be sufficient to bind and charge the securities, without any prospective or future prescription of duty. *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

Limitation of Actions.—In an action to recover the penalty of an official bond given by a cashier of a bank to secure the faithful performance of the duties of his office, if the misapplication of the funds equal to the penalty of the bond occurred within less than ten years next preceding the institution of the suit, it is a matter of no consequence whether the statutory period of limitation, applicable in cases of this character, be ten or twenty years.

Elam v. Bank, 86 Va. 92, 9 S. E. 498. See the title **LIMITATION OF ACTIONS**.

Assignment of Breaches.—In an action to recover the penalty of an official bond given to secure the faithful performance by a cashier of a bank of discount and deposit of the duties of his office, a demurrer to the declaration will not be sustained on the ground that the assignment of breaches is not specific enough, where it appears that most of the books and papers which could shed light upon the transactions under investigation have been destroyed, and whatever information existed outside of these sources is in the possession of the adverse party. In such case the assignment of breaches is as specific as practicable under the circumstances. *Elam v. Bank*, 86 Va. 92, 9 S. E. 498; *Allison v. Farmers' Bank*, 6 Rand. 204; *Caldwell v. Farmers' Bank*, 6 Rand. 241.

3. Amount of Penalty.

"The former special court of appeals, in 1851, decided in the same way in the case of *Carter v. Bank of Virginia* (not reported), wherein they held a bond given in the sum of \$6,000 to be good and binding upon the securities, although the by-law of the bank required a bond in the penalty of \$3,000 only." *Durkin v. Exchange Bank*, 2 Pat. & H. 312.

4. Effect of Imposing Additional Duties.

Words are sometimes added to the effect that the officer shall perform all the "duties of the said office which may be prescribed by the directors." These words clearly enlarge, rather than restrict, the responsibility of the sureties, and distinctly anticipate that additional duties may be imposed during the term of the suretyship, and will be included within its protection. But evidently these additional duties must be consistent with the functions of the office named; or, if not consistent, they

must at least be of a lower grade and a less risk. A teller could not be made a director, nor could a bookkeeper be made a president, and still remain guarantied by this bond, by virtue of the enlarging power of this phrase. Morse on Banks and Banking, 4th Edition, vol. 1, citing *Durkin v. Exchange Bank*, 2 Pat. & H. (Va.) 277.

5. Pleading and Practice.

See ante, "Of Accountant," VIII, E, 1; "Of Cashier," VIII, E, 2.

Assignment of Breaches.—In actions to recover the penalty of official bonds given by a bank officer to secure the faithful performance of their duties, where there has been a misappropriation or misapplication of the funds of the bank, the evidence must of necessity be general; therefore, an attempt to state the breaches of the condition contained in the bond with exactness of detail would lead to great prolixity of pleading, and so some generality of statement, in the interest of justice, must be permitted. *Allison v. Bank*, 6 Rand. 204; *Elam v. Bank*, 86 Va. 92, 9 S. E. 498; *Caldwell v. Farmers' Banks*, 6 Rand. 241. See *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

IX. Stock and Stockholders.

See generally, the title STOCK AND STOCKHOLDERS.

A. SALES AND CONVEYANCES.

1. Gifts.

Where a completed gift of bank stock from a husband to his wife has been clearly established, her title thereto will not be affected by the mention of the stock in a subsequent will or deed of trust of the husband, to which she was not privy, and under which she does not claim, nor by the fact that the stock continued to stand in his name, and that he collected the dividends thereon. *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126. See the title GIFTS.

2. Equitable Assignments.

See the title ASSIGNMENTS, vol. 1, p. 762.

The delivery of a certificate of bank stock, unendorsed, by the donor to the donee, with intent to transfer title by way of a gift, is effectual as an equitable assignment, although no legal title passes for want of an endorsement and transfer on the books of the company. A delivery which vests an equitable title only in the donee is all that is required to constitute a valid gift. "In *Thomas v. Lewis*, 89 Va. 1, the gift under consideration was accomplished by the delivery to Bettie Lewis of the keys to a safety deposit box which was in a vault in the Planters' Bank. An inspection of the record shows that among the contents of the safety deposit box were certain stocks, some of which had been bought by Thomas and not endorsed by him and others stood in his name; and none of them had been endorsed or transferred on the back to the donee, Bettie Lewis. The court held that all the stocks in the box had been sufficiently delivered by the delivery of the keys to the box containing the certificates. It would seem that, if the delivery of the keys to a box containing unendorsed certificates of stock, was sufficient to constitute a transfer of the equitable title to the stock represented by those certificates, that a fortiori the delivery of the certificates themselves would have been deemed a sufficient delivery to vest title in the donee." *First Nat. Bank v. Holland*, 99 Va. 495, 39 S. E. 126.

3. Pledge and Collateral Security.

See the title PLEDGE AND COLLATERAL SECURITY.

If any person, for valuable consideration, sell, pledge, or otherwise dispose of any shares of stock belonging to him, to another, and deliver to him the certificate for such shares, with power of attorney authorizing the transfer of the same on the books of

the corporation, the title of the former shall vest in the latter, so far as may be necessary to effect the sale, pledge, or other disposal of the said share, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from, the former. W. Va. Code, ch. 53, § 37. But the person in whose name shares of stock stand on the books of the corporation shall be deemed the owner thereof, so far as the corporation is concerned. Code, ch. 53, § 19. In order to bind the bank whose stock is thus pledged as collateral, notice should be given its presidents, cashier or other officer at its place of business, and in the usual course of business. *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 647.

A stockholder of one bank, by written assignment, transfers his stock to another bank as collateral security for his indebtedness or liability, of any or every kind, present or future; giving such bank the right at any time of collection, to determine to which debt or liability it will apply the same. Such right of application of the collection on, or proceeds of the sale of, such pledge or collateral, exercised in good faith, can not be interfered with or contested by the creditors of the debtor to the detriment of the pledgee. *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 647.

4. Purchasers of Stock.

"How stands the purchaser of the stock? Like the purchaser of any other article. He confides in the title of the person from whom he buys, and his vendor is bound to the warranty of that title. *Medina v. Stoughton*, 1 Salk. 210; 3 T. R. 57. Does he purchase at private sale? Then he emphatically looks to his vendor. Does he purchase at public sale? The principle caveat emptor strictly applies. Does he purchase, as is most usual, through a broker? There the broker is his agent as well as the agent of the

seller. If the broker is defrauded, the seller is responsible; if he joins in the fraud, he is answerable himself. In short, in the whole transaction, the purchaser, either by himself or his agent, is the party concerned with the seller. The bank is but the passive instrument of their will, so long as they conform to the established regulations. If, indeed, either party varies from them to the prejudice of the other, and with the connivance of the bank, there might be plausible reason for holding it ultimately liable. But so long as the officer of the bank pursues the law, so long is the bank within the pale of its protection." *Bank v. Craig*, 6 Leigh 430, per Tucker, P.

5. Usury.

See the title USURY.

A sale of bank stock at whatever price, is not usurious, unless the object be to borrow money at more than lawful interest, and not to purchase stock, and the price of stock be graduated as a device to effect that object; or there be a combination between the seller of the stock on credit, and a person to whom the buyer sells it for cash; in either of which cases, the transaction becomes usurious. *Greenhow v. Harris*, 6 Munf. 472.

Sale of Stock at Exorbitant Price Coupled with Loan of Money.—A

proposition is made by S. to the directors of a bank, that he would purchase 100 shares of the stock of the bank (of \$100 each) at par, and that the bank should discount for him a note of \$8,000, on a pledge of the stock at \$80 the share, upon the faith of the expectation that, if the proposition should be acceded to, the bank would discount for him another note for \$2,000 on the personal security of indorsers, so as to make up the sum of \$10,000, which, he said, he was desirous to raise for his present exigencies, and upon condition that the bank should not call upon him for the money for eighteen months, to which the di-

rectors of the bank answer that they will sell him one hundred shares of stock at par, for the price whereof they will receive and discount his note for \$10,000, secured not by a pledge of the stock, but by other persons joining him in the note as makers and an indorser, the note to be regularly renewed every sixty days, and the discounts paid according to the custom of the bank, for and during the term of eighteen months; and also, that S. should have a loan of \$2500 for the same term of eighteen months, on the same terms; and to these terms of the bank S. assents, and the notes are accordingly made and discounted, S. and the directors both knowing, that the utmost value of the stock in the market at the time, was but \$80 the share; held, this was a sale of stock at an exorbitant price coupled with a loan of money arising out of a proposition to borrow money, the sale and loan one entire contract, inseparably connected with each other, and the one made dependent on the other; and the transaction, and S.'s notes made and discounted by the bank in pursuance of the agreement, were usurious. *Bank v. Stribling*, 7 Leigh 26, sequel to 5 Rand. 132, cited in *Bank v. McVeigh*, 29 Gratt. 554.

B. TRANSFER OF STOCK.

See post, "National Banks," XVII.

"It is provided, by the act of incorporation, that the stock 'shall be assignable and transferrable,' according to such rules and regulations, as shall be prescribed by the laws and ordinances of the bank;' and, accordingly, certain regulations have been adopted, by which the seller, either in person or by attorney, makes an actual assignment on the transfer book of the bank, in the presence of some one of its officers. Those regulations are designed to insure regularity in this important branch of its business; to ascertain, beyond question, to whom dividends are to be payable; to pre-

vent the possibility, as far as may be, of contending claims for the same stock; and thus to secure the bank against the danger of paying to the wrong person. The bank has no agency in the transaction, except to open its books to an assignment upon the face of them, to take in the old scrip, and to issue to the purchaser a new certificate of his title to so many shares of stock. It has no right to interfere further, than to see, that the rules of the bank are complied with; for the right of a party to assign is independent of the bank, and can only be restricted or trammelled so far as the regulations, made under the above cited clause of the charter, have the effect of limiting and controlling the mode of exercising the right. The bank can impose upon one man no greater restriction than on another, nor, by the exertion of an arbitrary will, extend, for a particular occasion, those rules, whose validity and use consist in their generality, as laws of the corporation." *Bank v. Craig*, 6 Leigh 429, per Tucker, P.

Stock in Name of Guardian.—When application is made for the transfer of stock in a bank in conformity with its by-laws by one prima facie entitled to have the same transferred, the bank has no control or discretion as to the transfer, or right to prevent it on their transfer book; hence where stock, standing in the name of the guardian of an infant, but belonging to the latter, was sold by the guardian, and transferred to the purchaser by the bank, in accordance with its by-laws, it is not liable therefor, though the sale was in fraud of the ward's rights, and with the intent by the guardian to appropriate the proceeds to his own use. *Bank of Virginia v. Craig*, 6 Leigh 399.

Transfer Subject to Bank's Lien for Debts Due Bank.—Charter of bank incorporated in 1870 provided that "the bank shall have a lien prior to all

others upon any stock held by a stockholder for any debt of said stockholder to said bank." The stock certificates contained no notice of this lien, but declared that they were "transferable only on the books of the bank, in person, or by attorney, on the surrender of the certificate." A stockholder, J., indebted to the bank, borrowed money from a third person, and gave him the certificate as collateral, with power of attorney to transfer the stock. J. became bankrupt, and then lender applied to the bank to transfer the stock. Bank refused so to do, until paid its debt due from J. Held, the act of 1870, acts, 1869-70, p. 488, incorporating this bank, superseded the general law as to chartered companies, providing for the transfer of stock, and gave the bank the prior lien for any debt due it from stockholder, on his stock, which lien was not waived by leaving the certificates outstanding. In this case the lien of the bank upon the stock, was, under its charter, paramount to that of the lender to J., and the bank had the right to be first satisfied before transferring the stock to the lender. If lender chose to hold the stock, he held subject to the bank's lien. *Bohmer v. Bank*, 77 Va. 445.

Right to Arrest Transfer of Stock.—"Is there, then it may be asked, no case in which the bank can be justified in arresting the transfer of stock? Assuredly there are such cases; as if a power of attorney, or the scrip were known to the officer to be forged, the officer would be justified in refusing to permit the transfer. So too, it may be arrested by a restraining order or injunction, made by a court of competent jurisdiction, at the instance of a party interested. But I do not think that mere knowledge of facts by the president, or any one or more directors, in their individual characters, would make the bank responsible, even though such facts would be a sufficient foundation for a restraining order.

Whether an express notice in writing to them, as a corporate body, would suffice, I am not now called upon to decide. When the question is presented, it will merit consideration, to what officer of the bank such notice should be given; for though process must be served on the president, I apprehend notice is to be given to that officer within whose appropriate sphere the transaction falls." *Bank v. Craig*, 6 Leigh 433, per Tucker, P.

Bank stock, standing in name of F., guardian of C., may be sold and transferred by the guardian, and the officers of the bank have no right to control or prevent him from transferring it on their transfer book. *Bank v. Craig*, 6 Leigh 399.

Notice to Stop Transfer of Stock.—

If one desires to arrest the transfer of stock, he must go to the transfer clerk and not to the bookkeeper. *Bank v. Craig*, 6 Leigh 433, opinion of Tucker, J.

C. CONTEST OVER OWNERSHIP.

"It also merits consideration, what is to be the course of the bank upon receiving such express notice of a contest about the stock? Must it lie still, refusing to permit a transfer to one, or to pay dividends to another; or must it file a bill of interpleader to settle the contest? Is it most reasonable to require the party who wishes the restraint, to institute his proceedings, and procure a restraining order, which the bank must obey, or, to compel the bank to exhibit its bill of interpleader for the purpose of settling a controversy in which it has no interest? The statement of the question furnishes, I think, its own reply. Be this, however, as it may, it may safely be affirmed, that a company (whose president and directors can only bind it by a majority of their votes, and whose president can not bind it alone) can never be subjected to loss by reason of his

unofficial knowledge of the transactions of the holders of stock. The mischiefs of such a doctrine would be incalculable; while, on the other hand, a few are to be apprehended, from requiring the party, who would arrest a transfer, or charge the holder with a trust, to assert his remedy in the courts, by asking a restraining order." *Bank v. Craig*, 6 Leigh 434, per Tucker, P.

D. DIVIDENDS.

The board of directors may from time to time declare dividends of so much of the net profits as they may deem it prudent to divide. If any stockholder be indebted to the corporation, his dividend, or so much thereof as may be necessary, may be applied to the payment of the debt, if the same be then due and payable. *W. Va. Code*, p. 507, ch. 53, § 39. *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 647.

E. GUARDIAN AND WARD.

See the title **GUARDIAN AND WARD**.

If a guardian unnecessarily sells bank stock belonging to his ward, and appropriate the proceeds, he and his sureties shall be held to replace the stock, or account for and pay its present value, and the amount of dividends thereon accrued since the sale was made; and, in such case, there shall be no commissions allowed on the value of the stock, even in favor of the guardian's sureties, but commissions shall be allowed on the dividends. *Bank v. Craig*, 6 Leigh 399.

Bill in equity, by a ward against a guardian, his sureties, and Bank of Virginia, alleges waste of ward's estate by guardian, and prays an account of the guardianship, and a decree for the balance found due, and alleges that the guardian's sureties insist, that the bank is primarily responsible for certain bank stock embezzled by the guardian, without having explained why or on

what ground; the sureties answer, and state the ground on which they insist that the bank is primarily responsible for the stock; and the bank answers the bill, without taking any notice of the allegations against it, in the answers of the sureties; held, here is no case made between the plaintiff and the bank, and it is therefore erroneous to make a decree against the bank for the stock. *Bank v. Craig*, 6 Leigh 399.

F. INVESTMENTS BY EXECUTORS.

An executor will be allowed a commission on money found in the house and invested in bank stock. *Hipkins v. Bernard*, 4 Munf. 83. See the title **EXECUTORS AND ADMINISTRATORS**.

G. BANK'S LIEN ON STOCK.

See ante, "Bank's Lien," VII.

H. TAXATION OF BANK STOCK.

See post, "Taxation," X.

X. Taxation.

See generally, the title **TAXATION**.

A. CONFLICT BETWEEN STATE AND NATIONAL GOVERNMENT.

The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporations. The state may tax a banking institution; but it can not tax the currency or the government's bonds belonging to such bank. *Western Union Telegraph Co. v. Richmond*, 26 Gratt. 1.

B. BANK STOCK.

Residence of Stockholders.— Under acts 1883-84, p. 568, § 17, the state, without regard to the residence of stockholders, levies for state purposes a tax on the assessed value of their shares of stock as it does upon other

moneyed capital. And Code, 1887, § 833, requires the supervisors of each county to levy for county purposes annually, and to order the levy on all property assessed with state taxes. *Stockholders v. Supervisors*, 88 Va. 293, 13 S. E. 407. See *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Under ch. 54, W. Va. acts, 1875, shares of bank stock are only assessable to the holder thereof in the district where he resides, and then only in case they have not been included in the assessment of the capital of the bank in the district or municipality in which it does business. *Watson v. Fairmont*, 38 W. Va. 183, 18 S. E. 467.

The board of supervisors of a county in Virginia have an unquestionable right to levy and collect a tax for county purposes upon the shares of stock of a bank located in the county. *Stockholders v. Supervisors*, 88 Va. 293, 13 S. E. 407.

Assessment or Valuation.—The city of Richmond, having under its charter a general power of taxation, may levy a tax for local purposes on the shares of stock of a bank located in the city, and in estimating the value of such shares need not deduct any portion of the capital of the bank exempt from taxation. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Enforcement.—And the officers of the bank may be required, under the provisions of Va. acts, 1883-84, p. 568, § 17, to pay the tax on the shares so assessed. In no other way can the shares of nonresident shareholders be reached. This provision of the act does not render the tax a tax on the capital of the bank. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Place of Taxation.—At common law the situs of the stock for purposes of taxation is with the stockholders, and not with the bank. *Stockholders v. Supervisors*, 88 Va. 293, 13 S. E. 407.

But under the statute (Va. acts, 1883-

84, p. 568, § 17), the situs of bank stock for the purposes of taxation is where the bank is located, and it is immaterial where the stockholder resides. *Union Bank v. Richmond*, 94 Va. 319, 26 S. E. 821; *Stockholders' Bank v. Washington County*, 88 Va. 293, 13 S. E. 407.

Hence it is not error to refuse to allow amendments to the pleadings merely averring the nonresidence of a certain member of the stockholders. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

C. CAPITAL STOCK.

The distinction between a tax upon the shares of bank stock and the capital of a bank was very fully stated in the following language: "It has been established as the law governing this court that the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in the aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the state, or in bonds or mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities. On the other hand we have held that the shareholders or stockholders, by which is meant the same thing, may be taxed by the states on stock or shares so held by them, although all the capital of the bank be invested in federal securities, provided the taxation does not

violate the rule prescribed by the act of 1864." *Union Bank v. Richmond*, 94 Va. 318, 26 S. E. 821.

The capital stock and the shares of the capital stock are distinct things. Both may be taxed, and it is not double taxation. *State Bank v. Richmond*, 79 Va. 113.

The city of Richmond, having under its charter a general power of taxation, may levy a tax for local purposes on the shares of stock of a bank located in the city, and in estimating the value of such shares need not deduct any portion of the capital of the bank exempt from taxation. The shares of stock are distinct and different from the capital of the bank. The shares may be taxed though the capital itself be invested in nontaxable securities. And the officers of the bank may be required, under the provisions of Va. acts, 1883-84, p. 568, § 17, to pay the tax on the shares so assessed. In no other way can the shares of nonresident shareholders be reached. This provision of the act does not render the tax a tax on the capital of the bank. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Effect of Failure to Assess Capital Stock.—If a municipality in which an incorporated bank does business neglects to assess the capital stock of such bank, as it has the legal right to do, it can not assess a nonresident shareholder with the value of the shares held by him. *Watson v. Fairmont*, 38 W. Va. 183, 18 S. E. 467.

D. PERSONAL PROPERTY.

Assessment or Valuation.—Where ordinance directs assessment of tax "on all personal property, money and credits, including all capital stock," etc., the valuation of the personal property of a bank is rightly ascertained by adding to the paid up capital the demand notes of stockholders given for unpaid up capital stock, drawing interest and held by the bank.

Insurance Co. v. County, 9 Penn. S. R. 413. *State Bank v. Richmond*, 79 Va. 113.

The capital and personal property of a bank should be assessed to it, in its corporate capacity, in the district in which it does business. *Bank v. County Court*, 36 W. Va. 341, 15 S. E. 78; *Watson v. Fairmont*, 38 W. Va. 183, 18 S. E. 468.

Place of Taxation.—Domicile of holder of evidence of debt is the situs of the debt for taxation purposes. Notes held by a bank located in a city are taxable by said city, wherever the makers may reside, whether in or out of the city, or in or out of the state. *State Bank v. Richmond*, 79 Va. 113.

E. PENALTY FOR NONPAYMENT.

Where tax has been lawfully assessed on a bank and it not paid when due, of course the penalty imposed by the ordinance for nonpayment of the tax may rightly be enforced. *State Bank v. Richmond*, 79 Va. 113.

XI. Insolvency, Assignment and Receivership.

See ante, "Directors of Insolvent Banks," VIII, C, 5.

A. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 802.

Right to Assign.—Independently of the statute, an insolvent banking corporation has the right to assign all its property for the benefit of its creditors generally. *Lamb v. Cecil*, 25 W. Va. 288; *Farmers' Bank v. Willis*, 7 W. Va. 31.

Under the act of February 12, 1866, the banks of the commonwealth were required to go into liquidation, when insolvent, and execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. *Exchange Bank*

v. Knox, 19 Gratt. 739, reaffirmed in *Saunders v. White*, 20 Gratt. 327; *Bank v. Marshall*, 25 Gratt. 378.

Foreign Corporation.—It was earnestly, and with great appearance of reason, contended by the counsel for the appellants, that, as incidental to the right of recovering, in Virginia, a debt acquired by an original and legal contract in Ohio, an Ohio banking corporation might legally make, in Virginia, the assignment of a note or other chose in action, in payment of a debt originally and legally contracted in Ohio. But, as this point does not necessarily present itself in these cases, we forbear to express any opinion upon it. *Bank v. Pindall*, 2 Rand. 465, 474.

Preferences and Priorities.—It is evident that the act of February 12, 1866, requiring the banks of the commonwealth to go into liquidation, the banks being insolvent, and to execute deeds conveying all their property to trustees for the payment of their debts, was intended to secure the equal distribution of the effects of these corporations among their creditors. *Robinson v. Gardiner*, 18 Gratt. 509; *Exchange Bank v. Knox*, 19 Gratt. 739; *Saunders v. White*, 20 Gratt. 327. See *Peters v. Bain*, 133 U. S. 670, 10 Sup. C. T. Rep. 354.

Under the act of February 12, 1866, requiring the banks of the commonwealth to go into liquidation, the banks, being insolvent, execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. Held, that the act forbids and prevents all preferences among the creditors of the bank. *Exchange Bank v. Knox*, 19 Gratt. 739, reaffirmed in *Saunders v. White*, 20 Gratt. 327; *Bank v. Marshall*, 25 Gratt. 378.

Priorities.—The first section of the act provides that it shall be lawful for the president and directors of any bank of circulation, chartered by the gen-

eral assembly of Virginia, to make a deed conveying all the assets of the bank to such persons as they may select, and providing that "the proceeds of said assets shall be distributed amongst all persons, corporations and associations entitled to share in such distribution according to the legal rights and priorities of such persons, corporations and associations at the time such deed shall be executed." This provision plainly contemplates that the deed shall recognize and respect existing priorities, which neither the bank nor the legislature could destroy or impair; but it gave no authority to create new ones. The act did not undertake to ascertain the rights and priorities of different classes of creditors, or to lay down any rules upon that subject. It left them to be ascertained in each case according to the particular facts and the law applicable to them. It contemplated that, subject to such existing priorities, equality should be the rule of distribution. The second section makes a provision, the object of which is to prevent any creditor from obtaining by suit more than his "just and rateable share in the distribution of the proceeds of the assets of the bank," and thus to preserve the equality contemplated by the first section. This section is in these words: "That whenever any creditor or creditors of any bank of circulation of this commonwealth shall, by any suit or legal process whatsoever, seek to obtain a judgment, decree or order, which said judgment, decree or order when rendered or made would create a lien in favor of such creditor or creditors upon the assets of said bank, or upon any portion of such assets, and thereby entitle such creditor or creditors to receive more than his or their just and rateable share or shares in the distribution of all the assets of said bank, then and in that case, and in order to preserve the just rights of all creditors

of said bank to a fair pro rata distribution of the proceeds of said assets, and for the purpose of effecting such distribution, it shall be the duty of the president and directors of said bank, and they are hereby required to make, or cause to be made, a deed of conveyance of the assets of said bank in such manner and form and for such purposes as are provided for in the first section of this act." This provision in effect declares, that each creditor of the bank is entitled to his "rateable share" in "a fair pro rata distribution" of the assets of the bank, and plainly implies that such is to be the rule of distribution in case no deed shall be made. The deed is required to be made only when it shall become necessary to prevent a disturbance of this rule of distribution; the object of the deed is not to establish the rule, but to "preserve" it. This view is confirmed by the third section, which makes it the duty of the banks, or their legal representatives, "on the 1st day of April, 1866, and quarterly thereafter until final liquidation," to publish a statement of their condition, "and to make distribution of the assets on hand at the end of each quarter, according to the provisions of the first section of this act, so far as the same can be done consistently with the interests of all the creditors of said banks." This provision shows, that the rule of distribution was established by the first section, and that the same rule is to be observed in every quarterly distribution "until final liquidation." *Robinson v. Gardiner*, 18 Gratt. 514.

Note Holders Not Entitled to Priority.—The note holders of an insolvent bank, having no lien, stands upon the same footing as depositors and other general creditors, and are entitled to no priority. *Robinson v. Gardner*, 18 Gratt. 509, approved in *Exchange Bank v. Knox*, 19 Gratt. 729; *Saunders v. White*, 20 Gratt. 327; *Bank v. Marshall*, 25 Gratt. 378.

Preferences by and to Directors.—

Directors of a bank are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors in preference to stockholders and other persons. But they are not technically trustees nor bound to apply the assets rateably among the general creditors. They may not only make preferences between creditors, but such preferences may be made in their own favor if they be creditors. But in such cases they must act with the utmost good faith. *Planters' Bank v. Whittle*, 78 Va. 737. See *Lamb v. Cecil*, 28 W. Va. 653, approved and applied in *Lamb v. Pannell*, 28 W. Va. 663.

Objection that assignments of assets made by the directors of a bank to pay debts for which they are individually bound, are void, under Va. Code, 1873, ch. 57, § 18, which provides that "No member of the board shall vote on a question in which he is interested, otherwise than as a stockholder," must be made in the court below, and can not be raised for the first time in an appellate court. *Planters' Bank v. Whittle*, 78 Va. 737.

Assets Are Trust Funds for Creditors.

—It seems that all the assets of an insolvent corporation are a trust fund for the payment of creditors of the corporation. *Lamb v. Laughlin*, 25 W. Va. 300.

After the admitted insolvency of a banking corporation and the nonuse of its franchises, the officers and stockholders of such corporation, in whose hands the assets remain, hold them as quasi trustees for the creditors, who as the beneficial or equitable owners of such assets occupy as to them the position of cestuis que trust. *Lamb v. Pannell*, 28 W. Va. 663, approving *Lamb v. Cecil*, 28 W. Va. 653.

Grantees in Deeds Trustees for Creditors, Not Bank.—Where a bank in conformity with the act of February

12, 1866, entitled "An act requiring banks of the commonwealth to go into liquidation," executed its deed of assignment, it ceased to exist for the purposes for which it was created. A resumption of its operations as a bank was simply impossible. The stockholders had no longer any interest in it. It only remained to wind them up for the benefit of the creditors. Therefore, the grantees in such deeds were not trustees for the bank, but for the creditors only, and are purchasers and assignees for value of all the property and effects of the bank, for the benefit of the creditors. *Robinson v. Gardiner*, 18 Gratt. 509; *Exchange Bank v. Knox*, 19 Gratt. 739; *Saunders v. White*, 20 Gratt. 327; *Bank v. Marshall*, 25 Gratt. 378; *Farmers' Bank v. Willis*, 7 W. Va. 31.

Checks and Drafts of Correspondent Bank Do Not Pass.—The assignees of an insolvent banking firm, the surviving partner of which has made an assignment, can not hold as assets of the firm the proceeds of checks and drafts which were in the mails at the time of the death of the other partner one morning before the banking hours, and were received by the survivor the same day and paid by charging them against the accounts of the drawers, the proceeds being placed to the credit of the bank which sent them. *First Nat. Bank v. Payne*, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284, citing *Overseers of Poor v. Bank*, 2 Gratt. 547.

Consideration.—Generally, a bank may convey or transfer its property in possession, or choses in action, either for a new consideration, or to satisfy or secure a pre-existing debt. When a bank is insolvent, or in danger of insolvency, the just principle of equality in part payment of creditors, alike entitled to satisfaction, suggests not only the legal right, but the moral duty of an assignment, or other measure, to secure and effect a rateable distribution of its assets among such

creditors. When the assignment is to trustees to secure antecedent debts, these constitute a valuable consideration entirely adequate to sustain the assignment, which becomes completely effectual to protect the creditors against demands thereafter acquired by any one. *Farmers' Bank v. Willis*, 7 W. Va. 47; *Wickham v. Martin*, 13 Gratt. 427; *Evans v. Greenhow*, 15 Gratt. 153.

Seal of Corporation.—Where a deed of assignment from a banking corporation has affixed to it the common seal of the corporation, and the signature of the proper officer is proved, courts are to presume, that the officer did not exceed his authority, and the seal itself is prima facie evidence, that it was affixed by proper authority. The contrary must be shown by the objecting party. *Lamb v. Cecil*, 25 W. Va. 288.

Suit by Assignee to Collect Claims.—Whatever claims a bank could collect by suit or action before an assignment may be so collected afterwards by the trustee in the deed of assignment. *Lamb v. Cecil*, 25 W. Va. 288; *Lamb v. Cecil*, 28 W. Va. 653, approved in *Lamb v. Pannell*, 28 W. Va. 663.

Estoppel.—If before suit brought by the trustee in the deed of assignment from an insolvent banking corporation to recover the amount of discounted bills and notes fraudulently received from the cashier without authority by a director of such insolvent banking institution, the said trustee had paid such director dividends on the indebtedness of such institution to him, this fact does not work an estoppel to maintain such suit. *Lamb v. Cecil*, 25 W. Va. 288; *Lamb v. Cecil*, 28 W. Va. 653, approved in *Lamb v. Pannell*, 28 W. Va. 663.

Laches.—When a director of an insolvent banking corporation by fraud and collusion with the cashier of such institution receives from the cashier for his deposits, without the authority of the board of directors, discounted

bills and notes, the property of said corporation, and suit is not brought therefor until nearly five years after such transaction, the doctrine of laches does not apply. *Lamb v. Cecil*, 25 W. Va. 288; *Lamb v. Cecil*, 28 W. Va. 653, approved in *Lamb v. Pannell*, 28 W. Va. 663.

Suit in Name of Bank for Trustees.

—A bank having, in pursuance of the act of February 12, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees upon a note discounted by the bank prior to the execution of this deed. Va. Code, 1873, ch. 56, § 31, p. 843. *Crews v. Farmers' Bank*, 31 Gratt. 349.

Admissibility of Copy of Deed.—

Where a deed of assignment is made for the benefit of creditors by a banking corporation, a copy of such deed from the records of deeds of the county may be exhibited with the bill by the trustee with the same effect as if he had filed the original. *Lamb v. Cecil*, 25 W. Va. 288.

B. SUSPENSION OF SPECIE PAYMENT.

The banks of this commonwealth in which the public moneys were on deposit, paid the interest falling due in January, 1840, upon public loans, in specie or its equivalent. Under the proviso to the second section of the act of March 28, 1838 (Sess acts of 1838, p. 27, ch. 13), they claimed credit in account with the commonwealth for the premium which they had to pay to the public creditors for the then difference between specie and the notes of the banks. Held: 1. That under the acts in 2 R. C., 1819, ch. 174, § 6, p. 2, and in Sess acts of 1838, p. 27, ch. 14, the claim of any bank for such premium may properly be presented to the first auditor. 2. That, upon the disallowance of such claim, the bank may file a petition for redress to the court of chancery for Henrico and

Richmond, created by the act of March 13, 1840-41, p. 65, ch. 48. 3. That according to the true construction and effect of the act of December 11, 1839, in Sess. acts of 1839-40, p. 52, ch. 63 (especially the first proviso thereto), the claim of any bank for the premium so paid must be disallowed; dissentiente Brooke, J., on the last point. *Com. v. Farmers' Bank*, 2 Rob. 737.

C. SALE OF COLLATERAL SECURITIES BY TRUSTEE.

See the title PLEDGE AND COLLATERAL SECURITY.

The trustee of a bank in liquidation has the same right as any pawnee or pledgee to sell collateral security transferred to the bank, upon giving to the debtor notice of the time and place of the sale. But if it appears that he had actual knowledge of the fact a reasonable time before the sale was to take place, this is sufficient without a formal notice. *Alexandria, etc., R. Co. v. Burke*, 22 Gratt. 254. See also, *Howe v. Ould*, 28 Gratt. 1.

D. WINDING UP.

See post, "Savings Banks," XVI.

1. Creditors' Suits.

See the title CREDITORS' SUITS.

Where a bank has become insolvent and ceased to do business, one or more of the creditors, stockholders and depositors, may bring a creditors' suit for themselves and all others against the bank and its president for a settlement of its affairs and a distribution of its assets, for which purpose the court will appoint a receiver. *Finney v. Bennett*, 27 Gratt. 365.

The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April, 1865, and it has done no business since, and in fact it had been abandoned and ceased to exist. In April, 1866, H. and M. suing as well for themselves as for all the other stockholders, creditors and depositors, etc., filed their

bill against the bank and the president, for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June, 1866, there was a decree for an account. Held, it is a proper case for a creditor's suit. *Finney v. Bennett*, 27 Gratt. 365.

2. Receivers.

See the title RECEIVERS.

In General.—Until the appointment of a receiver and the award of the injunction, the management of the affairs of a bank remains in the hands of the directors, and assignments by them in payment of the company's debt may be lawfully made. *Planters' Bank v. Whittle*, 78 Va. 737.

Employment of Real Estate Agents.

—See the title BROKERS.

Receiver of insolvent bank employed agent to sell real estate upon commissions of ten per cent. It was not agreed whether commissions should be paid out of cash payment or out of entire price when paid. Agent sold for \$85,000, whereof \$10,000 was paid and default made as to residue. Held, agent was entitled to ten per cent. only on such sum as had been or should be paid. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974.

Receiver reported sale to court stating agreement as to commissions, and procured a decree for payment thereof, "whenever whole price should be fully paid." Agent, who was no party to the suit, drew an order on receiver for a sum out of any funds payable to him as commissions under the court's decree. Held, the order did not estop agent from denying correctness of the decree. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974.

Action by Receiver—Evidence—Records.—The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April, 1865, and it has done no business since, and in fact it had been

abandoned and ceased to exist. In April, 1866, H and M. suing as well for themselves as for all the other stockholders, creditors and depositors, etc., filed their bill against the bank and the president, for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June, 1866, there was a decree for an account. Held, in an action by the receiver against a debtor of the bank, the record in the chancery cause is evidence for the plaintiff. *Finney v. Bennett*, 27 Gratt. 365.

XII. Forfeiture of Franchise and Dissolution.

Forfeiture of Franchise.—The mere fact that a statute under which a bank is organized prohibits it to take certain securities or to do certain acts, or makes it penal to do so, does not render such securities void, because such prohibitions are made, and such penalties are imposed for the benefit of the government, which may or may not at its pleasure enforce the forfeiture; and certainly not for the benefit of the borrower or his securities. *Wroten v. Armat*, 31 Gratt. 228, citing *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706; *Rivanna Navigation Co. v. Dawson*, 3 Gratt. 19.

Quo Warranto.—In a case decided by this court, *The Banks v. Poitiaux*, 3 Rand. 136, it was held, that under an act of assembly authorizing a bank to hold so much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more; the bank may purchase more ground than is necessary for the erection of a banking house, build fire proof houses on the vacant land, for the greater security of the banking house, and sell them out to third persons. And that, even if the bank violated its charter in so doing, the only proceeding against it would be by quo

warranto; and the purchasers of the houses can not resist a specific performance of their contracts by alleging that the bank had exceeded its powers in erecting and selling the houses. *Wroten v. Armat*, 31 Gratt. 251.

Dissolution.

By Death.—The death of any one member of a banking association operates as a dissolution thereof as between all the members, and on such dissolution the survivor has the right to take possession of the copartnership assets and settle up the affairs of the joint concern; and it may be stated, as a settled proposition, that the power of a partner to make a contract for the firm ceases upon the dissolution of the firm, and the surviving partners or ex-partners can enter into no contract which will bind the estate of the deceased partner, except such as is appropriate and necessary in settling the affairs of the concern. Dissolution operates as a revocation of all authority for making new contracts; as dissolution finds the engagements of the company, they must remain until liquidated and paid. *First Nat. Bank v. Payne*, 85 Va. 890, 894, 9 S. E. 153, 3 L. R. A. 286.

Enforcing Liabilities after Dissolution.—After a banking corporation shall expire, or be dissolved, its assets remain subject to the payment of its liabilities, and suits may be brought against such corporation to enforce its liabilities. *W. Va. Code*, p. 511, ch. 53, § 59. *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

XII. Consolidation and Reorganization.

When a new banking corporation, with different stockholders, is formed out of another, it can not be sued by the creditors, or be held liable for the debts of the old corporation, except upon some special ground, such as having received assets of the old cor-

poration without giving value therefor. *Donnally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

XIV. Pleading and Practice.

A. ACTIONS BY OR AGAINST BANKS.

1. Must Sue and Be Sued in Corporate Name.

See the title **CORPORATIONS**.

An incorporated bank must sue and be sued in its corporate name. *Mcveigh v. Bank*, 26 Gratt. 188; *Porter v. Nekervis*, 4 Rand. 359; *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792.

Mason v. Farmers' Bank, 12 Leigh 84, is cited in *Stewart v. Thornton*, 75 Va. 217, to the point that a corporation must sue and be sued in its corporate name.

"President and Directors"—Error—Jeofails.—Where a suit is brought against the president and directors of a branch bank, this is not a mere misnomer, which must be pleaded in abatement, but is a bar to any recovery; and though a verdict be founded upon the general issue pleaded, the error is not cured by the statute of jeofails. *Mason v. Farmers' Bank*, 12 Leigh 84.

"Two questions then present themselves: 1. Whether an action can be maintained against the president and directors of the office of discount and deposit at Petersburg? and 2. Whether this action is so brought? As to the first, it may be considered as definitely settled by the judgment of this court in the case of *Tompkins v. The Branch Bank of Virginia*; in which two judges, who did not sit in that cause, express, in this case, their entire concurrence. The grounds upon which that decision was made are believed to be unassailable; and we see no reason to depart from a precedent, which has settled a point of practice and the construction of a statute, for the future

government of the profession. Is this an action against the corporation itself, or is it an action against the branch bank? To this it may be answered, in the first place, that there is no sensible distinction in this respect, between the case at bar and that of *Tompkins v. The Branch Bank of Virginia*, so that, without more saying, that case would determine this. But, secondly, a reference to the declaration, ascertains beyond questions, that the demand is against the branch and not against the corporation, and the assumpsit is laid accordingly. (The judge quoted the words of the declaration, and said) Language can not be more plain, and argument would be thrown away in an attempt to prove more clearly, that the action is against the branch bank, and not against the corporation itself. It is against the agent, not against the principal. The two boards are distinct, composed of distinct and different individuals, with different powers and authority. The mother bank represents the corporation; the branch bank does not; it is the mere agent of the corporation, appointed by the stockholders indeed, but only for the management of the branch, 'under such agreements and subject to such regulations as shall be deemed proper, not contrary to law or to the constitution of the bank.' Hence it is obvious, that the two bodies of directors are distinct, and that a suit against the president and directors constituting the bank agency at Petersburg, can not be a suit against the president directors and company, representing, and indeed constituting the corporation itself. There is, indeed, a further distinction between the branch and the bank itself, in their name and style; the true name and style of the former is 'The president and directors of the office of discount and deposit;' the style of the latter is 'The president, directors and company of the Farmers' Bank of Virginia.' The

branch bank is not the company; and the words 'and company' are in the declaration improperly added to their style. Strike them out, and the company is not sued; insert them and you erroneously bind up with the company as constituting the corporation, not those who do constitute it, but a set of mere agents who do not." *Mason v. Farmers' Bank*, 12 Leigh 89.

Action by Cashier Not Action by Bank.—An action by A. B., cashier of a certain bank, upon a note to him as such cashier, is not an action by the bank and although the declaration states that notice was given and protest made in behalf of the bank, such allegation is a mere surplusage, especially where the note is nonnegotiable; and hence the question as to whether the bank could deal in paper of the kind sued on does not arise in such case. *Porter v. Nekervis*, 4 Rand. 359.

"Farmers' Bank of Virginia"—Suit by That Name—Objection on Appeal.—It was held in *Farmers' Bank v. Willis*, 7 W. Va. 32, 52, citing *Mason v. Farmers' Bank*, 12 Leigh 84, that when "The Farmers' Bank of Virginia," by that name, brought suit, and the defendants made no objection, on that account, but pleaded in bar, and agreed the facts using that name, and the "president, directors and company of the Farmers' Bank of Virginia," indiscriminately, as the name of the same corporation, and submitted the case to the court, which gave judgment in favor of the bank; the defendants, who appealed, can not, in the appellate court, object successfully to the name in which the suit was brought.

Action in Name of Bank for Trustee in Insolvency.—A bank having, in pursuance of the act of February 12, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees upon a note discounted

by the bank prior to the execution of this deed. Va. Code, 1873, ch. 56, § 31, p. 843; *Crews v. Farmers' Bank*, 31 Gratt. 349.

Branch Banks.—Upon the construction of the statute of March 19, 1832, authorizing suits against branches of banks in this commonwealth, it was held, that a suit can not be maintained against the president and directors of the branch; the suit must still be brought against the principal bank by its corporate name. *Mason v. Farmers' Bank*, 12 Leigh 84; *Tompkins v. Branch Bank*, 11 Leigh 372. See ante, "Branch Banks," III.

2. Averment of Corporate Existence.

In actions by or against domestic banks in the corporate name, if created by a public act of the legislature, it is not necessary to allege corporate existence, or to set out the act of incorporation. It may prove that it is incorporated under the general issue. *Taylor v. Bank*, 5 Leigh 471; *Rees v. Conococheague Bank*, 5 Rand. 326; *Crew v. Farmers' Bank*, 31 Gratt. 349. But see *Jackson v. Bank*, 9 Leigh 240. See post, "Judicial Notice," XV, D. See the title CORPORATIONS.

A banking corporation of the district of Columbia, or of any state of the union, and even a foreign corporation, may maintain suits in the courts of Virginia. It is not necessary for such corporation to show in its declaration how it was incorporated; it may prove that it is incorporated under the general issue. *Taylor v. Bank*, 5 Leigh 471; *Bank v. Pindall*, 2 Rand. 465. But see *Jackson v. Bank*, 9 Leigh 240.

3. Action against Bank for Failure to Protest Note.

In an action against a bank to recover damages for the bank's negligence in failing to protest for nonpayment, a note left for collection by the plaintiff, the fact that cashier handed plaintiff, in lieu of old note

which should have been protested, a renewed note, saying former was lost, and plaintiff retained latter some time, is not conclusive of plaintiff's ratification of the bank's action, but evidence from which the jury might or might not infer such ratification. *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135.

Pleading by Way of Recital.—In an action against a bank to recover damages for the bank's negligence in failing to protest for nonpayment a note left for collection by the plaintiff, where declaration, though inartificially commencing statement of cause of action with a quod cum, yet states the essential averments in direct and positive terms, it is sufficient. *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135.

Date of Placing for Collection.—And in an action against a bank for negligence in failing to protest a note placed with it for collection, it is sufficient if the declaration avers it was so placed before its maturity, though the date of the placing is not specified. *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135.

4. Action for Failure to Pay Depositor's Checks.

The facts which constitute the cause of action to recover for a failure of a bank to pay checks of a depositor properly drawn on funds on deposit, should be set forth in the pleadings with sufficient certainty to be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court which is to render judgment. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

5. Assumpsit by Bank to Recover Money Lost by Bailee.

Where a bank put into the hands of the defendant for safe keeping a certain sum of gold in April, 1865, it being the time when the enemy were approaching, it was held that if the defendant is robbed of it, he is not

liable to the bank for the money. *Danville Bank v. Waddill*, 31 Gratt. 469. See the title BAILMENTS, ante, p. 223.

B. INTERPLEADER.

"O. D." deposited in bank fourteen bags of silver coin of the value of \$7,496.75, which was claimed by "H. R." administrator, etc., as the property of his decedent. Upon the refusal of the bank to deliver the coin to "O. D." she brought an action of detinue, to recover the same. The bank appeared to the action, filed the affidavit prescribed by § 1, ch. 107, W. Va. Code, 1868, and on its motion said administrator was required to interplead with the plaintiff. Held, that under said § 1, ch. 107, the interpleader was properly directed. *Dickeschied v. Exchange Bank*, 28 W. Va. 340. See *Bank v. Craig*, 6 Leigh 434. See the title INTERPLEADER.

C. SERVICE OF PROCESS.

See the title SERVICE OF PROCESS.

Under Va. Code, 1887, § 3225, where the officers specified in the statute can not be found, process against any private corporation except a bank of circulation may be served on any agent thereof in the county or corporation in which he resides, or in which the principal office of the company is located, whatever may be the employment of such agent. *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

Order of Publication.—Where a company doing business both in banking and insurance, is sued on a policy in county where the insured property lies, and there is no agent residing there on whom process may be served, an order of publication is proper. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77.

Service on President.—Bill filed by the sureties of a guardian against him, and the president and directors of Bank

of Virginia, not the president, directors and company of the Bank of Virginia, which is its corporate name; injunction ordered by the court against the guardian, to restrain him from selling his ward's stock in the bank; a subpoena, with an injunction indorsed by the clerk, to restrain the president and directors of the bank from permitting the guardian to transfer the stock, is served on the president; held, this process, so served, does not bind the bank, nor is it even notice to the bank, actual or constructive, of the equity asserted by the guardian's sureties in their bill, since the bank in its corporate character is not party to the bill, and the president is not the officer of the bank whose province it is to receive such notice. *Bank v. Craig*, 6 Leigh 399.

D. APPEAL AND ERROR.

See the title APPEAL AND ERROR, vol. 1, p. 418.

The true construction of § 20 of the act "for establishing a bank in the town of Alexandria" is, that the power of granting appeals, writs of error, or supersedeas is taken away from the appellate court, in relation only to judgments rendered pursuant to that act, and upon writs of *capias ad respondendum* executed according to the directors thereof. See also, as to the right of appeal to the supreme court of the United States, from judgments of the circuit court of the District of Columbia, in favor of the bank of Alexandria. 4 Cranch 384-398, *Young v. Bank*. *Winchester v. Bank*, 2 Munf. 339. See ante, "Of Unauthorized Banks," V, B.

XV. Evidence.

See the title EVIDENCE.

A. PROOF OF INCORPORATION.

See ante, "Averment of Corporate Existence," XIV, A, 2; post, "Judicial Notice," XV, D.

1. Of Domestic Banks.

In an action by or against a domestic banking corporation, by a name which imports such corporation, if the bank was created by a public act of the legislature of which the court could take judicial notice, it is not necessary to allege or prove its corporate existence. *Rees v. Conococheague Bank*, 5 Rand. 326; *Gillett v. American Stove, etc., Co.*, 29 Gratt. 567; *Hays v. Northwestern Bank*, 9 Gratt. 127; *Farmers' Bank v. Willis*, 7 W. Va. 31. Compare *Taylor v. Bank*, 5 Leigh 471.

In *Hays v. Northwestern Bank*, 9 Gratt. 130, it is said: "But it is insisted that the evidence in support of the plaintiff's action was insufficient in this, that there was no proof that the plaintiff was an incorporated institution authorized to sue; and the case of *Jackson v. Bank of Marietta*, 9 Leigh 240, is relied upon in support of the objection. That was an action of assumpsit by a bank alleged to have been incorporated by an act of the legislature of Ohio; the plea was non-assumpsit, and there was a demurrer to the plaintiff's evidence filed by the defendant. The court held, that proof of the plaintiff's incorporation was necessary to maintain the action; and none having been given, there was judgment for the defendant. But this is an action by a bank incorporated by the legislature of Virginia, and the act for its incorporation is a public act of which the courts will judicially take notice. *Stribbling v. Bank of the Valley*, 5 Rand. 132. In that case the court ex officio took notice of the act incorporating the Bank of the Valley; and the Northwestern Bank was incorporated by the same act. It was not necessary, therefore, that it should have been specially given in evidence to the jury."

Unsworn Plea Nul Tiel Corporation.

—In a suit by a banking corporation the plea of "nul tiel corporation" unaccompanied by an affidavit denying

the corporate existence of the plaintiff, does not put the plaintiff to the proof of its corporate existence. Special pleas which only raise questions which are involved in the plea of nil debet, under which the defendant may rely upon the same matters in evidence which are set out in the pleas, are properly excluded. *Crews v. Farmers' Bank*, 31 Gratt. 349.

2. Of Foreign Banks.

A bank brings a suit in Virginia, declaring that it is a corporate company by act of the legislature of Ohio; plea, the general issue; at the trial, defendant demurs to plaintiff's evidence; the demurrer contains no direct proof of the legal incorporation of the bank, nor can the fact be fairly inferred from the evidence stated in the demurrer; held, this defect of evidence is fatal to the plaintiff's case. *Jackson v. Bank*, 9 Leigh 240, cited in *Gillett v. American Stove, etc., Co.*, 29 Gratt. 567.

Nor can the want, in the demurrer to evidence, of this necessary proof to entitle the bank to recover, be supplied by resort to a demurrer to the declaration, which was overruled, whereby the averment therein contained, of the legal incorporation of the bank, was admitted. *Jackson v. Bank*, 9 Leigh 240.

Printed Copies of Statute—Foreign Corporations.—In an action by the president, directors and company of the bank of Alexandria, being an incorporated bank and body politic by that name established at Alexandria in the District of Columbia, by virtue of the act of assembly entitled "an act for establishing a bank in the town of Alexandria," it was held, that the printed copies of the acts of congress, distributed to the executives of the several states to be distributed among the people, are proper evidence to show the incorporation of such institution. *Taylor v. Bank*, 5 Leigh 471.

B. DECLARATIONS AND ADMISSIONS OF OFFICERS AND AGENTS.

See the title DECLARATIONS AND ADMISSIONS.

Even though it should be held that a cashier has no implied power to receive money for interest in advance on a note owned by the bank, and to grant indulgence, still letters written by the cashier a good while after the date when he is said to have granted the time, and which are claimed to obtain admissions that he had granted such indulgence, such admissions are not admissible against the bank, because made a considerable time after the act of the cashier granting indulgence. That matter was closed. Such admissions are not part of the *res gestæ*. But the rule is well settled that the cashier has no power to bind the bank by such admissions made at any time. *Bank v. Wetzel* (W. Va.), 50 S. E. 886.

The mere statement of a bank clerk, unsworn to, "that a note of \$500 had been placed in the hands of the bank's attorney for suit," is not evidence of the claim, and the commissioner should not allow it without proof of its existence, and the court should in such a case recommit the report for proof. *White v. Drew*, 9 W. Va. 696.

C. DOCUMENTARY EVIDENCE.

See the title DOCUMENTARY EVIDENCE.

The book of a teller in a bank is not per se evidence to establish the facts appearing in that book, but may be given in evidence in connection with the evidence of the teller himself, if the teller's evidence make it proper to refer to it, to prove that a particular entry was made. (This was in a prosecution for forgery.) *Courtney v. Com.*, 5 Rand. 666.

A dispatch, or the copy of a dispatch, purporting to have been written and sent by A. B., as cashier, to C. D.,

can not be read in evidence, without first proving that it is a genuine paper; that is, that it was written and sent by the party whose name it bears. *National Bank v. National Bank*, 7 W. Va. 544.

D. JUDICIAL NOTICE.

See ante, "Averment of Corporate Existence," XIV, A, 2; "Proof of Incorporation," XV, A. See generally, the title JUDICIAL NOTICE.

In General—Domestic Corporations.

—The acts of the general assembly incorporating banks are public acts of which the court will judicially take notice. *Stribbling v. Bank*, 5 Rand. 132; *Farmers' Bank v. Willis*, 7 W. Va. 42; *Mason v. Farmers' Bank*, 12 Leigh 87; *Hays v. Northwestern Bank*, 9 Gratt. 120; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 349; *Northwestern Bank v. Machir*, 18 W. Va. 271.

In Virginia and West Virginia, banks are usually incorporated institutions, but unlike many other corporations, banks are organized under general, as distinguished from special, statutes; being thus general or public, such statutes are not required to be proved, but are noticed by the courts ex officio. *Stribbling v. Bank*, 5 Rand. 132; *Hays v. Northwestern Bank*, 9 Gratt. 127.

In *Stribbling v. Bank*, 5 Rand. 132, it was held, that the law incorporating the bank in question was a public law of which the court would take judicial notice. The members of the court were unanimous as to this question, but their reasons therefor were somewhat different. Judge Carr was inclined to think that all the banking laws of Virginia were public laws, since all the citizens of the commonwealth were interested therein and the commonwealth had a large interest in them, having the power to appoint officers and in a great degree to control the banks, the banks being moreover subject to inspection by the state, and it being a felony to counterfeit the

notes of such bank. All this inclined Judge Carr to think that the bank laws were thus public laws, but he was well satisfied that even if they were not public laws at first they had been made so by the recognition frequently given them by public laws; and revisals having directed the publication of such laws as public laws, revisal of 1819 especially. Judge Green passed his opinion upon the provisions of the act declaring that all notes or bills negotiable at this bank should be put upon the footing of foreign bills of exchange, and a suit at bar was brought upon such a note. Judge Green, however, was of the opinion that although the main provisions of the act constituted a public law the provision prohibiting the bank from taking interest at a rate of more than one-half of one per cent. for thirty days was private in its nature and the court could not take judicial notice thereof. He thought that the act of March 12, 1819, providing for the republication of the laws including the act incorporating the bank in question, did not make these provisions as to interest a public one. Judge Coalter was of the opinion that the whole of the banking laws of Virginia were public acts, banks being in their very nature public corporations. The laws providing for the publication of the banking laws, moreover, make such banking laws public, even if they had not been so in the first instance. Judge Coalter was, moreover, of the opinion that the act of March 12, 1819, which permits private laws to be given in evidence without being pleaded, made the law incorporating the bank in question a public law. He was also influenced by the fact that these banking laws were expressly directed by law to be printed in the new Rev. Code, 1 Rev. Code, together with all the undoubted public acts of state, and to be distinguished from the titles and dates of private and local

acts which were directed to be published. Judge Cabell said that he was satisfied that the act in question was public on account of 2 Rev. Code, 97, § 7, directing that in addition to the capital stock of the bank to be raised by subscription, there should be created in the name of the commonwealth, for the benefit of the fund for internal improvements a number of shares equal to fifteen per cent. of the amount of stock subscribed; the commonwealth being thus made a member of the corporation by the law giving it existence.

The charter of the Farmers' Bank of Virginia was a public act of which the court would take judicial notice. *Mason v. Farmers' Bank*, 12 Leigh 84; *Stribbling v. Bank*, 5 Rand. 132; *Farmers' Bank v. Willis*, 7 W. Va. 31.

"Looking to the charter (which though not found in the verdict, is a public law of which we must take notice. *Stribbling v. Bank of the Valley*, 5 Rand. 132), the court must know that the Farmers' Bank is a chartered institution, and has a branch established by law in the town of Petersburg." *Mason v. Farmers' Bank*, 12 Leigh 87.

The act incorporating the Northwestern Bank of Virginia by the legislature of Virginia was a public act, of which the courts will take judicial notice; and in an action by the bank it is not required to prove its incorporation. This corporation existing under the laws of Virginia prior to the foundation of the state of West Virginia, its existence was preserved by art. 11, § 8, constitution of 1863; art. 8, § 36, constitution of 1872. *Bank v. Machir*, 18 W. Va. 271, following *Hays v. Northwestern Bank*, 9 Gratt. 127.

E. USAGES AND CUSTOMS.

See the title USAGES AND CUSTOMS.

The Farmers' Bank is an incorporated bank chartered by the legislature

mainly for the purpose of lending money; that is its trade, and all contracts with it, must be construed according to the usages of that trade, which all are presumed to know who deal with it. Their contracts are to be explained by the usages which make a part of them, unless such usages be contrary to law. *Crump v. Trytitle*, 5 Leigh 256, per Brooke, J. See *Bacon v. Bacon*, 94 Va. 693, 27 S. E. 576.

"Under the influence of these considerations, I do not hesitate to rest this case upon these grounds; that the usage complained of has uninterruptedly prevailed for a number of years, and been so uniform and invariable as to have become the known and established rule in all transactions with our banking institutions; and that it must be considered now, as forming part of the law which is to govern the discount of commercial paper. It is found by the case agreed, to be the universal custom of the banks in relation to this commercial paper, which has sprung up in our banking system. This is sufficient to establish it, unless, as I have said before, it is unequal, or repugnant to the principles of general law. For 'custom of this sort,' as Judge Pendleton tell us 'when first brought into court is a matter of fact, and merchants are examined to prove what it is. When legal decisions are made upon it, it becomes the law of the land, of which all parties and courts are to take notice without stating it.' 1 Call 159. And after such decisions, it needs not evidence to support it. Nay, more, it ought no longer to be left to juries to decide upon it, as a fact, on the mere evidence of merchants; when once established, it is propounded as law by the court. 2 Burr. 1222." *Crump v. Trytitle*, 5 Leigh 260.

"Notes negotiable at the banks, having been played upon the footing of foreign bills of exchange, are to be

treated of course as commercial paper, and to be governed by the law and custom of merchants, as applying to banking transactions. This law and custom of merchants, though in most of its principles well fixed and ascertained, yet recognizes some variety in usages. Thus it is, that the general usage and course of trade is respected in the decision of controversies coming within its influence. Thus it is, that though by the general law merchant, payment of a promissory note must be demanded on the third day after the time limited for the payment thereof, in order to charge the indorser, yet, in the District of Columbia, where the custom of the banks is to make the demand on the fourth day, that custom is sanctioned as the law of promissory notes negotiable in those Banks. *Renner v. Bank of Columbia*, 9 Wheat. 581. So here, the custom of taking the discount for sixty-four days on notes which are payable on the sixty-fourth day after date, including the day of the date, having been uniformly established since the foundation of the banks, that custom ought to be sustained. A usage, indeed, which is permitted to control a general principle, must be uniform and general, and moreover, reasonable, fair, impartial, and not contrary to law. When so proved, it is said to become a part of the law, and will be recognized as such. *Consequa v. Willings*, etc., Peters C. C. Rep. 225. Now this is emphatically the case with the usage in question here. It is coeval with the banks. It has governed the innumerable contracts which have been made with them for thirty years. It has never been questioned by the legislative body. The state having an interest in the stocks, has also a supervisory control over the several establishments. Its committees examine their transactions annually, and scrutinize their course of business. Yet, notwithstanding all this prudent jeal-

ousy, and the guards which have been thrown around the banks, the present prevailing practice of discounting notes has never been called in question. Charters, moreover, have been renewed, without pruning away these excrescencies, if indeed they be such; and this silent approbation of the legislature has confirmed a practice, which if now for the first time declared illegal, must shake all our banks to their foundations." *Crump v. Trytitle*, 5 Leigh 259.

Circulation of Notes of Unchartered Bank.—The fact that it was a general custom for individuals to violate the act of 1805 in relation to the issue of circulating notes by unchartered banks, did not render such issue any less culpable or give a right of action upon notes so issued. *Wilson v. Spencer*, 1 Rand. 76. See ante, "Of Unauthorized Banks," V, B.

Usage and Custom as to Manner of Paying Indebtedness to Bank.—See ante, "Payment of Debts Due Bank and Set-Off," V, A, 3, d.

XVI. Savings Banks.

A. REGULATIONS PRESCRIBED BY EARLY STATUTES.

By § 3 of the act prescribing general regulations for the incorporation of savings institutions, societies or banks, passed March 24, 1838 (acts of 1838, ch. 108, p. 83), it is declared that the board of directors "shall have power to regulate the manner of making and receiving deposits, the form or certificates of deposits, and the manner of transferring the same." By § 4, "any savings institution, society or bank shall be capable of receiving from any person or persons any deposit or deposits of money, and all moneys so received shall be invested in stocks or other securities at the discretion of the directors, and in the manner deemed most safe and beneficial." By § 5, "it shall not be lawful for any savings institution, society or bank to purchase

or discount any debt or claim to become due at a rate of discount or interest exceeding the rate of one-half of one per centum for thirty days; and all contracts which may be made contrary to the foregoing provision shall be utterly null and void." *Com. v. Horner*, 10 Leigh 700. See Va. Code, ch. 49; W. Va. Code, ch. 54.

By an act passed March 20, 1832 (acts of 1831-32, ch. 79, p. 69; suppl. to Rev. Code, ch. 315, p. 385), it is enacted, "that nothing in the aforesaid act passed on February 24, 1816, shall be so construed as to prevent, limit or in any manner control the savings institution of Richmond, and the Franklin savings institution of said city, and other institutions of like character and purpose within the commonwealth, from receiving money on deposit, granting certificates for the same, discounting notes or other paper at legal interest, or drawing for their own funds on any bank or other place in which the same may have been deposited; provided, that nothing herein contained shall be so construed as to allow the institutions aforesaid the power of emitting or circulating any notes, drafts or bills, whether payable to order or bearer, or any other security for the payment of money or other valuable thing, in the name or on account or for the benefit of the said institution, or to do any other act in virtue hereof, except such as are before herein named." *Com. v. Horner*, 10 Leigh 700, 710.

B. DEPOSITS GENERAL AND SPECIAL.

When money has been deposited with a savings bank, and there has been no contract that a different rule shall prevail, such institution, when the deposit is made, ordinarily, becomes the owner of the money deposited, and consequently a debtor for the amount, and under obligation to pay, on demand, not the identical money received, but a sum equal in legal value.

But it seems this rule does not apply where the thing deposited is not money but a commodity. *Zinn v. Mendel*, 9 W. Va. 580. See ante, "With Respect to Deposits," V, A, 1.

C. BANK'S LIEN.

In January, 1856, by deed which was duly recorded, T. and wife conveyed to D. a house and lot in trust to secure W., of Philadelphia, against any loss or damage which he might sustain by his acceptance of any drafts or bills which might thereafter be drawn by T. upon W., which acceptances W. had agreed to make for the accommodation of T. W., accordingly, from the date of the deed to January, 1861, accepted the drafts of T. to a large amount, and T. was indebted to him for much more than the house and lot was worth. In 1871 the A. Savings Bank being the holder of three notes of T., given on renewals of notes which were due before the date of the deed, filed a bill against T. as an absent defendant, to attach the said house and lot, insisting that the deed having been given to secure future advances was null and void as to the creditors of T. Held, the savings bank had no lien on the house and lot until the filing of its bill. *Alexandria Savings Inst. v. Thomas*, 29 Gratt. 483. See ante, "Bank's Lien," VII.

D. DIRECTORS.

A creditor of a savings bank can not generally maintain an action at law against the directors thereof for simple nonfeasance of duty to the corporation, or fraud in the management or disposition of the money or property of the corporation. *Zinn v. Mendel*, 9 W. Va. 580. Compare *Marshall v. Farmers', etc., Bank*, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84. See ante, "Directors," VIII, C.

But directors of such institutions, may make themselves liable in an action at law for loss and damages, for false representations made or caused

to be made by them, and perhaps acts done or caused to be done by them, with intent thereby to deceive and defraud the plaintiff, and which had the designed effect, and caused loss and damage to the plaintiff, but the false representations made of caused to be made, or, acts done or caused to be done by the defendants, and relied on by the plaintiff, and the intent thereby to deceive and defraud the plaintiff, must be averred or alleged in positive terms. *Zinn v. Mendel*, 9 W. Va. 580.

The president of a savings bank misappropriated its funds and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts, and were loaned large sums by the bank with little or no security, though such borrowers were responsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice, or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but 10 per cent. on the deposits. Held, that though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors. *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84.

E. WINDING UP AND DISSOLUTION.

It has been held that one person may file a creditor's suit on behalf of himself and all other stockholders, creditors and depositors, against a savings bank and its president, that has ceased to do business, for a settlement of its affairs and the distribution of its as-

sets. And the court met the objection that there was no precedent for such a case, by saying that it ought to be borne in mind that these savings banks are institutions of recent origin, and no question as to the administration of their effects, upon going into liquidation upon insolvency, has probably gone up to the higher courts. *Finney v. Bennett*, 27 Gratt. 366. See ante, "Winding Up," XI, D.

Where a savings bank has ceased to do business and gone into insolvency, upon a creditor's bill filed by one of the creditors on behalf of himself and all other stockholders, creditors and depositors, against the bank and the president for a settlement of its affairs and distribution of its assets, the court will appoint a receiver to wind up its affairs. *Finney v. Bennett*, 27 Gratt. 365.

XVII. National Banks.

See ante, "Bank's Lien," VII.

A. POWER OF STATE TO CONTROL.

"These decisions made by the supreme court interpreting an act of congress, are direct authority and binding upon this court. National banks have been brought into existence by the national government and are regulated and controlled by that government. Their constitutionality has been sustained and as the laws of congress, passed in pursuance of the federal constitution, are supreme, the states can exercise no control over such banks nor in any wise affect their operation, except in so far as congress may see proper to permit. Congress having prescribed the rate of interest which a national bank may charge and likewise the penalty for taking more than the rate allowed, the states are bound by the limitations thus prescribed both as to the rate and the penalty. They can impose no penalty nor enforce any forfeiture beyond that fixed by con-

gress; nor can they apply remedies other than those given by the act declaring the forfeiture or the penalty." *Bank v. Boylen*, 26 W. Va. 556, 53 Am. Rep. 113, reaffirmed in *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

B. POWERS, DUTIES AND LIABILITIES.

1. In General.

National banks are intended to do the business of the country in the midst of the people just as others lending money and discounting paper do, whose places they have filled nearly everywhere. They can sue and be sued in the state courts on all business done by them, secure themselves, and purchase property held by them as security when sold under state laws, and otherwise enjoy the advantages of those laws as fully as any citizen of the state. *Lynch v. Bank*, 22 W. Va. 556, 46 Am. L. Rep. 520.

2. Loans.

a. Loans on Real Estate Security.

The Exchange Hotel Company of Fredericksburg, in order to complete their building, which they had commenced before the war, in June, 1866, borrowed of the National Bank of Fredericksburg \$10,000, to be secured by a deed of trust on the property, and by direction of the company the president and secretary of the company, by deed dated June 27, 1866, and duly recorded, conveyed the property in trust to secure the money. The company then employed Wroten, a builder, to complete the building, and contracted to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The company, out of the money borrowed, paid Wroten \$8,000, and when the work was completed there was due him \$5,791.50. He had recorded the contract to secure the mechanic's lien, and on January 1, 1867, the company conveyed the prop-

erty, subject to the lien of the first deed, in trust to secure the said balance. In April, 1870, judgment creditors of the hotel company whose debts were due before the first deed was made, filed their bill against the company, the bank, and Wroten, claiming that under the statute the deed to secure the bank enured to the benefit of all the creditors of the company being such at the time of its execution. And so the court held, and the property being sold under the decree, the proceeds were distributed pro rata among the plaintiffs and the bank. Afterwards the assignee in bankruptcy of Wroten filed a bill to review the decrees, and insisted that the deed to secure the bank was null and void on the ground that under the act of congress under which the bank was organized it was forbidden to lend money on real estate, and also on the ground that as against Wroten's mechanic's lien the trust in favor of the bank extended only to the property in the condition it was when the deed was executed. Held, the act of Congress of June 3, 1864, Rev. Stat., United States, §§ 5136-5137, under which this bank was organized, does not imply a negation of the corporate power on the part of the national banks which might be organized under it to make a loan of money on real estate; does not annul any loan made by any such bank; or release or discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of such loan. If the act of congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or make it penal to do so, such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture; and it could not be avoided by the borrower or his creditors. *Wroten v. Armat*, 31 Gratt. 228.

Provisions of Act of Congress.—The National Bank of Fredericksburg was organized very soon after the war between the Confederate States and United States, under the act of June 3, 1864 (See Rev. Stat. United States, tit. 62, p. 998, § 5136), which declares that "upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power," etc. The seventh enumeration of express powers is in these words: "Seventh. To exercise by its board of directors, or duly organized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, or bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." Section 5137 declares that "a national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title or possession of any real estate pur-

chased to secure any debts due to it, for a longer period than five years." These are the only provisions of the said act of congress which can have any effect to imply a negation of corporate power on the part of the national banks which might be organized under it to make a loan of money on real security. Can they have any such effect? Can their effect be to annul any loan made by any such bank; to release and discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of any such loan? We are of the opinion that they can not have any such effect. It will be observed that none of these provisions prohibit the banks organized under the said act of congress to loan money on real estate, nor impose any penalty on the act of any such bank in so doing. The most they do is to declare that such banks shall have power to loan money "on personal security." Does this exclude, by necessary implication, the common-law power of such a corporation to loan money on real security, or any other security which would be satisfactory to the bank or might be desired by any persons bound as endorers for said loan, for their indemnity? *Wroten v. Armat*, 31 Gratt. 248.

The lien of the bank under its deed of trust extended to the whole property as it was at the time of the sale, and was not confined, as against the mechanic's lien, to the property as it was when the deed was made. *Wroten v. Armat*, 31 Gratt. 229.

b. Loans on Bank's Own Stock as Security.

Section 5201, U. S. Rev. Stat. prohibits national banking associations from making loans upon security of shares of their own stock. Hence a by-law, though notice thereof be endorsed on the certificate of stock, is void, which prohibits a stockholder who is indebted to bank from transferring his stock without the consent

of the board of directors. *Feckheimer v. National Exchange Bank*, 79 Va. 80.

Section 36 of the national banking act, approved June 3, 1864 (§ 5, 201, U. S. Rev. Stat.), under which act the said bank was organized, provides: "That no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such stock, unless such security or purchase shall be necessary to prevent loss on a debt previously contracted in good faith, and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; in default thereof a receiver may be appointed to close up the business of the association according to the provisions of the act." In passing upon this question and construing this section, the supreme court of the United States held in a recent case that these associations are expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of congress on this subject that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to loan money on the security of its shares, it would imply also the power to become the owner of those shares, and this congress intended to guard against. These institutions were created to subserve public purposes, and not the mere private interests of the stockholders. And in no better way could this object be attained than in placing shareholders in their pecuniary dealings with the bank on the same footing with other customers. Whatever may have been the reason which induced the action of congress in providing thus, the provision is plain and un-

ambiguous, in the law, and binding on all associations organized thereunder. *Feckheimer v. National Exchange Bank*, 79 Va. 80.

3. Certifying Checks.

The act of congress passed March 3, 1869, making it unlawful for a national bank to certify checks, unless the drawer has, at the time, an amount of funds on deposit in said bank equal to the amount specified in the check, does not invalidate an oral acceptance of a check, or an oral promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. But the act of congress does not invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, but that it will pay the same whenever a draft, left with it for collection by the drawer, and sufficient in amount for the purpose, shall have been paid. *National Bank v. National Bank*, 7 W. Va. 544.

C. STOCK.

Definition and Nature.—A deed which conveys all the grantors' "property, real and personal," embraces and conveys all their shares of stock in a national bank. *Feckheimer v. National Exchange Bank*, 79 Va. 80. See ante, "Stock and Stockholders," IX.

Transfer of Stock.—L. & S. own shares of stock in N. E. bank of N., and failing, indebted to the bank, assign the shares to F., trustee. The certificates contain notice of such a by-law. Transfer could only be made upon the books of the bank, which refuses to allow said shares to be transferred to trustee. Latter files his bill, asking that the bank be required to allow such transfer to be made on its books, and to issue new certificates therefor. Held, the remedy at law is not adequate, and it is not a case for compensation in damages, but for specific performance, which can only be enforced in a court of chancery. *Feck-*

heimer v. National Exchange Bank, 79 Va. 80.

D. INTEREST AND USURY.

See the title USURY.

Application to Principal of Debt.

Under the provisions of the act of Congress (U. S. Rev. Stat., §§ 5197, 5198) usurious interest, actually paid to a national bank on discounting and renewing a series of notes, can not in an action by the bank on the last of them be applied in satisfaction of the principal of the debt. *National Exchange Bank v. Boylen*, 26 W. Va. 554, reaffirmed in *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

"*Lynch v. Bank*, 22 W. Va. 554, 46 Am. Rep. 520, is a case very different from this and the decision in that case has no application here. That was an action to recover double the amount of the usurious interest paid the bank by the plaintiff, while this is an action in which the defendants are attempting to set off usurious interest paid against the principal of the debt sued on. The former is expressly authorized by the act of congress, while the latter can not be done according to the authorities before cited." *National Exchange Bank v. Boylen*, 26 W. Va. 557.

Remedy to Recover Penalty.—Either debt or assumpsit will lie by a borrower against a national bank to recover the penalty prescribed by the National Currency Act, § 5198, Rev. Stat., United States, for exacting and receiving usurious interest on loans made by such bank. *Lynch v. Bank*, 22 W. Va. 554, 46 Am. Rep. 520, reaffirmed in *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

Remedy Cumulative or Exclusive.

The remedy given by section 5198, Rev. Stat. U. S., for the recovery of usurious interest paid to a national bank, is exclusive. *Stevens v. Bank*, 4 Sup. Ct. 336, 111 U. S. 197, 28 L. Ed. 399; *Charleston Nat. Bank v. Brad-*

ford, 51 W. Va. 255, 41 S. E. 153, reaffirming *Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113. See the title **ACTIONS**, vol. 1, p. 126.

Jurisdiction of State Court.—A state court has jurisdiction in an action brought by a borrower against a national bank to recover the penalty, prescribed by the National Currency Act (§ 5198, Rev. Stat. U. S.) for exacting and receiving usurious interest on loans made by such bank. "While the decisions of the different state courts upon the question, whether or not such courts have jurisdiction of actions against national banks for penalties and forfeitures, prescribed by the act of congress, for exacting and receiving usurious interest, are not entirely uniform, I am of opinion that the decided weight of the more recent

decisions are in favor of sustaining such jurisdiction; especially where the actions are by private persons for the recovery of the penalty of twice the amount of interest prescribed by the statute above quoted." *Lynch v. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

Limitation of Actions.—An action for the recovery of the penalty prescribed by said § 5198, must be commenced within two years from the time the usurious transaction occurred. Each payment of such interest is a transaction, within the meaning of said section, and the prescribed limitation commences to run from that time, although the debt on which such interest was paid remains unpaid. *Lynch v. Bank*, 22 W. Va. 554, 46 Am. Rep. 520. See the title **LIMITATION OF ACTIONS**.

BAR.—See the titles **ABATEMENT**, **REVIVAL AND SURVIVAL**, vol. 1, p. 2; **AUTREFOIS**, **ACQUIT AND CONVICT**, ante, p. 181; **FORMER ADJUDICATION OR RES ADJUDICATA**; **LIMITATION OF ACTIONS**; **PLEADING**. And see **BARRED**.

Barbers.

See the titles **LICENSES**; **SUNDAYS AND HOLIDAYS**.

Bar Examinations.

See the title **ATTORNEY AND CLIENT**, ante, p. 145.

BARGAIN AND SALE.—In *Ocheltree v. McClung*, 7 W. Va. 235, it is said: "In England, the deed of **bargain and sale** was sometimes used, but not so generally as other conveyances and assurances. It was, I believe, for the most part, if not entirely, limited, to the simple transfer of an estate to take effect in presenti, to a bargainee in esse and ascertained. Under the act of parliament requiring enrollment, it was less convenient to the parties than the deed of lease and release. In Virginia, this deed was used not only for the conveyance of a fee absolute, qualified, or conditional, immediately from the bargainor to the actual bargainee for his own benefit; but for the limitation and creation of different estates in successive or substituted takers, and for the conveyance to trustees for the benefit of others. At any rate, the deeds usually employed for such purposes contained words of **bargain and sale**, while, as other species of conveyance, they were entirely inappropriate, or wanting in essential requisites to their validity. As deeds of **bargain and sale** they vested the estates as intended, or they failed to vest them at all."

In *Claiborne v. Henderson*, 3 Hen. & M. 349, it is said: "A **bargain and sale**

of lands may be defined a real contract on a valuable consideration, for passing or transferring them from one to another. (a) And when made by word only, it is no way distinguishable, that I can discover, from a contract, or agreement, to the same purpose." See also, the titles DEEDS; VENDOR AND PURCHASER.

Bargains.—In *Claiborne v. Henderson*, 3 Hen. & M. 352, it is said: "Perhaps it may be supposed that the words 'bargains, sales, and other conveyances,' which are declared to be valid and binding between the parties, though void as to creditors and subsequent purchasers, extend only to conveyances in writing. To my apprehension, the word bargains, as well as the word 'sales,' which are used as separate and distinct descriptive terms in this amendatory act, can not be interpreted to designate that particular species of written conveyances, called a deed of bargain and sale. They are used in a more general and comprehensive sense, and signify a real contract for a valuable consideration, for passing and transferring lands from one to another."

Barges.

See the title SHIPS AND SHIPPING.

Barns.

See the titles ARSON, vol. 1, p. 723; BURGLARY.

Barratry.

See the title INSURANCE, and references given.

As to barratry in criminal law, see *State v. McGlumphy*, 37 W. Va. 805, 17 S. E. 315.

BARRED.—See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; AUTREFOIS, ACQUIT AND CONVICT, ante, p. 181; FORMER ADJUDICATION OR RES ADJUDICATA; LIMITATION OF ACTIONS; PLEADING.

In *Choen v. Guthrie*, 15 W. Va. 106, it is said: "What meaning is to be given to the word barred as used in this act? It says in a joint action on contract 'although the plaintiff may be barred as to one or more of the defendants,' yet he may recover against another. * * * It seems to me the word barred used in the act must be interpreted to mean the same as the words 'acquitted or discharged' in the act of 1838, nonassumpsit is a plea in bar and so is non est factum. If the defendant makes good his defense under either of these pleas, the plaintiff 'is barred of his action' as to him." See also, *Bush v. Campbell*, 26 Gratt. 430. And Compare *Steptoe v. Read*, 19 Gratt. 2.

A statute provided as follows: "In an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." In construing this provision the court said: "Upon what principle are these words to be confined to cases in which the plea of the defendant admits the contract alleged, but sets up some matter in discharge of the obligation. The word barred gives countenance to no such idea. Nonassumpsit is a plea 'in bar' of the action; so is non est factum. If the defendant makes good his defense under either of these pleas, plaintiff is 'barred of his action' as to him." *Bush v. Campbell*, 26 Gratt. 430.

Barroom.

See the title INTOXICATING LIQUORS.

BASIS OF COST.—See *Peyton v. Stuart*, 88 Va. 64, 66, 67, 82, 83, 84, 13 S. E. 408, 16 S. E. 160.

BASTARDY.

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I. Who Are Bastards.

A. DEFINITION.

A bastard in Virginia is "one born out of wedlock, lawful or unlawful, or not within a competent time after the coverture is determined; or, if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledge the child; or who is born in wedlock when procreation by the husband is for any cause impossible." *Smith v. Perry*, 80 Va. 567.

B. ISSUE OF VOID MARRIAGES.

Under the statute which declares that "The issue of marriages deemed null in law shall nevertheless be legitimated," Va. Code, 1904, § 2554, Va. Code, 1887, § 2554, the issue of a woman by a second marriage, which took place during the lifetime of her first husband, are legitimate. *Stones v. Keeling*, 5 Call 143, approved in *Heckert v. Hile*, 90 Va. 390, 18 S. E. 841, where the issue of a second marriage born before the dissolution of the first marriage, were held legitimate, and the case of *Greenhow v. James*, 80 Va. 636, was held not to be in conflict with this decision nor that of *Stones v. Keeling*, supra.

C. LEGITIMATION BY SUBSEQUENT INTERMARRIAGE.

Act of 1785 Retroactive.—A child born out of wedlock in the year of 1776 was legitimated by the subsequent intermarriage of his parents and acknowledgment by his father in 1778, under the act of 1785, taking effect January 1, 1787, providing that: "Where a man, having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." *Sleigh v. Strider*, 5 Call 439; *Rice v. Efford*, 3 Hen. & M. 225.

Recognition before or after Marriage.—In *Ash v. Way*, 2 Gratt. 203, it was held, that the recognition requisite, in connection with subsequent

marriage to legitimate the child may be either before or after the marriage. (Va. Code, 1904, § 2553.)

"Issue of Marriage."—Issue born before the intermarriage of their parents, are to be deemed "issue of the marriage," where the parents afterwards intermarry, so as to prevent them from being mere volunteers under a marriage settlement. *Coutts v. Greenhow*, 2 Munf. 363.

But the decision in *Coutts v. Greenhow*, 2 Munf. 363, was discredited, or at least held not to apply where such subsequent intermarriage was illegal, or where the parties, being a white person and a negro went out of the state to be married though the marriage was valid where celebrated. *Greenhow v. James*, 80 Va. 636. In this case it was held, that the provision of the Va. Code, 1887, § 2553, that "If a man having had a child or children by a woman, shall afterwards intermarry with her, such child, etc., if recognized by him before or after marriage, shall be deemed legitimate," does not apply to a marriage made absolutely void by the terms of the statute; e. g., a marriage between a white person and a negro.

D. LEGITIMATION BY ACT LEGALIZING MARRIAGE OF NEGROES.

The act of assembly of February 27, 1866, "To legalize the marriage of colored persons then cohabitating as husband and wife" applies to the issue of such marriages, whether born before or after the passage of said act, and whether there had been any formal marriage ceremony or not. *Smith v. Perry*, 80 Va. 563. In this case it was said that this law, "in effect, antedates the marriage, and makes it valid from the time the relation began, and their children are legitimate whether recognized or not, if the cohabitation continued until the day of the passage of the law, and it was not in the power

of the father to bastardize the children begotten by him, if he was still cohabitating with the mother. Where the connection and cohabitation has ceased before the passage of the law, the legitimacy of the child depends upon the recognition of the father."

Question of Bastardy.—Where in a case under this law it is charged that the supposed bastard was begotten by one not the husband, the question of bastardy must be settled as that question would be, when bastardy is charged against a person born during coverture or recognized during coverture, though born before. *Smith v. Perry*, 80 Va. 563.

To Be Construed Liberally.—Such a law, being remedial, must be construed so as to advance the remedy and extend the relief. *Smith v. Perry*, 80 Va. 567. See the title STATUTES.

Slave Marriages.—Plaintiff was born in 1862, of parents living together as husband and wife from 1861 to 1864, he being a colored man, and she a slave and dying then, and plaintiff was recognized as his child, and as such reared to womanhood. Held, under constitution, art. 11, § 7; act February 27, 1866, § 2, she was his legitimate child. *Scott v. Raub*, 88 Va. 721, 14 S. E. 178.

L. and S., colored persons, were never married, but cohabited together as man and wife previous to November, 1863, when S. enlisted in the United States army. The result of the cohabitation was a child, I. S. died in 1865, but before his death recognized the child en ventre sa mere, as his, and declared his intention to marry L., who died a few years after the birth of the child, the latter subsequently dying unmarried and childless. To this child, before its death, the United States government paid \$1,200 for her father's services. After her death I.'s maternal next of kin claimed that she was illegitimate and that they were entitled to her whole estate, which

claim was contested by her paternal next of kin, who insisted on the division of the estate into moieties, one of which should be distributed among them. Held, the act of February 27, 1866, (Va. Code, 1873, ch. 104, § 13), being retrospective, legitimated the child, I., though her parents had ceased to cohabit as man and wife before its passage. *Fitchett v. Simth*, 78 Va. 524.

Application of § 2227, Va. Code, 1867.—Code, § 2227, relating to the legitimacy of children of colored persons, who, under certain conditions, cohabited prior to February 27, 1866, applies only where such person had agreed to occupy the relation of husband and wife. *Patterson v. Bingham*, 101 Va. 372, 43 S. E. 609. See the title HUSBAND AND WIFE.

II. Presumption of Legitimacy.

A. IN GENERAL.

The presumption of the law is in favor of the legitimacy of the child where recognized by the husband, unless procreation by the husband was impossible for any cause, from his being beyond the seas, and the like. *Smith v. Perry*, 80 Va. 563; *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377; *Bowles v. Bingham*, 3 Munf. 601. See the title PRESUMPTIONS AND BURDEN OF PROOF.

B. EVIDENCE TO OVERTHROW.

See post, "Evidence," V, H.

Must Be Clear and Positive.—The presumption of legitimacy is not rebutted by proof of circumstances, which only create doubt and suspicion. To repel the presumption of legitimacy in any case, the evidence must be clear and positive. *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377.

Nonaccess of Husband Must Be Proved beyond Reasonable Doubt.—Nonaccess of the husband to the wife must be proved beyond all reasonable doubt; so where the preponderance of evidence is in favor of the legitimacy

of the issue, the question will be decided in favor of legitimacy. *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377.

"This presumption can be destroyed only by contrary proof, demonstrating that the child is not the child of the husband; which, again, can only be by showing that, from his continued absence from his wife, at or about the time of procreation, or from the impotency of his body, it is impossible that he should be the father. This presumption, in favor of legitimacy, is so strong, and the exceptions thereto are held under such strictness, that, where a man was divorced from his wife, propter perpetuam generandi impotentiam, and then married another woman, who had issue during the marriage that issue was holden to be his, on the ground that a man may be *hæcilis et inhabilis diversis temporibus*. It is not, therefore, a mere circumstance of probability that will operate in this case to bastardize the issue. Such issue will be held to be legitimate, unless it be conclusively shown, that a person, other than the husband, must necessarily and unavoidably have been the father. This doctrine applies, a fortiori, it is believed, to cases of procreation before the marriage." *Bowles v. Bingham*, 3 Munf. 601.

Husband's Declarations.—A husband's declarations that a child born in wedlock is not his, are not sufficient evidence to prove it illegitimate; notwithstanding it was born only three months after the marriage, and a separation, between his wife and himself, soon after took place by mutual consent. *Bowles v. Bingham*, 2 Munf. 442. See the title HUSBAND AND WIFE.

Where the parents of the supposed bastard lived together as husband and wife and reared the child as their own, and the pretended father only sets up his claim, after the child's death, in order to succeed to his property, though respectable witnesses assert

their belief that he is the father, on the ground that the mother did have an older child by the pretended father, who was acknowledged to be his child, nevertheless, this was held insufficient and the presumption of legitimacy prevailed. *Smith v. Perry*, 80 Va. 563.

Mulatto Child of White Parents.—

Where husband and wife are both white persons and a child is born of the wife during their wedlock and cohabitation; upon the trial of an issue, whether this child is the legitimate child of the husband, evidence that the child is a mulatto, and that, in the course of nature a white man and a white woman can not procreate a mulatto, is admissible and proper. *Tucker, P.*, saying: "It is not this or that particular impossibility that bastardizes the child. The essence of the rule is, that if it be impossible that the husband can be the father, the child is a bastard. The cases of the husband being beyond sea, imprisoned, impotent, and the like, are but instances of the application of the rule. Even nonaccess, if proved, though the parties are in the same kingdom, will suffice. How, then, if the impossibility rests upon the laws of nature itself? Shall it be less regarded? Shall the white child of a white couple be bastardized, upon questionable proof that the husband was rendered impotent by disease; and shall we legitimate a negro because he was born in wedlock? The learned judges give no countenance to such opinions." *Watkins v. Carlton*, 10 Leigh 575.

III. Custody of Bastards.

See the title PARENT AND CHILD.

2 Rev. Code, § 35, p. 274, provided that "every bastard child may be bound apprentice, by the overseers of the poor of the district or corporation for the time being, wherein such child shall be born; every male, until

he attains twenty-one years, and every female until she attains eighteen years, and no longer." *Brewer v. Harris*, 5 Gratt. 300. See § 2583, Va. Code, 1904. And see the title APPRENTICES, vol. 1, p. 684.

IV. Capacity to Inherit and Transmit Inheritance.

A. BASTARDS.

The statute of October, 1875, 12 Hen. Stat., p. 138, prescribes the course for descents of real estate. Section 16 enacts that "bastards also shall be capable of inheriting or transmitting inheritance in the part of their mother in like manner as if they had been lawfully begotten of such mother." The statute of October, 1785, has been repeatedly re-enacted in Virginia with some modifications; the clause above cited, however, has always been re-enacted without change. 1 Rev. Code, 1819, p. 357, § 18; p. 523, § 5; Va. Code, 1904, § 2552. It has been decided under this statute that bastards might transmit inheritance collaterally, on the part of their mother. *Hepburn v. Dundas*, 13 Gratt. 219. In *Garland v. Harrison*, 8 Leigh 368, *Parker, J.*, says: "I have no doubt that it was intended by 1 Rev. Code, 1819, p. 257, § 18 (Va. Code, 1904, § 2552), to bestow upon illegitimate children the same capacities of inheriting from or through their mother and passing inheritances to and through her, as they possess under § 19 in respect to both parents; that is to say, to make them in all respects legitimate children of their mother."

Upon a devise to a daughter for life, and at her death the property to be equally divided among her children, an illegitimate child of the daughter will take with her legitimate children. *Bennett v. Toler*, 15 Gratt. 588. See *Thomason v. Anderson*, 4 Leigh 118. See the title WILLS.

Transmitting Inheritance.—The estate of a bastard goes to his maternal

kindred to the exclusion of his paternal kindred. *Fitchett v. Smith*, 78 Va. 524; *Scott v. Baub*, 88 Va. 721, 14 S. E. 178.

Under the statute of Virginia directing the course of descents, 1 Rev. Code, ch. 96; Code, 1887, § 2552, bastards are capable of transmitting inheritance on the part of their mother; and where a bastard dies intestate, leaving no children or descendants, but leaving his mother surviving, and two bastard brothers, by other fathers, the estate will pass to the mother and the two bastard brothers; but the two bastard brothers, being regarded as of the half blood only, will each inherit only half so much as the mother. *Garland v. Harrison*, 8 Leigh 368; *Hepburn v. Dundas*, 13 Gratt. 219; *Thomason v. Anderson*, 4 Leigh 118. See the title DESCENT AND DISTRIBUTION.

B. EFFECT OF LEGITIMATION.

Capacity to Inherit.—Where a bastard marries and dies, leaving a legitimate child; and then the parents of the bastard marry and the father of the bastard, before the father's marriage, and in the lifetime of the bastard, recognizes her as his child; and so recognizes her after his marriage, which is after the bastard's death, it was held, that the child of the bastard may inherit through his mother, from her father. *Ash v. Way*, 2 Gratt. 203. See present statute, Va. Code, 1887, § 2553, which provides that recognition may be before or after marriage. See the title DESCENT AND DISTRIBUTION.

Distribution of Father's Estate.—An illegitimate child, born before the first of January, 1787, of parents who intermarried also before that period (the father, who died in 1799, having recognized the child by his will as his own, though born before wedlock), is entitled to an equal distribution of the father's unbequeathed estate, with his other children born after the marriage,

being legitimated by the act of 1785. *Rice v. Efford*, 3 Hen. & M. 225.

Children legitimated by the act of February 27, 1866, are entitled to share by inheritance in the real estate of their father. *Scott v. Raub*, 88 Va. 721, 14 S. E. 178.

Transmitting Inheritance.—Where a bastard was legitimated by the act of February 27, 1866, the estate of such bastard was divided into two moieties, one for the maternal, the other for the paternal next of kin. *Fitchett v. Smith*, 78 Va. 524.

V. Bastardy Proceedings.

A. OBJECT OF PROCEEDINGS.

It Must Appear That Child Has Been or Is Likely to Be Chargeable to the Parish.—Under § 18, act of 1792, "providing for the poor," etc., a putative father can not be bound to support a bastard child, unless it appear that such child has either actually been, or is likely to be, chargeable to the parish. *Fall v. Overseers of Augusta County*, 3 Munf. 495.

In *Swisher v. Malone*, 31 W. Va. 442, 7 N. E. 439, it is said that a bastardy proceeding is in no sense a criminal prosecution, nor does it pretend to impose upon the accused any punishment for his act. Its only purpose is to prevent the child from becoming a county charge, by compelling the father to bear the burden of its maintenance.

It Is Immaterial Whether Anything Has Been Actually Paid.—Where the county court makes an order against the putative father of a bastard child, that he shall pay to the overseer of the poor twenty dollars a year for seven years, though the overseers of the poor may never have paid anything for the support of the child, they are entitled to recover these annual sums from the putative father. *Willard v. Overseers of Poor of Wood County*, 9 Gratt. 139.

But where a bastard child has never been placed on the parish list, but has

been supported without any engagement of the overseer of the poor respecting it, the court is not authorized by § 18, act of 1792, "providing for the poor," etc., to enter a retrospective judgment, compelling its alleged father to pay for its previous maintenance. *Fall v. Overseers of Augusta Co.*, 3 Munf. 495.

B. WHO MAY INSTITUTE.

Mother.—Under the statutory provisions of this state, a bastardy proceeding can only be instituted by the mother of the child. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See also, *Howard v. Overseers*, 1 Rand. 464; *Mann v. Com.*, 6 Munf. 452; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439.

Married Women.—An order of the county court that the putative father of a bastard child, whose mother was a married woman, who had been deserted by her husband should pay to the overseers of the poor a certain sum annually for six years, commencing from the birth of the child, was held proper, though the statute applies in terms only to single women. 2 Rev. Code, 1819, p. 272, Va. Code, 1873, p. 923, § 1; *Lyle v. Overseers*, 8 Gratt. 20.

C. JURISDICTION.

Act of December 9, 1873, Not Applicable to Causes Then Pending in Circuit Courts.—The act of December 9, 1873, "To amend and re-enact chapter 80 of the Code," touching the maintenance of bastards, was not retrospective and did not take away from the circuit courts their jurisdiction to try warrants of bastardy, which had issued and under which recognizances had been taken, requiring defendants to appear in said courts, before the passage of said act, but the proceeding should conform as far as possible to that act. *Tennant v. Brookover*, 12 W. Va. 337. See the title JURISDICTION.

Justice of the Peace.—The law re-

quires the justice if it be a proper case to issue a warrant directed to the sheriff of or constable in any county where the accused may be, requiring him to be apprehended and taken before a justice of any township of the county in which he may be found. *Tennant v. Brookover*, 12 W. Va. 337. See the title JUSTICES OF THE PEACE.

It is not necessary for the warrant in bastardy proceedings to be returned before the justice of the township or district in which the accused is found. *Tennant v. Brookover*, 12 W. Va. 337.

Appellate Jurisdiction.—The superior courts of law have jurisdiction to grant writs of supersedeas to orders of the county or corporation courts, binding persons accused of being the fathers of bastard children, to support such children. *Mann v. Com.*, 6 Munf. 452.

D. WARRANT.

1. Who Makes Application.

A putative father of a child could be bound to support such child by a warrant issued by a magistrate upon the application of the overseers of the poor, or one of them. *Mann v. Com.*, 6 Munf. 452. Compare *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439.

2. Complaint.

a. Who Makes.

Mother.—According to the statutory provisions the mother prefers charges against the putative father. *Howard v. Overseers*, 1 Rand. 464; *Mann v. Com.*, 6 Munf. 452; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

b. How Made.

Charges Must Be in Writing.—It must appear that the charge before the magistrate by the mother of the bastard child was taken down in writing according to the provisions of the act or the judgment will be reversed and the complaint dismissed. *Howard v. Overseers*, 1 Rand. 464; *Mann v. Com.*, 6 Munf. 452.

c. Residence Required.

If the complainant in bastardy proceedings has resided for a year in the county she may go before any justice in any township thereof and make the accusation. *Tennant v. Brookover*, 12 W. Va. 337.

The law does not require that the woman, who makes the complaint, should have resided a year in the county before the birth of the child, but, "for the preceding year," i. e., for a year preceding her complaint. *Tennant v. Brookover*, 12 W. Va. 337.

Residence Need Not Be Laid.—It is not necessary for the warrant against putative father to show in what district or township the woman resided, nor that she resided in the same district or township in which the justice, before whom she made the complaint, resided. *Tennant v. Brookover*, 12 W. Va. 337.

E. PARTIES.

One or More of the Overseers of the Poor.—A person accused of being the father of a bastard child, can not lawfully be found to support such child, unless it appear that one or more of the overseers of the poor were parties to the cause in the court making the order against such person. *Mann v. Com.*, 6 Munf. 452. See generally, the title PARTIES.

F. CONTINUANCE.

Under the statutory provisions of West Virginia failure regularly to continue a bastardy proceeding from time to time operates as a discharge of the accused, and such proceedings can only be renewed by the mother in the manner provided by law. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See the title CONTINUANCES.

G. RENEWAL OF RECOGNIZANCE BOND.

Failure regularly to require a renewal of the recognizance bond of the putative father in a bastardy proceeding operates as a discharge of the ac-

cused. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See generally, the title BAIL AND RECOGNIZANCE, ante, p. 196.

H. EVIDENCE.

Complainant's Chastity Not in Issue.—In a prosecution for bastardy against the putative father of a bastard child, the character of the complainant for chastity is not involved in the issue. *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439.

Evidence of Previous Sexual Inter-course of Complainant.—Upon the trial in such a proceeding the defendant will not be permitted to introduce evidence to prove that the complainant has at any time had carnal connection with other men, unless such connection has occurred within such a period before the commencement of her gestation that it is possible that one of such other persons may have been the father of the child. *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439. See ante, "Presumption of Legitimacy," II.

To Invalidate Complainant's Testimony.—If a single woman, having been delivered of a bastard child, on her oath, charge a certain man with being its father, and aver that there is no possibility of her being mistaken, it is competent for the person accused to invalidate her testimony by proving that, about nine months before its birth, she was guilty of criminal intercourse with other men. But if the defendant admit that he, also, had criminal intercourse with her about the same time, such proof should be rejected, and he may be confined to proof of the general character of the mother. *Fall v. Overseers of Augusta County*, 3 Munf. 495.

If upon such trial the complainant upon the witness stand, in her examination in chief or upon cross examination, has testified that she has never had connection with any man other

than the defendant, he can not, for the purpose of impeaching her testimony, or of showing that he is not the father of the child, introduce testimony tending to show that she has had such carnal connection with other men, unless it has occurred so near the commencement of her gestation that some person other than the defendant may be the father of the child. *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439.

Admission of New Evidence on Appeal.—On an appeal from an order of a county court, providing for the support of a bastard child, it is irregular for the appellate court to receive new evidence of the fact, which was not before the county court, but the judgment of the lower court will not be reversed for this error alone. *Howard v. Overseers*, 1 Rand. 464.

I. JUDGMENT OR ORDER.

Requiring Bond—Payment of Installments.—It is not error for the court to render a judgment ordering the defendant to pay a certain amount for the maintenance of a bastard child at the end of every year, and requiring the defendant to give bond for the performance of the order, though one of the installments became due six months before the judgment was rendered; for though he can not go back and pay the first installment, yet he can pay it when he executes the bond. *Tennant v. Brookover*, 12 W. Va. 337. See the title JUDGMENTS AND DECREES.

Compelling Compliance with Judgment.—In a proceeding in bastardy against the putative father, after the defendant has been arrested, the case tried before a jury, and judgment rendered upon the verdict, and the defendant has given bond, approved by the court, to insure compliance with the order of the court as to the payment of money for the maintenance of the child, the cause is ended, and the law does not authorize the rearrest of the defendant to compel him to com-

ply with the judgment of the court, or to give a new bond to secure such compliance. *Barbour County Court v. O'Neal*, 42 W. Va. 295, 26 S. E. 182.

When Appellate Court Should Itself Render Judgment.—In a bastardy proceeding, the county court having decided in favor of the putative father, and the overseers of the poor having spread the facts upon the record by an exception, and taken an appeal to the circuit court, that court, upon reversing the judgment of the county court, should not send the cause back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing to be due, but without interest. *Willard v. Overseers of the Poor of Wood County*, 9 Gratt. 139.

J. COSTS.

To Whom Given.—The defendant can not assign it as error that the court gave the costs to the overseers of the poor for the use of the plaintiff instead of to the plaintiff herself since it does not concern him. *Tennant v. Brookover*, 12 W. Va. 337. See the title COSTS.

VI. Compromise.

See generally, the title COMPROMISE.

Mother Has Power to Compromise the Proceedings.—Under the statutory provisions of this state, a bastardy proceeding can only be instituted by the mother of the child; and unless the county court assumes the prosecution thereof, and orders the suit to proceed in its name, she has the right to compromise and dismiss the same. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

Note Given in Compromise.—A note given to a woman in compromise of a bastardy proceeding is binding and valid, and on sufficient consideration, and the payment thereof can not be avoided on the ground that the compromise of such proceeding is contrary to public policy, or against public morals. Nor can the innocence of the putative father be set up as a defense against the recovery of such note, in the absence of fraud on the part of the obligee in procurement thereof. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See also, the title COMPOUNDING OFFENSES.

Battery.

See the title ASSAULT AND BATTERY, vol. 1, p. 731.

Bawdy Houses.

See the title DISORDERLY HOUSES.

BAY CRAFT.—The words "bay or river craft, or other boat," in § 17, ch. 95, Va. Code, 1860, embraces steamboats of 500 tons burthen. *Steamboat Wenonah v. Bragdon*, 21 Gratt. 685. See generally, the title SHIPS AND SHIPPING.

BAY—LANDS OF THE BAY.—The act of 1780 exempts from location and grant all unappropriated lands on the Chesapeake Bay, or the sea shore, or on the shore of any river or creek in the eastern part of the state which have remained ungranted, and have been used as a common to all the good people of the commonwealth. Held, the preamble of the act shows that it was intended to reserve to the poor and others the privilege of fishing; and it was only intended to reserve the shores or the lands on the shores necessary for the enjoyment of the privilege. *Garrison v. Hall*, 75 Va. 150. See generally, the title PUBLIC LANDS.

BE AUTHORIZED.—In *Turner v. Smith*, 18 Gratt. 838, it is said: "The words of the act are that the commissioners shall **be authorized** to bid off the land for the United States. Literally construed, this language is permissive, not mandatory. But such expressions are often construed to be mandatory, and not merely permissive. And it is a general rule of construction, that where power is conferred upon public officers by statute, in language which literally imports permission or authority merely, the language will be construed as peremptory whenever the power is conferred for the benefit of the public or of individuals." See also, *MAY*. And see the title *STATUTES*.

BECOME VACANT.—A constitutional provision was as follows: "The presidents of the county courts, the justices of the peace, sheriffs, prosecuting attorneys, clerks of the circuit and county courts, and all other county officers, shall be subject to indictment for malfeasance, misfeasance, or neglect of official duty, and upon conviction thereof their offices shall **become vacant**." In construing this provision the court said: "If the party happens to be so convicted, that alone divests him of office as an unfit incumbent. He may refuse to yield, and proceedings for actual amotion become necessary; but that would be a proceeding by mandamus or quo warranto, wherein the record of conviction would be the only evidence required to dispossess him of actual possession, and it would not be a proceeding to investigate the original charge. The words **become vacant** show this." *McDonald v. Guthrie*, 43 W. Va. 595, 27 S. E. 845. See also, the title *PUBLIC OFFICERS*.

BEER.—See the titles *INTOXICATING LIQUORS*; *JUDICIAL NOTICE*. *Beer* is defined as "a fermented liquor made from any kind of malted grain, with hops or other flavoring matters; also, as a fermented extract of the roots and other parts of various plants, as spruce, ginger, sassafras." *State v. Oliver*, 26 W. Va. 426. See also, *State v. Thompson*, 20 W. Va. 678.

Bees.

See the title *ANIMALS*, vol. 1, p. 375.

BEFORE.—See *AFTER*, vol. 1, p. 238.

BELIEVE.—In *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 291, it is said: "Another objection to the affidavit is that it says that the affiant '**believes** the plaintiff ought to recover thereon \$116,' the objection being to the word **believes**. There are, it is true, many different degrees of belief. Trifling facts, which would inspire belief in one man, would not in another. Sometimes belief is mere vague, indefinite opinion; in other cases, conviction based on solid facts. Before seizing a man's property, the amount of money, giving the extent of the seizure, ought to be given, and given positively, according to the books. 1 Shinn, *Attachm.* § 135c; 3 Enc. Pl. & Prac. 21, note 3; *Dyer v. Flint*, 74 Am. Dec. 76. But our statute as to attachments in circuit courts allows belief as to amount, and the justices' chapter requires no particular word, only a statement of the amount of the claim; and we can not quash the affidavit for this cause." See generally, the title *ATTACHMENT AND GARNISHMENT*, ante, p. 70.

Under W. Va. Code, 1899, ch. 32, § 7, if a physician gives a prescription to enable one to obtain liquor from a druggist as medicine, either stating that it is, or that he **believes** it is, absolutely necessary as a medicine, and not as a bever-

age, when he either knows, or **believes**, or has reason to **believe** it is not so necessary, or when he does not know it to be so necessary, he violates said statute, and is guilty of the offense it creates. The physician must act in entire good faith. It is his duty to examine and ascertain whether the liquor is absolutely necessary as a medicine. The court said: "The word **believe**, or other qualifying word does not save him. He can not say that his prescription only states a belief, whereas the one which the statute requires is in positive language as to the medical call for the liquor, and he is not guilty of infraction of the statute, because of its nonliteral concurrence with the statute. If he gives a prescription calculated to accomplish a wrongful sale, and it does so, he is guilty, even though the druggist may be indictable also for acting on such a prescription. So the prescription be false, it is enough. It is the physician's duty to know—to ascertain—whether the necessity exists." *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 608, 610. See generally, the titles INTOXICATING LIQUORS; PHYSICIANS AND SURGEONS.

Think.—Under the act of the legislature on the subject of attachments, passed in 1867, an affidavit that the affiant thinks the plaintiff ought to recover the sum claimed, is not equivalent to an affidavit that he **believes** he ought to recover such sum; and is not sufficient to authorize an attachment. *Rittenhouse v. Harman*, 7 W. Va. 380. See generally, the title ATTACHMENT AND GARNISHMENT, ante, p. 70.

Belligerent Rights.

See the title WAR.

BELONG.—By marriage settlement, a wife, at the death of her husband, was to have a "carriage and horses **belonging** to it." It was held, that this embraced only the two horses that had ordinarily drawn the carriage, and not the four occasionally driven to it. *Hearne v. Roane*, Wythe 90.

BELOW.—In *Bradford v. McConihay*, 15 W. Va. 756, it is said: "The only doubtful word in it was the word **below**; and as the court construed the word **below** to mean on the 'lower side,' it could only mean by the words '**below** Lens creek' on the lower or northern side of Lens creek."

Bench Warrant.

See the title WARRANTS, and references given.

BENEFICIAL AND BENEVOLENT ASSOCIATIONS.

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VI. Assessments and Forfeiture of Membership for Nonpayment, 347.**VII. Disposition of Death Benefit, 348.****VIII. Interpleading Rival Claimants of Death Benefit, 350.****IX. Erroneous Instructions—When Not Reversible Error, 350.****X. Evidence, 350.****CROSS REFERENCES.**

See the titles ASSOCIATIONS, vol. 1, p. 843; CHARITIES; CONSTITUTIONAL LAW; CORPORATIONS; COLLEGES AND UNIVERSITIES; FOREIGN CORPORATIONS; HOSPITALS AND ASYLUMS; JOINT STOCK COMPANIES; LABOR; LIFE INSURANCE; MASTER AND SERVANT; MUTUAL INSURANCE; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; RELIGIOUS SOCIETIES; TAXATION.

I. Definitions, Nature and Object.

Benevolent Association.—A society whose principal object is charity and whose revenues, are wholly applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances, is a benevolent association. *Petersburg v. Petersburg Ben. Ass'n*, 78 Va. 431. See post, "Exemption from Taxation," IV.

Surviving Members.—In the act of May 18, 1887, "the surviving members" designates such as are "not deceased," and not those whose certificates are "not lapsed." *Mutual Benefit Life Ins. Co. v. Marye*, 85 Va. 643, 8 S. E. 481. See post, "Assessments and Forfeiture of Membership for Nonpayment," VI.

"Assessments upon Surviving Members."—"Assessments upon surviving members' is understood to be assessments to meet the loss caused by the death of a member, made after his death, upon those members who survive him." *Mutual Benefit Life Ins. Co. v. Marye*, 85 Va. 643, 645, 8 S. E. 481. See post, "Assessments and Forfeiture of Membership for Nonpayment," VI.

Purpose.—Benefit societies are not organized for the purpose of making

money, but for fraternal and benevolent objects. They aim to provide benefits for their members in time of sickness, indemnity to their families upon their death, and to furnish to the working classes and men of moderate incomes a cheap and simple substitute for life insurance. *Knights of Honor v. Oeters*, 95 Va. 610, 615, 29 S. E. 322. See post, "Constitution and By-Laws," II.

Revenues Applied to Charitable Purposes.—The revenues of an association are applied to charitable purposes where they are applied wholly to paying current expenses, the assistance of its indigent members, and the families of such as have died in need. These are charitable purposes, and the relief afforded is none the less charity because confined to the members of the association and the families of deceased members. It is not essential to charity that it shall be universal. *Petersburg v. Petersburg, etc., Ass'n*, 78 Va. 431. See post, "Exemption from Taxation," IV.

II. Constitution and By-Laws.

See post, "Dissolution," V.

The constitution and laws of fraternal societies, to which the members subscribe, by which and all changes of which they agree to be bound, are

contracts, and will be enforced by the courts like all other contracts if not against public policy. *Hechmer v. Gilligan*, 28 W. Va. 750.

It is the policy of the law and the aim of the courts, to substantially uphold the rules and regulations prescribed by the constitution and by-laws of benevolent societies for the purpose of enabling them to attain the objects for which they are organized. *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322. See ante, "Definitions, Nature and Object," I.

Notice of Charter Provision.—Persons dealing with a benevolent society must be presumed to have acted with reference to the provisions of its charter, with notice whereof they are affected. *Whitehurst v. Whitehurst*, 83 Va. 153, 1 S. E. 801.

Rule of Construction.—Where the rights of persons claiming to be beneficiaries under a benefit certificate are called in question by by-laws regulating the payment of the benefit in case of failure on part of the member to designate a beneficiary, such by-law will not be so construed as to divert the fund from the intended beneficiary, and to appropriate it in favor of persons who are not intended to be benefited when they are susceptible of the more liberal construction. *Whitehurst v. Whitehurst*, 83 Va. 153, 1 S. E. 801. See ante, "Definitions, Nature and Object," I.

III. Exemption of Foreign Associations from Deposit of Bonds.

See the title MUTUAL INSURANCE.

IV. Exemption from Taxation.

See the titles CONSTITUTIONAL LAW; TAXATION.

"By the act approved March 16, 1874, (acts 1874-75, p. 219), the real estate owned by Masonic, Odd Fellows and other like benevolent asso-

ciations, where the proceeds arising from said property were devoted exclusively to charitable or school purposes, was exempt from taxation, with the proviso, however, that no lot or building should be exempt which was used wholly or partially for any private purpose, or for profit. But by the act now in force (acts 1876-77, pp. 302, 303), to the proviso contained in the act of 1874, is added these words, 'but where a part of such proceeds are used for charitable or school purposes, then to that extent the said property shall be exempt from taxation.'" *Petersburg v. Petersburg, etc., Ass'n*, 78 Va. 431.

Virginia Code, 1873, ch. 33, § 14, and the acts amendatory thereof, exempting from taxation property owned by benevolent associations, is valid under art. 10, § 3, state constitution. The power of the legislature to exempt from taxation is absolute; but taxation is the rule, exemption the exception, and the intent of the legislature to exempt must be clear. *Petersburg v. Petersburg, etc., Ass'n*, 78 Va. 431.

When by acts 1874-77, ch. 301, § 15, the legislature to the proviso contained in acts 1874-75, ch. 206, § 15, added the words "but where a part of such proceeds are used for charitable or school purposes, then to that extent the said property shall be exempt from taxation," it intended to include property of such associations used for "any private purpose or for profit," and to exempt such property to the extent its proceeds are used for such purposes. *Petersburg v. Petersburg, etc., Ass'n*, 78 Va. 431.

The grant of power to exempt from taxation all property used for benevolent purposes, carries with it the power to exempt property the proceeds whereof is used for those purposes. *Petersburg v. Petersburg, etc., Ass'n*, 78 Va. 431.

A society whose principal object is charity and whose revenues, are wholly

applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances, is within the meaning of the act of March 16, 1874, exempting from taxation property owed by benevolent associations. The fact that the relief afforded is confined to members of the association and the families of deceased members does not exclude a society from the benefit of the exemption. *Petersburg v. Petersburg, etc., Ass'n*, 78 Va. 431. See ante, "Definitions, Nature and Object," I.

V. Dissolution.

When the limit of corporate existence of a benevolent association is fixed, either by charter or general law, the corporation is dissolved when that limit is reached, without any action to that end either by the state, or the members of the corporation. Thereafter it is without power to adopt by-laws, or do other like acts. It can not set up the defense of by-laws made by it as a *de facto* corporation to avoid its contracts. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891.

A provision of the charter of a benevolent society organized and incorporated as the successor of an old association, which had been dissolved by the expiration of the period of its corporate existence as fixed in its charter, bound the new association to pay all the liabilities of the old. It was held, that this provision did not revive the old society or give any life or effect to a by-law adopted by it after its legal dissolution. *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891. See ante, "Constitution and By-Laws," II.

VI. Assessments and Forfeiture of Membership for Non-payment.

See the title MUTUAL INSURANCE.

Notice.—"Parties have the right to agree what notice shall be given of assessments." They may agree that notice may be given by mail. *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254.

Notice to Assignee.—The assignment of the certificate to the complainant with the consent of the defendant company placed him in the same condition and position with respect to all rights and liabilities under it that the insured had before the transfer. The complainant, being the assignee of the certificate, and responsible for the assessment made, was the proper party to be notified of such assessments. *Survick v. Valley Mut. Life Ins. Ass'n*, 2 Va. Dec. 254, 256.

Forfeiture of Membership.—Where it appears that a member of a benefit society was duly suspended at the time of his death for nonpayment of assessments, there can be no recovery on the certificate on his life which was payable only on condition of his being in good standing at the time of his death. *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322. See also, *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254. See ante, "Definitions, Nature and Object," I.

Failure to Receive Notice by Mail.—Where the by-laws of a benefit association provide that failure to pay assessments within thirty days from date of mailing notice of same to the address of the holder of a benefit certificate forfeits all rights under the benefit certificate, such a failure to pay is fatal, where a notice is sent, but never received by the assured. *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254.

Where the parties have agreed that notice may be given by mail it is sufficient to prove the mailing; and its failure to reach the assured by reason of its miscarriage in the mail will not excuse the nonpayment of the assessment within the time prescribed. *Sur-*

vick v. Valley Mut. Life Ass'n, 2 Va. Dec. 254, 256. See post, "Evidence," X.

Fact of Notice Must Be Alleged and Proved.—Under the decision in *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254, it would seem that where the nonpayment of an assessment is relied upon by a benevolent association to defeat an action to compel the reinstatement of or a recovery upon a benefit certificate, the fact of the giving of notice in accordance with the by-laws of the association must be alleged and proved affirmatively.

Waiver of Forfeiture.—The forfeiture of a certificate in a benefit society is not waived by the fact that the financial reporter of a subordinate lodge is in the habit of receiving payment of assessments after the end of the month for which they are levied, and within which they are payable, under the penalty of suspension and a forfeiture of the benefit certificate, when there is no evidence that the supreme lodge, which is sued on the certificate, is aware of such habit. *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322.

Where the arrears for which a member of a benefit society stands suspended, and his benefit certificate forfeited, have not been paid at the time of his death, no waiver of the forfeiture can be implied from the fact that the local treasurer had previously been in the habit of receiving payment of such arrears after the dates at which they were payable. *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322.

Assessment in Violation of Charter.—A benevolent association can not declare a benefit certificate forfeited for the nonpayment of an assessment levied in violation of the charter and by-laws of the society. *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254.

Reinstatement.—A member of a benevolent association can not maintain an action to compel the reinstatement

of a benefit certificate which has been forfeited by nonpayment of an assessment after the expiration of the time fixed by the by-laws of the association within which such action may be brought. *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254.

Limitation of Right to Question Assessment.—A limitation of six months in the by-laws of a benevolent association, within which an assessment may be questioned, is valid. *Survick v. Valley Mut. Life Ass'n*, 2 Va. Dec. 254. See also, *Easley v. Valley Mut. Life Ass'n*, 91 Va. 161, 21 S. E. 236.

VII. Disposition of Death Benefit.

Appointing Beneficiaries.—Ordinarily a member of a benefit society has no property in the policy but only the power of designating a beneficiary under his certificate by a method prescribed by the charter and by-laws of the society. Such designation when made is the mere execution of a power of appointment. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364. See the title POWERS.

Not an Assignment.—Where a member of a benefit society has the power of designating a beneficiary under his certificate by an assignment, in a method prescribed by the charter and by-laws of the society, such designation, when made, is not an assignment, although so called, but is the mere execution of a power of appointment, and it is not necessary that either the certificate, or the so called assignment, should be delivered to the beneficiary. The retention of the certificate is a necessary incident of the power to change the beneficiary. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

Manner of Exercise.—Where the assured under a benefit certificate has the power to change the beneficiary at pleasure, provided the appointee is selected from the authorized class, the power of appointment or right to dis-

pose of the fund may be exercised in any manner agreed on in the contract of insurance. If the contract provides that it may be done by an assignment of the certificate, that method should be pursued. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364. See also, *Whitehurst v. Whitehurst*, 83 Va. 153, 1 S. E. 801.

Effect.—Where a contract of insurance in a beneficial society provides for the designation or appointment of a beneficiary from an authorized class, by an assignment of the benefit certificate, by such an appointment the member does not transfer his right or estate in the certificate, or the fund to his beneficiary, but only executes a power. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364. See the title POWERS.

Delivery of Certificate.—"Where a member of a society has appointed a beneficiary in any of the modes pointed out in the contract of insurance, it is not necessary that the certificate of membership should be delivered to the beneficiary so named. The claim of the beneficiary in such case is not based on a contract, but upon the appointment and direction for the payment of the fund." *Niblack on Benefit Societies*, § 149; *Joyce on Insurance*, §§ 743, 849." *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

Change of Beneficiary.—The general rule is, that a policy of insurance and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his by deed or will, to transfer to any other person the interest of the person named in the policy. The person, whose life is insured, is under no obligation to pay the premiums, unless he has covenanted so to do; but if he does so, the person originally designated in the policy will derive the benefit. The change of designation

can only be made by the person originally designated, therefore such person must concur in the change. But fraternal societies with a constitution and by-laws are on a different basis. If the constitution and laws of a benevolent society permit, the holder of a benefit certificate may change the name of his beneficiary at will without the consent of the person previously or originally designated. *Hechmer v. Gilligan*, 28 W. Va. 750.

Where a member of a benefit society has the power of changing his beneficiary under his certificate by a method prescribed by the charter and by-laws of the society such change is not an assignment, although so called, but is the mere execution of a power of appointment, and it is not necessary that either the certificate or the so called assignment should be delivered to the beneficiary. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364. See the title POWERS.

Retention of Certificate.—Where a member of a benefit society has the power of changing the beneficiary under his certificate, at pleasure, by an assignment of the certificate in a method prescribed by the charter and by-laws of the society provided the appointee is selected from an authorized class, the retention of the certificate is a necessary incident of the power to change the beneficiary. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

Testamentary Indorsement.—The holder of a benefit certificate in a benevolent association by an indorsement thereon which was testamentary in character but which had not been and could not be admitted to probate, attempted to name a legatee or beneficiary of the fund and also to name an executrix. It was held, that any payment made to the person therein called the executrix, was a mere nullity and would not relieve the association from payment of the certificate to the

proper beneficiary thereunder. *Grand Fountain U. O. T. R. v. Wilson*, 96 Va. 594, 32 S. E. 48. See post, "Evidence," X.

Designation in Pursuance of Contract.—Where the assured is under contractual obligation to a particular beneficiary and exercises the power of appointment in his favor, he can not defeat the equities of the first appointee by selecting a second beneficiary, who is a mere volunteer, or acquires his interest with notice of the pre-existing equities. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

Where in the absence of contract, payments are made by a husband on a certificate in a benefit society issued to the wife, they are regarded as gratuitous, and create no equities in favor of the husband. Such acts can not place the wife under contractual obligation to exercise her power of appointment in his favor. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 36.

Failure to Designate.—Charter of this society provides that on death of member "the fund to which his family is entitled shall be paid as designated in application for membership, and this being changed by death, or otherwise impossible, it shall go: First, to the widow and infant children," and then to others in order named. W., in his application, directed that the fund should be paid as specified in his will. He died without a will, leaving a widow, but no infant child. In a controversy between his administrator and widow, it was held, that the widow is entitled to the fund. *Whitehurst v. Whitehurst*, 83 Va. 153, 1 S. E. 801.

VIII. Interpleading Rival Claimants of Death Benefit.

Section 2998, Va. Code, 1887, § 2998, Va. Code, 1904, permits a defendant association to require rival claimants of the proceeds of a benefit certificate to interplead and assert

their titles to the fund. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

Where a mutual benefit association, which is incorporated, is liable to one of two or more claimants for a death benefit, such benefit association can file a bill of interpleader to have the defendants set up their respective claims. *Hechmer v. Gilligan*, 28 W. Va. 750.

Where a mutual benefit association, which is incorporated, is liable to one of two or more claimants for a death benefit, the treasurer of such association can not file a bill of interpleader to have the defendants set up their respective claims, but such bill can be filed in such case only by the corporation itself. *Hechmer v. Gilligan*, 28 W. Va. 750.

Quære, can a mutual benefit association, which has paid a portion of a death benefit to two or more conflicting claimants, afterwards file a bill of interpleader to settle the question, to whom the residue should be paid? *Hechmer v. Gilligan*, 28 W. Va. 750.

IX. Erroneous Instructions—When Not Reversible Error.

In an action to recover upon a benefit certificate issued by a benevolent association a verdict will not be set aside for alleged error in instructions when the court can see that no other verdict could properly have been rendered under correct instructions. *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

X. Evidence.

An indorsement on a benefit certificate by the beneficiary therein which is testamentary in its character, but which has not been, and can not be, admitted to probate, is not admissible in evidence to show title in the legatee named in said indorsement. Nor, in an action on the certificate, is evidence relevant that merely tends to show that

the indorsement was made in the presence of witnesses, at the special instance and request of the beneficiary, and that she made her mark as a signature thereto. A will must be proved before a probate court in a proceeding for that purpose. *Grand Fountain U. O. T. R. v. Wilson*, 96 Va. 594, 32 S. E. 48. See ante, "Disposition of Death Benefit," VII. See the title **WILLS**.

Where the by-laws of a benefit association provide that failure to pay

assessments within thirty days from date of mailing notice of same to the address of the holder of a benefit certificate forfeits the benefit certificate, evidence to prove the mailing of the notice of an assessment for nonpayment of which a forfeiture has been declared, is admissible in an action to compel the reinstatement of the certificate or to recover upon it. *Survick v. Valley Mut. L. Ass'n*, 2 Va. Dec. 254. See ante, "Assessments and Forfeiture of Membership for Nonpayment," VI.

Beneficiaries in Insurance.

See the title **INSURANCE**, and references given.

BENEFIT.—See **PECULIAR BENEFIT**. See generally, the titles **EMINENT DOMAIN**; **SPECIAL ASSESSMENTS**.

BENEFIT OF CLERGY.—Separate verdicts found each of the prisoners guilty of feloniously stealing a horse of the value of £20, on September 29, 1793. Prisoners severally prayed **benefit of clergy**. Held, the prisoners are entitled to the **benefit of clergy**; the court ought not to proceed to judgment, and that a new indictment ought not to be preferred. *Com. v. Stewart*, 1 Va. Cas. 114.

In *Commonwealth v. Posey*, 4 Call 109, it was held, that a prisoner in case of arson was not entitled to **benefit of clergy**, on the authority of *Prowler's case*, 11 Co., 29.

Section 3882, Va. Code, 1904, provides: "There shall be no plea of **benefit of clergy**, nor any distinction between murder and petit treason; but the last mentioned offense shall be punished as murder."

Benevolent Associations.

See the title **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, ante, p. 344.

Bequeath.

See the title **WILLS**.

Bequests.

See the titles **CHARITIES**; **WILLS**.

BERKELEY SPRINGS.

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III. Bath Keeper, 355.

CROSS REFERENCES.

See the titles CORPORATIONS; TRUSTS AND TRUSTEES.

I. Title and Ownership.

The property known as the "Berkeley Springs" is the property of the state of West Virginia, the legal title being in the corporation known as the "Trustees of the Berkeley Springs," in trust for the public, as provided by cn. 202, acts, 1882. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599. See post, "In General," II, A.

How Acquired.—By the act of October, 1776, the Virginia legislature (9 Hen. St., p. 247), it would seem, simply seized fifty acres of the land of Thomas, Lord Fairfax, the celebrated proprietor of the Northern Neck of Virginia, by vesting it in trustees in trust to and for the public use and benefit and for no other purpose. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

The act reserved to Lord Fairfax one large and convenient spring suitable for a bath. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

The commonwealth of Virginia long claimed it to be its property and it was in fact long held in actual possession by it for public use. It is claimed to be the property of the state in an act passed by the Virginia legislature in March, 1857. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

"It passed to West Virginia by the legislative grant of Virginia to the new

state, found in ch. 68, acts, 1862-63, of the legislature of the reorganized government of Virginia. West Virginia has always claimed it." A resolution of the West Virginia legislature of 1868, p. 171, asserts that it is the property of the state and calls on the trustees for a plan to secure to the state the revenue from the property. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

Public Title Unquestionable.—"The public title can not be shaken at this late day. Perhaps, it was once questionable. Was that old act of 1776 one of forfeiture or confiscation, or did the Lord Fairfax consent to it? We do not know. If he consented, it does not appear." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 600.

"We find, by the two states, unbroken possession for 119 years, with claim of title and ownership, and no one disputing it. Of course, under the statute of limitations, the state acquired indefeasible title. And so, from this great lapse of time, we would conclusively presume either a grant or a dedication from Lord Fairfax, either or both, as might be requisite to sustain the state's title." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 600. See the titles ADVERSE POSSESSION, vol. 1, p. 199; LIMITATIONS OF ACTIONS.

II. Corporation of Trustees.

A. IN GENERAL.

See ante, "Title and Ownership," I.

By the act of October, 1776, the Virginia legislature (9 Hen. St., p. 247) provided that all the "Warm Springs," as they were then called, should be governed by a board of trustees whom it authorized to lay off quarter-acre lots with convenient streets and to sell the lots for building purposes, to "accommodate numbers of infirm persons who frequent those springs yearly for the recovery of their health." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

An act of the Virginia legislature, passed in March, 1857, declared that the public property in the town of Bath, in the county of Morgan, known as the "Public Square and Berkeley Springs," shall be vested in and governed by a board of trustees, whom it named, and whom it constituted a corporation by the name of the "trustees of the Berkeley Springs," and made sundry provisions of regulations. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

An act of the West Virginia legislature of 1868 recognizes the existence of the board of trustees of the Berkeley Springs and their control of the property. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

"Chapter 145, acts, 1872, declares: 'The public grounds in the town of Bath, in the county of Morgan, known as the "Public Square," and the medicinal springs and improvements thereon, shall be and continue under the management and control of a board of trustees, in trust as heretofore, for the public use and benefit.' It terminates at a fixed time the powers of the then trustees, and names others, and declares them and their successors a corporation by the name of the "Trustees of the Berkeley Springs," and makes divers provisions for management."

Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 600.

"By ch. 202, acts, 1882, the legislature again declares that the property, in the language of the act of 1857, shall be held by trustees for public use, and appoints trustees, and declares them a corporation." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 600.

B. POWER TO DELEGATE AUTHORITY.

The corporation of trustees of the Berkeley Springs property can not transfer to another the powers vested in it to be exercised for the public. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

C. ALIENATION BY TRUSTEES.

1. Without Legislative Consent.

See post, "Notice of Limitation of Power," II, C, 2; "Suits to Contest," II, C, 3.

The corporation of trustees of the Berkeley Springs can not make a lease of its property necessary to enable it to execute its functions, without legislative consent. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

By ch. 231, acts, 1872-73, the legislature authorized a lease or mortgage of the property. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 600.

Power of Alienation Forbidden.—

The act giving life to this corporation, and direction to its trustees, * * * after creating the corporation, and vesting it with its property and powers, inserts a proviso—I say a proviso—'that the said trustees shall have no power to mortgage or otherwise alien the public property aforesaid, nor shall they grant to the proprietor of any hotel, or any other person, any special or exclusive privileges in the use or enjoyment of said springs or public grounds.' The word 'alien' is used. My search in Abbott's, Anderson's, Bouvier's and Black's Law Dictionaries does not tell me that the word means anything in law but to transfer

property, thus covering a lease as well as conveyance in fee. The transfer of an estate for years as much falls under the broad word 'alien' as a transfer of the fee. The lease conveys the very title, not in fee, but the whole title, for its terms. It is absolute for that term, not a mere deed of trust, with power to end it by redemption. A particular estate is carved out of the fee, and title to it conveyed." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 603.

The corporation known as the trustees of the Berkeley Springs, executed a lease of the property to one "Daniel Cornelius, or his assigns * * * for the term of 99 years, and, for the improvement thereof and the public use and managing and controlling it, Cornelius and his assigns were, by the agreement, allowed to tear down and remove the present bath houses, beautify the grounds, erect new bath houses and a hotel, and manage and control the public property, charging certain rates for certain baths, and certain other rates, to be fixed by Cornelius, for other baths, receiving the returns from the property, and paying the trustees 1 per cent. of net profits from the baths." It was held, that this was ultra vires and void as under the common law of corporations and as under the act which constitutes the charter of the corporation known as the "Trustees of the Berkeley Springs." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

"Surely, a conveyance of the absolute possession for 99 years is an alienation. It is certainly so within the sense of this proviso; for it can not be thought that the legislature intended to forbid only the transfer of the fee, and yet allow an absolute lease, carrying the possession and use for so long a period as 99 years. The word 'otherwise' here has force. This language is 'mortgage or otherwise alien,' meaning in any wise alien. The act of 1857 contained this same prohibition. The

act of 1873 gave authority to lease, notwithstanding any prior law; but the act of 1882 returned to the policy of the act of 1857, by reinserting the same prohibition as that found in the act of 1857, repealing all acts in conflict, thus affording a reason to say that by the late act it was meant to repeal the act of 1873." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 603.

"The trustees had no color of authority to make this lease. Whether it was advisable or not we have no right to say. No power could authorize it but the legislature." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 603.

"This lease, besides giving Cornelius sole control, confers on him special and exclusive hotel privileges, contrary to the meaning of the act of 1882." *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 603.

2. Notice of Limitation of Power.

See ante, "Without Legislative Consent," II, C, 1; post, "Suits to Contest," II, C, 3.

Persons dealing with the corporation of trustees of Berkeley Springs must take notice of what is contained in the law of its organization, and must be presumed to be informed of the restrictions annexed to the grant of power by the law by which the corporation is authorized to act. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599. See the title CORPORATIONS.

3. Suits to Contest.

See ante, "Without Legislative Consent," II, C, 1; "Notice of Limitation of Power," II, C, 2.

a. Who May Sustain.

Where the corporation of trustees of the Berkeley Springs executes a lease of the property vested in it by the state, which is ultra vires, only the state or the corporation can sustain a suit to contest it. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599. See the title CORPORATIONS.

b. Corporation a Necessary Party.

See the title PARTIES.

In a suit to annul an act of the corporation of trustees of the Berkeley Springs as ultra vires, the corporation must be a party. *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599.

III. Bath Keeper.

Section 5, ch. 202, of the acts of 1882, provides that a bath keeper shall be elected annually by the board of trustees of the Berkeley Springs property, who shall continue such until the election of his successor. *Hunter v. Berkeley Springs*, 47 W. Va. 343, 34 S. E. 729.

Section 5, ch. 202, acts, 1882, in providing that the trustees of Berkeley Springs shall annually elect a bath keeper who shall continue such until the election of his successor, is merely

directory as to the time of such election, and was not intended to render such bath keeper, when elected, independent of such trustees for the annual period of one year, but was intended to place his election and after continuance in office at their pleasure for the better promotion of the purposes of their trust. *Hunter v. Berkeley Springs*, 47 W. Va. 343, 34 S. E. 729.

"The right to hold over is 'held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor attaches, as before and during such term,' and continues 'until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his selection, or which, by the law, is entitled to elect a successor.'" *Hunter v. Berkeley Springs*, 47 W. Va. 343, 34 S. E. 729.

BEST AND SECONDARY EVIDENCE.**I. The "Best Evidence" Rule, 356.**

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CROSS REFERENCES.

See the titles EVIDENCE, and references there given; PRODUCTION OF DOCUMENTS; PROFERT AND OYER; RECORDING ACTS; RECORDS; WITNESSES.

As to proof of execution of documents, see the title EXECUTION AND PROOF OF DOCUMENTS. As to proof of foreign judgments, see the title FOREIGN JUDGMENTS. As to proof of foreign laws, see the title FOREIGN LAWS. As to establishment of lost papers, see the title LOST INSTRUMENTS AND RECORDS.

I. The "Best Evidence" Rule.

A. STATEMENTS OF GENERAL RULE.

As a general rule, the best evidence which the nature of the case admits of, must be produced. *State v. Cain*, 9 W. Va. 559; *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757; *Lee v. Tapscott*, 2 Wash. 276; *Gilliam v. Perkinson*, 4 Rand. 325; *Pendleton v. Com.*, 4 Leigh 694, 26 Am. Dec. 342; *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105; *Ben v. Peete*, 2 Rand. 539; *Jones v. Com.*, 79 Va. 213; *Hubbard v. Kelley*, 8 W. Va. 46.

"Every person offering testimony shall produce the best evidence the nature of the thing will admit of; that is, as explained by the authorities, that no evidence shall be brought, which from the nature of the thing supposes a still greater evidence behind, and in the party's possession or power. (Buller's N. P. 293.) But if it does not appear from the nature of the thing, or otherwise judicially to the

court, that there is better evidence in the possession, or power of the party, then is the evidence, if otherwise unexceptionable, admissible." *Warner v. Com.*, 2 Va. Cas. 95, 98; *Jones v. Com.*, 79 Va. 213, 218.

Rule Refers to Quality, Not Weight, of Evidence.—It is a rule of evidence that the best evidence of which the case in its nature is susceptible should be required. But when there is no substitution of evidence, but only a selection of the weaker instead of the stronger proof, or an omission to supply all the proofs capable of being produced, the rule is not infringed. *State v. Cain*, 9 W. Va. 559.

Thus, on the trial of an indictment for selling intoxicating liquors to a minor, it is competent for the minor on his examination as a witness in behalf of the state to state his age to the jury, and such statement may be considered by the jury, notwithstanding there is other evidence tending to show that his father and mother are living. *State v. Cain*, 9 W. Va. 559.

Rule Applicable to Criminal Cases.—

"The general rule, which runs alike through civil and criminal proceedings, that the best evidence which the nature of the case admits of must be produced, is intended to preclude all testimony, which from its very nature supposes that the party offering it has it in his power to produce better evidence." *Pendleton v. Com.*, 4 Leigh 694.

B. APPLICATIONS OF RULE.**1. Proof of Contents of Private Writings.****a. General Rule.**

When the contents of a writing are to be proved, the writing itself is the best evidence, and must be produced or its absence satisfactorily accounted for, before other evidence of its contents will be received. *Ben v. Peete*, 2 Rand. 539; *Lunsford v. Smith*, 12 Gratt. 554; *Pidgeon v. Williams*, 21 Gratt. 251; *Taylor v. Peck*, 21 Gratt. 11; *Bowles v. Elmore*, 7 Gratt. 394; *Dawson v. Graves*, 4 Call 127; *State v. Gillaspie*, 47 W. Va. 336, 34 S. E. 733.

"The instrument itself is the best evidence of itself and its contents, and therefore its production can never be dispensed with unless unavoidable." *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

Book Entries.—Parol evidence of the contents of a private entry in a book by a person deceased, of payments of money to his children, neither the book nor a copy of the entry being produced, nor the book verified, is not admissible to show such payment, even if the book itself would be evidence. *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 639. See also, *Vinal v. Gilman*, 21 W. Va. 301; *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

Entries on the books of a bank should be proved by a production of the books themselves, and parol testimony is inadmissible unless the absence of the books has been satisfac-

torily accounted for. *Pidgeon v. Williams*, 21 Gratt. 251.

Written Contract.—Parol evidence is inadmissible to prove the contents of a written contract, unless the nonproduction of such contract is first duly accounted for. *Taylor v. Peck*, 21 Gratt. 11, 18.

Contents of Permit.—A witness can not be received to give evidence of the contents of a permit, not proved to have been lost. *Dawson v. Graves*, 4 Call 127.

Order for Sale of Liquor to Minor.—

On the trial of an indictment for selling spirituous liquors to a minor, it is not error to exclude testimony relative to a written order from the parent of the minor to the dealer for the liquor, in the absence of such order, or of some reason for its nonproduction. *State v. Gillaspie*, 47 W. Va. 336, 34 S. E. 733.

Power of Attorney.—Where an agent to sell land, covenants to convey the land to the purchaser "according to a power of attorney given him" by the vendor, this is a covenant for general warranty unless the power of attorney referred to in the covenant, confined the attorney to a special warranty, and it was shown to the purchaser at the time of the contract, or its contents fairly and truly stated to him; and the power of attorney not being produced and there being no proof of its being lost or mislaid, parol evidence is not admissible to prove that the vendor and purchaser contracted for a deed with special warranty. *Rucker v. Lowther*, 6 Leigh 259.

Without proof of its loss, or inability to produce the original power of attorney, no copy thereof can be admitted as evidence, unless it be such a copy as is provided for by W. Va. Code, 1868, ch. 130, § 20. *Dickinson v. Clarke*, 5 W. Va. 280.

Appeal to Commissioner of Internal Revenue.—The plaintiff in an action against a United States internal reve-

nue collector to recover taxes illegally collected, having testified that he made the appeal to the commissioner of internal revenue, required by the nineteenth section of the internal revenue act of 1866, in writing, should produce the written appeal in evidence, or an authentic copy thereof, or show good cause for its absence. *Hubbard v. Kelley*, 8 W. Va. 46.

In a prosecution for forgery the alleged forged paper must be produced or its nonproduction satisfactorily accounted for by showing it to be lost, destroyed, or in the hands of the accused or his friends, before evidence of its existence, character and contents is admissible. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561. See also, *Pendleton v. Com.*, 4 Leigh 694. See the title **FORGERY AND COUNTERFEITING**.

Copy.—Testimony in relation to the correctness of a copy of a paper is not admissible unless the absence of the original paper is accounted for. *Lunsford v. Smith*, 12 Gratt. 554.

b. Exceptions to Rule.

(1) Writings Collateral to Main Issue.

Tenancy Proved without Production of Lease.—If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. *Taylor v. Peck*, 21 Gratt. 11, 19.

Though a tenant holds under a written lease, he may, in an ejectment by his landlord against him, without producing the lease or accounting for its nonproduction, introduce receipts of his landlord for rent, showing that at the time the action was instituted, he held as tenant and his year was not out. *Taylor v. Peck*, 21 Gratt. 11.

(2) Parol Admissions of Contents of Writings.

A parol admission by a party to a suit is always admissible in evidence against him, although it relates to the contents of a deed or other written instrument, and such contents are directly in issue in the cause. *Taylor v. Peck*, 21 Gratt. 11. See the title **DECLARATIONS AND ADMISSIONS**.

"The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so." *Taylor v. Peck*, 21 Gratt. 11, 21.

2. Public Documents or Records.

See the title **RECORDS**

a. Statutory Provisions.

Under statutes in Virginia and West Virginia a copy of any record or paper in the clerk's office of any court, or in the office of the secretary of the state, treasurer or auditor, or surveyor of lands in any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. W. Va. Code, ch. 130, § 5; Va. Code, 1887, ch. 164, §§ 3334, 3335; *Battin v. Woods*, 27 W. Va. 58; *Hinchman v. Ballard*, 7 W. Va. 159; *Dickinson v. Railroad Co.*, 7 W. Va. 390. See *Phares v. State*, 3 W. Va. 567.

b. Judicial Records.

Proof in Same Court.—At common law the original record must have been produced wherever the cause was in the same court, a copy, however authenticated, being under no circumstances admissible, unless the original

were lost. *Burk v. Tregg*, 2 Wash. 216; *Anderson v. Dudley*, 5 Call 529. But see W. Va. Code, ch. 130, § 5; Va. Code. 1887, §§ 3334, 3335.

Records of Other Courts.—"The usual mode of proving the record of another court, is by the production of a certified copy. But the copy is not produced in such cases, because it is better evidence than the original. It is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place; and as one court will not take judicial notice of the records of another, the certificate supplies the necessary authentication. But the original, if properly authenticated, is equally admissible, and is, in its nature, the highest evidence." *Ballard v. Thomas*, 19 Gratt. 14.

Copies of Records under Statutes.—W. Va. Code, ch. 130, § 5, providing that "a copy of any record or paper in the clerk's office of any court, or in the recorder's office of any county, or in the office of the secretary of state, treasurer, or auditor, or in the office of surveyor of lands of any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original," so far as it applies to records of courts, is applicable only to the records of courts within the state. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Copies of Virginia Judgments.—A copy of an order of a county court in Virginia, attested by the clerk of such court, may be received and read in evidence in lieu of the original by the courts of West Virginia under the provision of the act of 1866. (W. Va. Code, 1868, ch. 130, §§ 5, 6, 7.) *Hinchman v. Ballard*, 7 W. Va. 152. See also, *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894.

Copies of Judgments of Federal Courts.—W. Va. Code, 1868, ch. 130,

§ 5, authorizing a certified copy to be given in evidence in lieu of the original record, applies as well to the records of a district court of the United States held within the state, as to the records of the state courts, and a copy of a judgment rendered in the district court of the United States within the state, attested by the clerk of the court in accordance with the provisions of the above section of the Code, will ordinarily be received as evidence of the existence of such judgment. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Abstract of Judgment.—An abstract as applied to records ordinarily means a mere brief, and not a copy of that from which it is taken, and a writing being only an abstract of an alleged judgment, and attested as an abstract, although attested by the clerk of the court in which the judgment was rendered, can not ordinarily be read as proof of the alleged judgment, where the existence of the judgment is denied. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Proceedings in Courts of Foreign Countries.—In *Young v. Gregorie*, 3 Call 446, it was held, that letters and depositions were admissible to prove that an attachment had been levied on the plaintiff's property in a foreign country, on the ground that it was not always in the power of a party to procure copies of such proceedings, and that often they could be proved in no other way than by depositions and testimony dehors the proceedings. See also, *Hadfield v. Jameson*, 2 Munf. 53. See the titles FOREIGN JUDGMENTS; RECORDS.

Naturalization—Absence of Record.—The law requires that an alien should be naturalized in a court of record, and his admission to citizenship must be a judgment of such court; therefore, if it is claimed in any case that an alien has been naturalized in a certain court and it be shown that if naturalized at all he was naturalized in that court,

and the records of such court are produced and an examination of them shows that no entry was made on the record naturalizing such alien, it can not be proven by parol evidence that such alien was admitted to citizenship in such court, but by inadvertence or for any other reason there was no entry made of it. *Dryden v. Swinburne*, 20 W. Va. 89.

Testimony by Judge as to Fact within His Own Knowledge.—In an action against a county for a balance due on a contract to construct a bridge, a member of the county court was allowed to testify that the court had accepted the bridge, without reading the order from the order book, as the acceptance was a fact within his knowledge. *Chenoweth v. County Court*, 32 W. Va. 628, 9 S. E. 910.

c. Records Other than Judicial.

In General.—Where the law requires a certain document or record to be kept by a public officer as a memorial of a fact, such document or record is the best evidence of such fact and is the only primary proof thereof. *Battin v. Woods*, 27 W. Va. 58.

Decision of Internal Revenue Commissioner on Appeal.—In a suit under § 19 of the U. S. Rev. act of 1866, to recover taxes illegally collected, in the absence of proper evidence of the appeal required by the act, a letter purporting to be that of the commissioner of internal revenue, to the plaintiff, saying that his claim had been rejected, but not showing on its face that it was relevant to the issues, and no legal evidence being introduced to connect it with the subject matter of the suit, is not admissible. The presumption is that if an appeal was properly taken by the plaintiff, according to the act of congress, in such cases, and the commissioner decided the appeal overruling the same, that he made an official record of the same, and the date thereof, in his office; and an official copy of the official entry, so

made by the commissioner, is the best evidence of such decision, and the letter of the commissioner can not be received as evidence to prove the decision of the commissioner, or the date thereof, unless the absence of the best evidence is first properly accounted for. *Hubbard v. Kelley*, 8 W. Va. 46.

Proceedings of Board of Registration.—It is error to admit as evidence a certified list of voters ordered by the board of registration to be stricken from the registry; only the record of the proceedings of the board, or a copy thereof, properly certified to be a copy, is admissible as evidence. *Phares v. State*, 3 W. Va. 567.

Appointment and Qualification of Executor.—In an action for a devastavit by a creditor of a testator against the executor and his sureties, the settled account of the executor was introduced, which showed a credit to the executor of money paid a legatee. The executor proposed to show by parol proof, that the legatee paid was not the legatee of his testator, but of a person of whom his testator was executor, and that his testator had received sufficient assets to pay the legacy, but had not done it. It was held, that the fact of such a legacy, and that the executor's testator was the executor, should be proved by the will and the record of his qualification; and parol evidence was inadmissible for that purpose. *Millers v. Catlett*, 10 Gratt. 477.

Copy of Contract Filed in Clerk's Office.—Under W. Va. Code, ch. 130. § 5, which provides that the copy of any record or paper in the clerk's office of any court attested by the officer in whose office the same is, may be admitted in evidence in lieu of the original, a copy of a contract and specifications made by the county court for building a bridge, may be read in evidence to the jury, especially when the order of the county court awarding the contract directed that the contract be filed in the office of the clerk of the

court. In such case the certified copy made by the clerk is the best evidence obtainable. *Chenowith v. County Court*, 32 W. Va. 628, 9 S. E. 910.

The entry in a "fiduciary book," in which Va. Code, 1849, ch. 132, § 1; Va. Code, 1860, ch. 132, § 1, required the clerk of the court to keep a record of personal representatives and their sureties, is, in the absence of the bond and other records, which were lost during the war, sufficient to show the fact of the suretyship of the persons named therein. *Timberlake v. Jennings*, 1 Va. Dec. 741.

Abstracts from Records of Marriages and Births.—Under W. Va. Code, ch. 63, § 27, an abstract from the books of the county court containing a record of marriages and births, duly certified by the proper officer having the custody thereof, *prima facie* evidence of the facts therein stated, and primary, not secondary, evidence of such facts. *Blair v. Sayre*, 29 W. Va. 604, 2 S. E. 97.

Certificate of Assessment.—A document not purporting to be a copy or abstract from the assessor's personal property list, but merely a certificate of a clerk of a county court of the assessment or nonassessment of a person or his property in such book, is not admissible in evidence. The personal property book itself is primary evidence. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21.

Transcript of Property Assessment in Foreign State.—A paper purporting to be the assessment of the property of a person in a foreign state, certified by the register of the county as a correct transcript of the taxable property of such person, is not admissible in evidence in the absence of evidence that by the law of the foreign state such assessment is a record, and that a copy thereof is evidence. *Trogon v. Com.*, 31 Gratt. 862.

List of Land Redeemed after Tax Sale.—Where lands have been sold for

the nonpayment of taxes and purchased by individuals, and the recorder or the clerk of the county court of the proper county has included the same in the list of redemptions required by § 16, ch. 31, W. Va. Code, to be made by him, such list is primary evidence of the redemption of the lands specified therein, and a copy thereof attested by the clerk of the county court in whose office the same is, may be admitted in evidence in lieu of the original. *Battin v. Woods*, 27 W. Va. 58.

Proof of Public Roads.—Roads, mills, bridges, etc., being established by matter of record, matter of record only can be admitted to prove whether a bridge was a public or private, bridge, and parol evidence is inadmissible. *Brander v. Chesterfield Justices*, 5 Call 548, 554.

Return on Execution.—The best evidence of a return on a *fieri facias* is the writ of *fieri facias* itself, with the indorsement on it by the officer; but when the records of the clerk's office are destroyed, the presumption is that the execution was destroyed with the other records, and the memorandum of the clerk kept in his office will be received to prove a return. *Brown v. Campbell*, 33 Gratt. 402.

d. Records of Deeds, Wills and Patents.

See the titles DOCUMENTARY EVIDENCE; RECORDING ACTS.

Parol evidence of a deputy clerk of a county court offered to prove certain entries in the landbooks of that county touching land in controversy is inadmissible. If these entries are, in any view, admissible evidence in the case, the books themselves are the best evidence of their contents. *Holston S. & P. Co. v. Campbell*, 89 Va. 396, 400, 16 S. E. 274.

Certified Copies.—A legally certified copy of an ancient deed, recorded on the grantor's acknowledgment, and accompanied with possession of the land by the grantee, ought to be received

as evidence, without any proof that the original is lost or destroyed. *Rowletts v. Daniel*, 4 Munf. 473.

A copy of a deed acknowledged by the grantor before justices, by them certified to the clerk for record, and by him certified to be a true copy, is admissible as primary evidence, equivalent to the original. *Baker v. Preston*, Gilmer 235.

There is no error in permitting the record of a deed to go in evidence, where the original is in possession of the party offering such record, without accounting for the original. *Robinson v. Pitzer*, 3 W. Va. 335.

Deed Improperly Recorded.—Where an original deed conveying lands lying wholly in Virginia is admitted to record outside the state upon proof and authentication wholly insufficient to have admitted it to record in Virginia, and a copy thereof is subsequently admitted to record in Virginia in a county where a part of the land conveyed lies, and the absence of the original deed is not accounted for, a copy from the copy so admitted to record is not admissible in evidence to prove recitals in the deed. *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329. See also, *Maxwell v. Light*, 1 Call 117.

Deed Registered in Foreign State.—An office copy of a deed registered in North Carolina is not admissible as primary evidence in Virginia unless there be some statute of North Carolina making such copy admissible in evidence. *Petermans v. Laws*, 6 Leigh 523.

Copy of Will Recorded in Virginia.—Under W. Va. Code, ch. 130, § 7, a copy of a record of a will in a clerk's office in the state of Virginia, attested by the officer in whose office the same is, is admissible as evidence in West Virginia, though it has not the seal of the court or a certificate of a judge, as required by the act of congress relating to the authentication of records.

Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894.

Copies of Patents.—The rule that the best evidence which the nature of the case admits of, ought to be produced, though generally true, is, in some cases, inapplicable as it respects titles to lands in this country. For example, a copy of a patent, either from the records of the register's office or of a county court, is as good evidence of title as the original would be. *Lee v. Tapscott*, 2 Wash. 276. See also, *Atkins v. Lewis*, 14 Gratt. 30.

And, it has been held that copies of surveys of waste and unappropriated lands, and of patents from the register's office, are competent evidence in the place of the originals. *Pollard v. Lively*, 4 Gratt. 73.

e. Corporate Records.

Municipal Corporations.—To prove the acts of municipal corporations, the record book required by law to be kept, containing the minutes and proceedings of the council or other governing body, is the best evidence, and if such record is existent and accessible parol evidence of such acts is inadmissible. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859; *Childrey v. Huntington*, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313. Compare *Phillips v. Huntington*, 35 W. Va. 406, 14 S. E. 17.

In an action to recover damages for injuries received on account of an alleged defect in the sidewalk of a city, if the plaintiff seeks to prove that the city authorized and directed the property owner to construct the sidewalk at the point where the injury occurred, in front of his premises, the records of the city council are the best evidence as to what its action was, unless no such record was kept as required by law; and parol evidence should not be received when such record books are accessible and can be produced. Chil-

drey v. Huntington, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313.

Where work or other action of city authorities is claimed to have been done by its authority, the records of the city council are the proper and best evidence, if existent and accessible. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266.

f. Proof of Foreign Laws.

In *Dickinson v. Hoomes*, 8 Gratt. 353, 409, Moncure, J., speaking of the proof of foreign laws, says: "I incline to think that the doctrine of primary and secondary evidence does not apply to the case, and that a foreign law, whether written or unwritten, may be proved by a person who is learned in that law, without laying any foundation for the introduction of secondary evidence." See the title FOREIGN LAWS.

3. Payment.

"There is a class of cases in which parol is primary evidence, notwithstanding the existence of written evidence of the same fact. Where a receipt is given for a payment, the general opinion is that the payment may be proved as well by parol evidence of the fact as by the production and proof of the receipt." *Bowles v. Elmore*, 7 Gratt. 393. But see *Hamlin v. Atkinson*, 6 Rand. 574, where the court say: "Not now deciding whether, if the witness had spoken positively, and with certainty as to the dates and amount of the payments made, his evidence, if believed by the jury, would have been equivalent to the receipts themselves, as being of equal degree, the court is of opinion, that as he could not so speak, his testimony ought not to have been received in the absence of the receipts, unless it had appeared that they were lost, or out of the power of the plaintiff."

The deposition of a witness that a note sued on was paid by another note, is not rendered inadmissible by the fact that the note given in payment

is secured by a deed of trust, upon the ground that the deed of trust is the best evidence of the transaction. *Lawson v. Zinn*, 48 W. Va. 312, 37 S. E. 612.

4. Ownership or Control of Property.

In an action for injuries received on the street or sidewalk of a city, the fact that the city has by its authorities treated the sidewalk where the accident occurred as a public street, has taken charge of and regulated it as other streets, and the possession and ownership of contiguous lots, are all facts which may be proved by parol without producing deeds or other record evidence. *Phillips v. Huntington*, 35 W. Va. 406, 14 S. E. 17.

5. Marriage.

In a prosecution for bigamy, where the first marriage took place in Pennsylvania under a law of that state, which provided that marriages might be solemnized by the parties taking each other for husband and wife in the presence of twelve witnesses, and that the certificate of the marriage under the hands of the parties and witnesses, one of whom was a justice of the peace, should be brought to the register of the county and there recorded, it was held, that such first marriage might be proved by the testimony of a witness present at the ceremony that the law was complied with, without producing the certificate of the marriage or a copy thereof from the register's office. *Warner v. Com.*, 2 Va. Cas. 95. See the title BIGAMY.

6. Official Character of Public Officer.

To prove that a certain person is a justice of the peace in a foreign state, it is not necessary to produce his commission or a copy thereof; but his official character may be proved by the evidence of a witness that he knows such person, and that he acts as and is generally reputed to be a justice of the peace. *Warner v. Com.*, 2 Va. Cas. 95.

7. Account Rendered.

In an action of assumpsit to recover the value of goods stored, an account of the sales of the goods, copied from the books of the bailee with his assent and in his presence, and acknowledged by him to be correct, is competent evidence for the plaintiff, as original and not secondary evidence. "The evidence consists in the rendition of a certain account, which fact is original evidence, though the account be a copy from a book." *Rea v. Trotter*, 26 Gratt. 585.

8. Contested Elections.

Certificates of the result of an election, made by the commissioners at the precincts are prima facie evidence of such result. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons, as to afford a reasonable probability of their having been changed or tampered with. If there has been an opportunity for tampering with ballots, they lose their character as primary evidence. *Dent v. Board of Com'rs*, 45 W. Va. 750, 32 S. E. 250. See the title ELECTIONS.

If there is evidence tending to show that ballots are not sealed up after being counted by the precinct election officers, the ballots, on recount, are not the best evidence, but the result will be governed by the precinct certificates, where the certificates and the recount differ in result. *Dent v. Board of Com'rs*, 45 W. Va. 750, 32 S. E. 250.

II. Grounds for Admission of Secondary Evidence.

A. LOSS OR DESTRUCTION OF PRIMARY EVIDENCE.

In General.—Secondary evidence is admissible to prove the contents of

documents (including deeds, records, letters, notes, accounts, wills and private memoranda) which have been lost or destroyed, without any suspicion of spoliation attached to the party offering to prove them by such evidence. *Wright v. Com.*, 82 Va. 183; *Ben v. Peete*, 2 Rand. 539; *Dawson v. Graves*, 4 Call 127; *Taylor v. Peyton*, 1 Wash. 252; *Rucker v. Lowther*, 6 Leigh 259; *Colley v. Sheppard*, 31 Gratt. 312; *Brown v. Campbell*, 33 Gratt. 402; *Corbett v. Nutt*, 18 Gratt. 624; *Thomas v. Ribble*, 2 Va. Dec. 321; *McSmithee v. Feamster*, 4 W. Va. 673; *Dickinson v. Clarke*, 5 W. Va. 280; *Vinal v. Gilman*, 21 W. Va. 301; *Edgell v. Conaway*, 24 W. Va. 747; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561. See also, *Timberlake v. Jennings*, 1 Va. Dec. 741; *Hamlin v. Atkinson*, 6 Rand. 574; *Lyons v. Gregory*, 3 Hen. & M. 237; *Buckland v. Com.*, 8 Leigh 732; *Dickinson v. Clarke*, 5 W. Va. 280.

As to sufficiency of evidence of loss or destruction, see post, "Sufficiency," III, B, 2.

Either the loss or destruction of a writing will entitle a party to prove its contents by secondary evidence, unless the destruction is shown to be fraudulent. *Vinal v. Gilman*, 21 W. Va. 301; *Edgell v. Conaway*, 24 W. Va. 747.

Where a portion of a written document is proven to have been destroyed and the other portion lost or in the hands of a nonresident of the state, and there is no suggestion that such destruction was fraudulent, the contents of such document may be proven by secondary evidence. *Edgell v. Conaway*, 24 W. Va. 747, 748.

Fraudulent destruction of the original document will prevent the party guilty of such destruction from proving its contents by secondary evidence. See *Beirne v. Rosser*, 26 Gratt. 537; *Vinal v. Gilman*, 21 W. Va. 301; *Edgell v. Conaway*, 24 W. Va. 747.

Deeds.—Where the original deed and its record are destroyed, the fact that

such a deed was made may be proved by secondary evidence; as, for instance, admissions of the grantor in a chancery suit. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

Wills.—If the record of a will is lost, after proof of the loss, its contents may be proved like any other document by parol and secondary evidence, such being the best evidence the nature of the case admits of. *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105. See *Smith v. Carter*, 3 Rand. 167; *Millers v. Catlett*, 10 Gratt. 477.

Upon proof that a will had been regularly admitted to probate in the circuit court of Richmond, proof of the loss and destruction of such record will authorize the admission of an official copy of the record, certified by the clerk. And this official copy having been admitted to probate in the orphans' court of the District of Columbia, an official copy from that office is admissible. *Corbett v. Nutt*, 18 Gratt. 624.

Where the plaintiffs in ejectment claim title through one of several heirs of the original owner, to whom such owner devised it to the exclusion of the other heirs, and the will has been lost, evidence of a witness who has examined the records of the courts where the will would probably be recorded, that such records do not contain any record of the will, is admissible to account for the nonproduction of the will or a copy. *Atkinson v. Smith*, 2 Va. Dec. 373.

On a trial for forgery of a bank check, if there be proof showing it to be highly probable that the original paper has been lost or destroyed, though this was not done by the accused or by his procurement, secondary evidence of the contents, character and description of the paper is admissible to sustain the prosecution. *Pendleton v. Com.*, 4 Leigh 694. See also, *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

Records.—According to the common law a record which has been burnt or destroyed, may be set up by parol evidence. *Newcomb v. Drummond*, 4 Leigh 57, 60. See also, *Burk v. Tregg*, 2 Wash. 216; *Brander v. Chesterfield Justices*, 5 Call 548; *McDonald v. McDonald*, 3 W. Va. 676.

Where the original record of a case in the court of appeals was lost or destroyed, the report of the case in a printed volume of reports of decisions of the court was held admissible in evidence to show that such a map as that mentioned in the reports, as *Watkins' map*, actually existed, and was in the papers in the cause; and thereby to lay a foundation for the introduction, as further evidence in the cause, of a map purporting to be and certified as a map of Manchester by the clerk of the superior court of chancery of the Richmond district. *Taylor v. Com.*, 29 Gratt. 780.

Equitable Defenses in Actions of Ejectment.—The statute, Sup. Rev. Code, 1819, pp. 159, 160, authorizing the defendant in an ejectment or writ of right to set up an equitable title, as a defense to the action, limits that defense to cases where the whole contract, and its precise terms, is manifested by plain written evidence. The written contract itself must be produced before the jury; and parol evidence of its contents is inadmissible, though it may have been lost or destroyed. *Davis v. Teays*, 3 Gratt. 283.

B. PRIMARY EVIDENCE OUT OF JURISDICTION.

Proof that a letter is out of the state, taken in connection with evidence showing an effort to obtain it, is a sufficient foundation for the introduction of parol or secondary evidence of its contents. *Beirne v. Rosser*, 26 Gratt. 537.

When a book of original entries is in the possession of a nonresident, so that its production can not be compelled by the court, then a copy of

such entries, which has been compared with the original entry, and proven to be an exact copy, is the best secondary evidence that can be obtained in the nature of the case, and is, therefore, admissible. *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562; *Edgell v. Conaway*, 24 W. Va. 747.

Necessity of Effort to Obtain Original.—Where a book of original entries is in the possession of a nonresident, its production can not be compelled by the court, and a sworn copy will be admitted without any proof on the part of the person offering the evidence that he has made any special efforts to induce the person who has the original book in his custody and who lives out of the state, to produce it at the trial. "In most cases all such efforts would be failures, and as their success would not depend on the action of the party offering to introduce such entries as evidence, he is under no obligation to prove that he has made an effort to get the original book of entries." *Vinal v. Gilman*, 21 W. Va. 301.

C. REFUSAL TO PRODUCE PRIMARY EVIDENCE ON NOTICE.

The refusal of a party to produce, on due notice, an original document which is in his possession, will authorize the admission of a copy in evidence, on proof of its being a true copy. *Maxwell v. Light*, 1 Call 117. See the title PRODUCTION OF DOCUMENTS.

In a prosecution for forgery, where the alleged forged instrument is in the possession of the prisoner or his counsel, notice to produce it, should be given before secondary evidence of its contents is admissible. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

Indictment for Burglary.—But upon an indictment for burglary, charging the prisoner with stealing labor tickets, parol evidence of them is admissible without further notice to produce them. *Wright v. Com.*, 82 Va. 183.

D. PRODUCTION OF PRIMARY EVIDENCE INCONVENIENT.

The secretary of a railroad company can not testify in regard to the result of his examination of the company's books, as to a certain item of accounts, as the proper mode of proving the account would be a production of the books, or, if this is very inconvenient or impossible, there must be presented to the jury an authenticated copy of such account. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

E. PRIMARY EVIDENCE INADMISSIBLE.

Where an original writing, if produced, would not be admissible in evidence, secondary evidence of its contents is also inadmissible. *Payne v. Com.*, 31 Gratt. 855; *Caperton v. Ballard*, 4 W. Va. 420.

III. Laying Foundation for Admission of Secondary Evidence.

A. IN GENERAL.

The ground relied on for the admission of secondary evidence ought to be established before the evidence is allowed to go to the jury. *Pidgeon v. Williams*, 21 Gratt. 257.

Harmless Error.—Although it is improper and irregular to admit in evidence copies of letters, without notice to produce the originals, or other foundation laid for the introduction of the copies, yet, if it appears from an examination of the letters that they were not necessary for the maintenance of the plaintiff's case, and could not have prejudiced the defendant, the appellate court will not, for this reason, reverse the judgment of the court below. *George Campbell Co. v. Angus*, 91 Va. 438, 439, 22 S. E. 167.

B. EVIDENCE OF LOSS OR DESTRUCTION OF PRIMARY EVIDENCE.

1. Admissibility.

Testimony of Party to Suit.—When

parties were disqualified to give evidence in chief, it was held that they could testify as to the loss of a written instrument so as to lay the foundation for the admission of secondary evidence of its contents. *Ben v. Peete*, 2 Rand. 539; *Thomas v. Ribble*, 2 Va. Dec. 321; *Bierne v. Rosser*, 26 Gratt. 537. See the title WITNESSES.

Statements of the prosecuting attorney as to the search made for the instrument alleged to have been forged, are not evidence against the accused, unless he is sworn, examined, and submits himself to cross examination as any other witness. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

2. Sufficiency.

In General.—To lay the ground for the introduction of secondary evidence of the contents of a written instrument it must be shown with reasonable certainty that the original is lost or destroyed. *Ben v. Peete*, 2 Rand. 539. See also, *Pendleton v. Com.*, 4 Leigh 694.

It is not necessary that all the possible evidence of the loss or destruction of the original paper should be exhausted; the sufficiency of such evidence is a preliminary question addressed to the discretion of the judge, and the object of the proof is merely to establish a reasonable presumption of the loss or destruction. *Edgell v. Conaway*, 24 W. Va. 747.

It is not necessary that the loss or destruction of the original papers, shall be "proved beyond all possibility of mistake;" it is only necessary that the evidence in relation to the loss should produce "a moral certainty that the court has had every opportunity for examining and deciding the cause, upon the best evidence within the power or control of the litigants." *Corbett v. Nutt*, 18 Gratt. 624, 638.

"In general, the party should give all the evidence reasonably in his power to prove the loss. He is not bound, however, to furnish the strongest pos-

sible assurance of the fact. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons of its nonproduction. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. In practice, when there is no ground of suspicion that the paper is intentionally suppressed, nor any discernible motive for deception, courts are extremely liberal in regard to secondary evidence." *Beirne v. Rosser*, 26 Gratt. 537, 545; *Corbett v. Nutt*, 18 Gratt. 624, 635; *Colley v. Sheppard*, 31 Gratt. 312.

"When a person with whom the obligee has lived and died, after a careful search, has been unable to find any trace of the paper; when the administrator, the legal and proper custodian, has never seen it, and can give no account after exhausting all the sources of information accessible to him, and when sixteen years have elapsed since the death of the obligee, and the bond is still missing, it may be fairly presumed that it is not in existence." *Colley v. Sheppard*, 31 Gratt. 312.

The plaintiff in an action offered in evidence a copy of a letter from himself to the defendant, and stated that defendant replied to that letter. He stated on oath that he placed the letter with other papers in the hands of his counsel in West Virginia; that he had written to his counsel to send him his papers by express, which the counsel did, writing to him at the same time that he had sent him all of his papers that were in his hands, but the letter and other papers which he put in the counsel's hands were not in the package of papers so sent; and that he had not since applied to the counsel for the letter, because he supposed it was useless after the counsel's letter saying he had sent all the papers. It was held, that in the absence of all suspicion of

fraud, parol proof of the contents of defendant's letter was admissible in evidence. *Beirne v. Rosser*, 26 Gratt. 537.

Presumption of Destruction of Record.—Where secondary evidence is offered to prove a return on a fieri facias, and it is shown that the records in the clerk's office have been destroyed, the presumption is that the execution was destroyed with the other records. *Brown v. Campbell*, 33 Gratt. 402.

Degree of Proof as Affected by Value of Document.—"In those cases where the proof of loss of a writing is presented only for the purpose of admitting parol testimony of its contents, the doctrine is well settled that the degree of proof necessary depends upon the character and value of the instrument in question; less being required where it is of little value, and reasonably not carefully preserved, and more where its value would suggest the propriety of its careful preservation." *Thomas v. Ribble*, 2 Va. Dec. 321, 324.

Diligence of Search for Missing Document.—In order to admit secondary evidence of the contents of a missing document, the party offering such evidence should prove that diligent search has been made for the document in a place where it might legally be deposited. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

A copy of a deed may be read in evidence, upon the oath of a party, that he had searched the clerk's office and all other places where he supposed the original deed might probably be found, and had not been able to find the original. *Ben v. Peete*, 2 Rand. 539.

Where plaintiffs in ejectment claim title through one of several heirs of the original owner, to whom such owner devised it to the exclusion of the other heirs, and the will has been lost, evidence of a witness who has examined the records of the courts where the will would probably be recorded,

that such records do not contain any record of the will is admissible to account for the nonproduction of the will or a copy. *Atkinson v. Smith*, 2 Va. Dec. 373.

A plaintiff in unlawful detainer proved that he deposited the original will of his testatrix with the clerk of the circuit court of Richmond, in 1864. He also proved that he had inquired for the will of the clerk, at his office in the city of Richmond, in whose custody it had been left, and the clerk, at his request, had made search for said paper, and reported that it had been lost and destroyed at the time of the fire in April, 1865. It was held, that in the absence of all suspicion of fraud, this testimony was sufficient to let in a copy of the will, of the accuracy of which copy there was no question. *Corbett v. Nutt*, 18 Gratt. 624.

C. PROVINCE OF COURT OR JURY.

The sufficiency of evidence of the loss or destruction of an original document, is a preliminary question addressed to the discretion of the court. *Edgell v. Conaway*, 24 W. Va. 747; *Colley v. Sheppard*, 31 Gratt. 312; *Ben v. Peete*, 2 Rand. 539; *Beirne v. Rosser*, 26 Gratt. 537; *Thomas v. Ribble*, 2 Va. Dec. 321.

"The preliminary evidence as to the loss of a paper, before proving its contents, is addressed to the court, and not to the jury, and yet it is proper evidence for the consideration of the latter when the question is as to whether such a paper as that described was ever in existence. If it is not produced, and is not shown to have been destroyed or lost, and thus rendered incapable of production, then the just inference is that such paper never had an existence. So that the evidence of the existence and loss is proper for the consideration of the jury." *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

D. WAIVER AND CURE OF DEFECTS.

Admission of Loss or Destruction.

—In an action on a bond the parties may by their form of pleading, not only dispense with all proof of the existence and contents of the instrument, but they may supersede the necessity of adducing preliminary proof of its loss as a condition precedent to the introduction of secondary evidence of its contents. *Colley v. Sheppard*, 31 Gratt. 312.

In an action of debt on a bond, proof of the bond was excused on the ground that it was lost by accident. The defendant pleaded payment and special pleas in which he averred that the bond had not been lost by accident, but had been destroyed by the obligee in her lifetime for the purpose of releasing the obligor from the payment of the debt. On the trial of the case evidence of the contents of the instrument was excluded on the ground that the plaintiff did not first prove to the satisfaction of the court the original existence of the bond and its loss. It was held, that in accordance with the rule that every pleading is taken to confess such traversable matter on the other side as it does not deny, the plaintiff was under no necessity of proving to the satisfaction of the court the original existence and the

loss of the bond, before offering parol testimony as to its contents. *Colley v. Sheppard*, 31 Gratt. 312.

Failure to Object.—If secondary evidence is introduced without objection in the court below, an objection to it in the appellate court comes too late and will not be considered. *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 557; *Shue v. Turk*, 15 Gratt. 256; *Connor v. Fleshman*, 4 W. Va. 693. See also, *Buchanan v. Clark*, 10 Gratt. 172; *Washington v. Burnett*, 4 W. Va. 84.

Curing Error.—Though parol evidence of the contents of a book has been admitted, over objection, without any excuse for the failure to produce the book, yet if, after exception has been taken, evidence is introduced showing a good reason why the book can not be produced, the error is thereby cured. *Pidgeon v. Williams*, 21 Gratt. 251.

IV. Degrees of Secondary Evidence.

Where the best secondary evidence obtainable of the contents of a writing has been admitted, the admission of other secondary evidence, if erroneous, can not possibly injure the person objecting and is no ground for reversal of the judgment. *Corbett v. Nutt*, 18 Gratt. 624.

Bestiality.

See the title SODOMY.

BET.—See the titles GAMING; GAMBLING CONTRACTS; ELECTIONS;

In *Lescallett v. Com.*, 89 Va. 882, 17 S. E. 546, it is said: "A bet is a wager between two or more persons. It involves a concurrence of wills; that is, there must be an offer to bet, made on one side, and accepted on the other. When the offer is accepted, and not before, the betting becomes complete. A bet, like an ordinary contract, may be made by telegraph, and, when an offer to bet is accepted by telegraph, the acceptance, as in the case of a contract, takes effect when the message of acceptance is delivered to the telegraph company for transmission, and not when it is received by the other party. If, therefore, an offer to bet is telegraphed by a person in this city to another in New York, and the latter accepts by telegraph, the betting is done, not in Richmond, but in New

York, because the offer, being accepted there, takes effect there. 2 Am. & Eng. Ency. of Law, 185; Bish. Cont., §§ 321, 322, 328; Minn. Oil Co. v. Collier Lead Co., 4 Dill. 434; State v. Hughes, 22 W. Va. 743; Garbracht v. Commonwealth, 96 Pa. St. 449."

In *Shumate v. Com.*, 15 Gratt. 660, it is said: "It is true, that a **bet** does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the **bet** must have both these chances. If, from the terms of the engagement, one of the parties may gain but can not lose, and the other may lose but can not gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a **bet** or wager as if the parties had shared equally the chances of gain and of loss. The amount **bet** by them is the amount which the one may win, and the other may lose."

Bet on Election.—In *State v. Griggs*, 34 W. Va. 78, 11 S. E. 741, it is said: "The statute says: that, 'if any person **bet** or wager money or other thing of value on any election held in this state,' he shall be punished as therein prescribed. The words '**bet** on any election' are broad. Do they not mean to **bet** on its result? Such result comes not simply from the act of polling, but from polling, counting the votes after its close, making out certificates, their preservation, and the declaration officially made upon them; and this whole process was designed by the legislature to be placed under the benefit and protection of this statute." See also, *Shumate v. Com.*, 15 Gratt. 653.

BETTERMENTS.—See the titles EMINENT DOMAIN; IMPROVEMENTS; SPECIAL ASSESSMENTS.

Peculiar Benefits.—See *Norfolk v. Chamberlain*, 89 Va. 248, 16 S. E. 730.

Betting on Elections.

See the titles ELECTIONS; GAMBLING CONTRACTS; GAMING.

BETWEEN.—See AMONG, vol. 1, p. 371.

Between.—When a mortgage was executed by a Pennsylvania railroad company authorized under its charter to build a road "from near Pittsburg, Pennsylvania, in the direction of Steubenville, Ohio, to the Pennsylvania State line," and the said mortgage grants the whole of their "railroads;" and other property "situated **between** and at the terminus of their railway at the city of Pittsburg and the boundary line of the state of Virginia in the counties of Alleghany and Washington in the state of Pennsylvania," it conveyed no property whatever in the state of Virginia. *Chapman v. Pittsburg, etc.*, R. Co., 26 W. Va. 299.

Beyond a Reasonable Doubt.

See the title REASONABLE DOUBT.

BEYOND THE CAUSE.—In *Crislip v. Cain*, 19 W. Va. 458, it is said: "There is a distinction between the action of the court in the cause, which the court has no right to take, unless all the parties are before it, and the action of the court **beyond the cause**. If any of the parties to the suit have died, the cause must be revived, before the court can take any action in the cause. By action of the court **beyond the cause** I mean those measures, which are necessary for the execution of a decree, which has been pronounced, and which are properly to be

regarded as adopted not in but **beyond the cause** as founded on the decree itself without respect to the relief, to which the party was primarily entitled upon the merits of the case. This kind of action **beyond the cause** may be had either before a final decree, as in this case, or after a final decree. This distinction is pointed out by Judge Baldwin in the case of *Cocke v. Gilpin*, 1 Rob. 28, and has been recognized as a correct distinction by this court heretofore. Whether this distinction was correctly applied in the case of *Cocke v. Gilpin* may be questioned; but the correctness of the distinction itself can not, we think, be questioned."

Beyond the Seas.

See the title LIMITATION OF ACTIONS.

Bias.

See the titles ARBITRATION AND AWARD, vol. 1, p. 693; JUDGES; JURY; WITNESSES.

Bible.

See the title PEDIGREE.

BICYCLES.

CROSS REFERENCES.

See the titles NEGLIGENCE; STREETS AND HIGHWAYS.

Definition.—Bicycles are vehicles. They come under the definition and description of vehicles. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883.

Use on Sidewalks.—Bicycles should not be ridden on sidewalks. Sidewalks are not the proper place for them. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883.

Exemption of Municipality from Liability.—The doctrine of the exemption of a municipal corporation from liability for injuries resulting from the unlawful or improper use of its streets and sidewalks by the public, and not from any defect in their state or condition, has been applied where persons have been injured by a collision with a bicycle being ridden upon its streets. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883.

Where a person is injured by being struck by a bicycle that was being ridden upon a sidewalk, it is obvious

that the injury results from the improper and dangerous use that was being made of the sidewalk by the bicyclist and not from a defective condition of the sidewalk. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883.

The municipality is not liable for damages resulting from a collision with a pedestrian, merely because it failed to pass an ordinance forbidding such use of its sidewalks. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 833.

Negligently Allowing Bicycle to Remain on Sidewalk.—It would seem from the language of the court in *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883, that recovery may be had against a municipal corporation for personal injuries caused by a bicycle that was stationary upon the sidewalk, and had been negligently allowed by the city to remain there, a city being responsible for the safe condition of its streets. See generally, the title STREETS AND HIGHWAYS.

Bids.

See generally, the titles AUCTIONS AND AUCTIONEERS, ante, p. 174: JUDICIAL SALES; SHERIFFS' SALES.

As to bids on contracts with cities, counties or towns, see the titles COUNTIES; MUNICIPAL CORPORATIONS.

BID TO COURT.—In *Terry v. Coles*, 80 Va. 702, it is said: "Mr. Barton says. 'In Virginia, a bid by a purchaser to a commissioner, is a **bid to the court**, and if accepted he is bound by it, but the court and not the commissioner is the seller, and the confirmation by the court, and its direction to convey, are essential to the validity of any sale that the commissioner may make.' Barton's Ch. P. 1070." See also, the title JUDICIAL SALES.

BIGAMY.

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A. Proof of Prior Marriage, 373.

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CROSS REFERENCES.

See the titles CONFLICT OF LAWS; CRIMINAL LAW; DIVORCE; EVIDENCE; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; MARRIAGE; PRESUMPTIONS AND BURDEN OF PROOF.

I. Statutory Provisions.

The Virginia and West Virginia statutes regarding the crime of bigamy are identical, and provide as follows: "If any person, being married, shall, during the life of the former husband or wife, marry another person in this state, or if the marriage with such other person take place out of the state, shall thereafter cohabit with such other person in this state, he shall be confined in the penitentiary not less than three nor more than eight years." Va. Code, 1887, § 3781; W. Va. Code, 1899, ch. 149, § 1. By a subsequent section it is provided that: "The pre-

ceding section shall not extend to a person whose former husband or wife shall have been continually absent from such person for seven years next before marriage of such person to another, and shall not have been known by such person to be living within that time; nor to a person who shall, at the time of the subsequent marriage, have been divorced from the bond of the former marriage, or whose former marriage shall at that time have been declared void by the sentence of a court of competent jurisdiction." Va. Code, 1887, § 3782; W. Va. Code, 1899, ch. 149, § 2.

II. Elements of the Offense.

A. PRIOR MARRIAGE.

In order for a second marriage to constitute the crime of bigamy it is, of course, essential that the first marriage should have been a valid marriage, and that the marital relation should have been subsisting between the parties thereto at the time the defendant entered into the second marriage. *Oneale v. Com.*, 17 Gratt. 582; *Bird v. Com.*, 21 Gratt. 800; *Moore v. Com.*, 9 Leigh 639; *Warner v. Com.*, 2 Va. Cas. 95; *State v. Goodrich*, 14 W. Va. 834.

Where a prior marriage is alleged to have taken place in another state it must be shown that the marriage was valid where contracted. *Warner v. Com.*, 2 Va. Cas. 95; *Bird v. Com.*, 21 Gratt. 800; *Oneale v. Com.*, 17 Gratt. 582. See the title CONFLICT OF LAWS.

If the defendant was already lawfully married at the time the first marriage alleged in the indictment took place, such marriage is a nullity, and the marriage laid in the indictment can not constitute the offense. *State v. Goodrich*, 14 W. Va. 834.

B. SUBSEQUENT MARRIAGE.

The subsequent marriage of the accused is of course another essential element of the crime. *State v. Goodrich*, 14 W. Va. 834; *Bird v. Com.*, 21 Gratt. 800; *Oneale v. Com.*, 17 Gratt. 582; *Warner v. Com.*, 2 Va. Cas. 95; *Moore v. Com.*, 9 Leigh 639.

III. Evidence.

A. PROOF OF PRIOR MARRIAGE.

1. Admissions of Accused.

On a trial for bigamy, the admission of the prisoner and his acts are competent evidence to prove the prior marriage, without producing the record, or a witness who was present at the marriage. *Oneale v. Com.*, 17 Gratt. 582; *State v. Goodrich*, 14 W. Va. 834; *Bird v. Com.*, 21 Gratt. 800; *Warner v. Com.*,

2 Va. Cas. 95; *Womack v. Tankersley*, 78 Va. 243.

2. Reputation and Cohabitation.

It has been held, that where in a prosecution for bigamy, a marriage is alleged to have taken place in a foreign state, the marriage can not be proved by reputation and cohabitation. *Bird v. Com.*, 21 Gratt. 800.

But in *Warner v. Com.*, 2 Va. Cas. 95, it was held, that the acknowledgment of the husband that he was married, and his cohabitation with the woman as his wife, was proper evidence in a prosecution for bigamy.

3. Certificate of Person Performing Ceremony.

The certificate of the party who performed the ceremony at the first marriage is admissible, in connection with other evidence, to show the prior marriage, even though it is not stated in the certificate that the celebrant was a person authorized by law to perform the ceremony. *Moore v. Com.*, 9 Leigh 639.

4. Testimony of Person Performing Ceremony.

In a prosecution for bigamy, the first marriage may be proved by the minister, who solemnized it. *State v. Goodrich*, 14 W. Va. 834.

Thus where a person proves that he is a Catholic priest and pastor of a church, and authorized to celebrate the rites of marriage; that by virtue of a license issued by the proper officer in the usual form, he married the defendant and a woman in the presence of two persons; and in accordance with the rules and customs of the Catholic church and the law, and it is proved that they afterwards lived together as husband and wife, this is sufficient evidence of the marriage. *Bird v. Com.*, 21 Gratt. 800.

5. Testimony of Witnesses Present at Marriage.

Although the testimony of a witness present at the marriage may not be as

conclusive or satisfactory as the confession of the party, there is no solid reason for rejecting it as incompetent. There is no technical rule forbidding the reception of such evidence. When a witness testifies to a marriage in a foreign state, solemnized in the manner usual and customary in such state, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as could be expected or desired, and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with its provisions. *Bird v. Com.*, 21 Gratt. 800.

Where it appeared that the first marriage took place in Pennsylvania, where a marriage could be solemnized by the parties taking each other for husband and wife before twelve witnesses, one of whom was a justice of the peace, a certificate of the marriage under the hands of the parties and the twelve witnesses being brought to the register of the county, and recorded, it was held, that the parol testimony of one of the witnesses who was present at the marriage was sufficient to establish that one of the number was a justice of the peace, and the fact of marriage. *Warner v. Com.*, 2 Va. Cas. 95.

When a witness testifies to a marriage in a foreign state, solemnized in the manner usual and customary in such state, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as can be expected or desired; and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with its provisions. *Bird v. Com.*, 21 Gratt. 800.

The fact of the marriage, may be established by parol testimony alone,

without producing the certificate of the marriage, or a copy thereof from the register's office. *Warner v. Com.*, 2 Va. Cas. 95.

6. Proof of License without Producing It.

On a trial for bigamy, evidence may be given of the prisoner's marriage under a license purporting to have been issued by the clerk of the proper court, and of the fact that such a license was issued to the prisoner, without producing the license itself, though it be within the power of the commonwealth. *Moore v. Com.*, 9 Leigh 639.

B. PROOF OF INVALIDITY OF PRIOR MARRIAGE.

On a trial for bigamy, where the defendant claims that the previous marriage on which the charge is based was invalid because at the time of such previous marriage he had a wife living, evidence is admissible to show that he had a wife living a year before such previous marriage, as from such evidence there would arise a presumption that she was living at the time of the previous marriage charged. *State v. Goodrich*, 14 W. Va. 834.

Transcript of Marriage Record of Foreign State.—To prove that the prisoner was a married man, when the first marriage named in the indictment was solemnized, it is proper to permit to go to the jury a paper purporting to be a transcript from the records of a county in the state of Ohio, duly authenticated by the probate judge, whose duty it is to keep such record, and which purported to show the marriage of the prisoner to another woman in that county, in accordance with the law of that state, within two years of the time the first marriage named in the indictment was solemnized. *State v. Goodrich*, 14 W. Va. 834.

Decree in Divorce Proceedings.—It is proper to permit to go to the jury a paper purporting to be a decree of

the court of common pleas of a county in the state of Ohio properly authenticated, and which purports to have been rendered in a suit brought by the prisoner's Ohio wife for a divorce, the decree offered purporting to be entered a year after the first marriage named in the indictment, and the court on the face of the decree reciting the legal service of the process on the defendant, and decreeing a divorce a vin-

culo matrimonii for the adultery of the prisoner. *State v. Goodrich*, 14 W. Va. 834.

Where a decree of divorce is introduced merely for the purpose of showing that up to the time of the decree the parties to the case were husband and wife, it is unnecessary to introduce other parts of the record in such divorce proceeding. *State v. Goodrich*, 14 W. Va. 834.

Bill and Note Brokers.

See the titles **BILLS, NOTES AND CHECKS; BROKERS.**

Bill De Bene Esse.

See the title **DEPOSITIONS.**

Billiard Tables.

See the titles **LICENSES; MUNICIPAL CORPORATIONS; ORDINANCES.**

Bill in Equity.

See the title **EQUITY.**

Bill of Attainder.

See the title **CONSTITUTIONAL LAW**

Bill of Costs.

See the title **COSTS.**

Bill of Discovery.

See the title **DISCOVERY.**

Bill of Exceptions.

See the title **BILL OF EXCEPTIONS.**

Bill of Exchange.

See the title **BILLS, NOTES AND CHECKS.**

Bill of Interpleader.

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BILL OF PARTICULARS.

- I. Office of the Bill, 377.**
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CROSS REFERENCES.

See the titles, ACTIONS, vol. 1, p. 122; AMENDMENTS, vol. 1, p. 316; AS-SUMPSIT, ante, p. 1; INSURANCE; NOTICE; PLEADING; SET-OFF, RECOUPMENT AND COUNTERCLAIM.

I. Office of the Bill.

The office of a bill of particulars is not to set forth matters of evidence, but to inform the opposite party of the cause of action to be relied on at the trial, and which is not plainly set out in the pleadings. *Richmond, etc., R. Co. v. Payne*, 86 Va. 483, 10 S. E. 749; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696.

The office of a bill of particulars is to give a fuller and more particular specification of the matter contained in the declaration, or of the nature and extent of the injury which the plaintiff claims that he has sustained. *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 622, 40 S. E. 591. See post, "Relation of Bill to Pleading," II.

And in *Columbia Accident Ass'n v.*

Rockey, 93 Va. 678, 25 S. E. Rep. 1009, it is said that the object of a bill of particulars is to give the opposing party more definite information of the character of the claim or defense than is generally disclosed by the declaration, notice or plea, and to prevent surprise. See *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167; *Am. Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705.

Dispensing with Special Assignment of Breaches.—Under the statute, § 46, ch. 160, acts of 1882, providing for the filing of a bill of particulars of the plaintiff's claim, the necessity for special assignments of breaches is to a great extent if not entirely obviated. By filing such bill of particulars with his declaration the plaintiff may dispense with such special assignment in most if not in all cases. *Wheeling v. Black*, 25 W. Va. 266.

II. Relation of Bill to Pleading.

Under ch. 66 of the acts of 1877 these statements of particulars required to be filed in an action on insurance policy whether filed by plaintiff or defendant are not in the nature of pleadings, and constitute no part of the pleadings but are in the nature of notice to the adverse party of the nature of the claim or defense intended to be set against him. *Cappellar v. Insurance Co.*, 21 W. Va. 576; *Choen v. Guthrie*, 15 W. Va. 113; *Abell v. Penn. Mutual Ins. Co.*, 18 W. Va. 412; *Smith v. Townsend*, 21 W. Va. 486; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

No Part of Declaration.—*Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167, overrules *Wright v. Smith*, 81 Va. 777, so far as the latter case decides that an account filed with the declaration under the statute (Va. Code, 1887, ch. 159, § 3248) is a part of the declaration.

Should Be Read in Connection with Declaration.—The main object of a bill of particulars being to give a more particular specification of the matter contained in the declaration, it should be read in connection with the declaration. *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167.

III. When Demanded.

The object of a bill of particulars being to advise the defendant of the precise nature and extent of the demand against him, the usual and better practice is to demand such bill before pleading to the merits. *Am. Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 706. See the title PLEADING.

IV. Ordering the Bill.

A. DISCRETION OF COURT.

It is, ordinarily, within the discretion of the court to order a bill of

particulars, yet, the power is much less frequently exercised in actions of tort than in actions ex contractu, as the general rule in tort is, that if a pleading is not sufficiently specific the remedy is by demurrer. *Richmond & D. R. Co. v. Payne*, 86 Va. 483, 10 S. E. 749.

There is no inflexible rule as to the classes of cases in which a statement of the particulars of the plaintiff's claim, or of the defendant's ground of defense, will be required, but it rests in the sound judicial discretion of the court. *Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348; *Driver v. Southern R. Co.*, 103 Va. 654, 49 S. E. 1000.

Supervision by Appellate Court.

While the question of whether or not such a bill shall be required to be filed is within the discretion of the trial court, to be soundly exercised under all the circumstances of the particular case, its action in granting or refusing such request will be supervised by the appellate court; but such action will not be reversed unless it is plainly erroneous. *Driver v. Southern R. Co.*, 103 Va. 654, 49 S. E. 1000. See the title APPEAL AND ERROR, vol. 1, p. 418.

"Some of the authorities hold that the requirement of such specification of particulars is only discretionary, and the improper exercise of the power to require not a subject of review in the appellate court (*Com. v. Giles*, 1 Gray 466-469), but I would think that the refusal to require it in a proper case would be reviewable." *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696.

B. WHEN ORDERED.

There is no error in refusing to order a bill of particulars when the declaration clearly and specifically states the cause of action relied on. *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749.

Actions in Tort or on Contract.

"It is contended broadly by counsel

for appellee that § 46, ch. 130, W. Va. Code, 1891, providing that 'in any action or motion the court may order a statement to be filed of the particulars of the claim or ground of defense,' does not at all apply to cases of tort; citing *City of Plymouth v. Fields*, 125 Ind. 323, 25 N. E. 347, and other cases. But I think the proposition that in no case of tort can this statute apply is entirely too broad. The power existed at common law in a court to require a bill or statement of the particulars of the claim or defense, because the court has inherent power to direct the conduct of a trial, and do those things incidental in nature necessary to advance justice and prevent surprise. The statute is but declaratory of common law. But by no means can it be rightfully asked in every case. It can be demanded only in those cases where the declaration or plea is allowably of so general a nature as not to apprise the party of the real cause of action or defense which he is to meet. I say allowably, for if the declaration or plea is more general or indefinite than is allowed by law, a demurrer or objection should be interposed, and a demand for particulars can not take the place of a demurrer. *Shadock v. Plank Road Co.*, 79 Mich. 7, 44 N. W. 158; *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749; opinion in *People v. Monroe*, 4 Wnd. 200. Its application is not so frequent in actions of tort as in actions based on contract; not because damages are unliquidated in tort, but because the declaration must in such cases have the requisite definiteness to inform the defendant of the nature of the cause of action, and the particular act or omission constituting the tort, else a demurrer will lie. But it has often been required in actions for torts, and even in criminal cases. It is only applicable where it appears that the party, from any cause, is placed in a situation such that justice can not be done without informa-

tion to be obtained by specification or bill of particulars. *Com. v. Snelling*, 15 Pick. 321. The subject is elaborately discussed in *Tilton v. Beecher*, 59 N. Y. 176. Our Code is the same on this point as the Virginia Code, and in *Central Lunatic Asylum v. Flanagan*, 80 Va. 110, the applicability of the statute to torts is substantially recognized." *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696. See also, *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591.

When the ground of defense or the particulars of the claim are not sufficiently described in the notice, declaration, or other pleading, the plaintiff may by resort to the provisions of Va. Code, 1887, § 3249, demand that a statement of the defense or of the particulars of the claim be filed and thereby avoid much of the mischief which might result from the laxity of pleading permissible in actions for negligence. *Wood v. Bank*, 100 Va. 306, 40 S. E. 931. See the title PLEADING.

In every action of indebitatus assumpsit the plaintiff shall file with his declaration an account, stating distinctly the several items of his claim against the defendant, and on failure thereof he shall not prove any item not so plainly and particularly described in his declaration as to give defendant full notice of its character. *Fitch v. Leitch*, 11 Leigh 473. See also, *Smith v. Townsend*, 21 W. Va. 486. See the title ASSUMPSIT, ante, p. 1.

The common-law principle that in an action of assumpsit, under the general issue, a general payment before suit brought may be proved without a bill of particulars, prevails in this state; but, if payment after suit brought is relied on, it must be pleaded; if a general payment, it may be proved without a bill of particulars, and, if specific, or partial, payments are relied on, they must be specified in a

bill of particulars. *Shanklin v. Crisamore*, 4 W. Va. 136.

Actions Other than Assumpsit.—In actions other than assumpsit the plaintiff should be required to give the defendant full notice of the subject or character of his claim, and, if the declaration fails to do this, the plaintiff should, if called upon, file such statement of particulars as will put defendant upon notice. *Richmond v. Leaker*, 99 Va. 7, 37 S. E. 348.

Set-Off.—Where the defendant relies upon a specific payment or set-off by way of discount against a debt, an account stating distinctly the nature of such payment or set-off and the several items thereof, must be filed with the plea, though the defendant may rely upon the parol admissions of the plaintiff to prove such payment. But this is not necessary where no specific payment is relied on. *Rice v. Annatt*, 8 Gratt. 557.

To file an unwritten plea of set-off with no bill of particulars and no issue taken upon it is certainly irregular but neither party can in the appellate court after verdict and judgment complain of this irregularity, as under this plea in the absence of a bill of particulars no evidence could have been received even if issue had been joined upon it. *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555. See also, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

In a suit for rent due, the defendant may, at the trial, prove and have allowed against any such debt any payment or set-off which is so described in his plea, or in an account filed therewith as to give the plaintiff notice of its nature, but not otherwise. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 313. See the title LANDLORD AND TENANT.

Actions for Personal Injuries.—In actions to recover damages for personal injury to plaintiff, resulting from failure on the part of defendant to fur-

nish proper tools to do the work assigned, where the declaration avers it was the duty of defendant to furnish "suitable and reasonable tools," etc., "then well known to defendant and possessed and kept by it," with which to do the work, it is not necessary to furnish a bill of particulars thereof. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Actions on Insurance Policies.—See the title INSURANCE.

The statement of particulars required by ch. 66 of the acts of 1877 to be filed in an action on insurance policy resemble closely the bill of particulars which under the provisions of W. Va. Code are required to be filed in actions of assumpsit with the declaration or with the pleas of payment to set-off or the bills of particulars which under W. Va. Code the court may be required to be filed in any sort of action. *Cappellar v. Insurance Co.*, 21 W. Va. 576.

Failure to Comply with Warranty or Condition in Insurance Policy.—Where a declaration in an action on a policy of insurance is filed in the form prescribed by ch. 66, acts, 1877, § 1, and the defendant under the fourth section of this act pleads, that he is not liable to the plaintiff as is in said declaration alleged, but the real defense is, that the action can not be maintained because of the failure to perform or comply with, or the violation of any clause, condition of warranty in, upon or annexed to the policy. or continued in or upon any paper, which is made by reference a part of the policy; and by the fourth section of above mentioned act the defendant is required to file a statement, in writing, specifying by reference thereto or otherwise, the particular clause, condition or warranty, in respect to which such failure or violation is claimed to have occurred with such affidavit thereto as is required by this section. *Cappellar v. Insurance Co.*, 21 W. Va. 576.

V. Requisites.

See ante, "Office of the Bill," I.

Generally.—A bill of particulars should contain the grounds of action not evidence. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 612, 40 S. E. 591.

In *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366, it was held, that the claims set forth in the bill of particulars must conform to the statements in the declaration in an action of assumpsit.

Must Be Intelligible.—In an action of assumpsit, if the plaintiff serves on the defendant a copy of the account sued on, it must be intelligible, and such as to inform him of the precise nature of the claim, and its extent. *Burwell v. Burgess*, 32 Gratt. 472. See *Johnson v. Fry*, 88 Va. 698, 12 S. E. 973; *Fitch v. Leitch*, 11 Leigh 475; *Moore v. Mauro*, 4 Rand. 488; *Cappellar v. Insurance Co.*, 21 W. Va. 576.

As to effect in evidence of vague and unintelligible bill of particulars, see post, "Evidence," X.

Account of Statement Rendered.—Where plaintiff in assumpsit filed with his declaration an account in these words, "1883, Jan'y 1. To balance due per account rendered, \$1405.07," it was held a sufficient specification of plaintiff's claim. *Fitch v. Leitch*, 11 Leigh 471.

Notice of Some Items Not Given.—An account filed in an action of indebitatus assumpsit which gives notice of the character of a claim is sufficient, although it may be made up of various items of which no notice is given. *Moore v. Mauro*, 4 Rand. 488; *Fitch v. Leitch*, 11 Leigh 474.

Account Not Dated.—When declaration in assumpsit states the date of the account filed, but which account was not dated, it was sufficient, it being presented as a debt due at the date of the suit. *Kenefick v. Caulfield*, 88 Va. 122, 13 S. E. 348.

Account of "Per Account Rendered," with Proof.—An account filed with the declaration in assumpsit for goods sold, charging goods sold "per account rendered," with proof that the account was rendered, is sufficient. *Robinson v. Burks*, 12 Leigh 378.

Filing Note with Affidavit of Set-Off.—In an action of assumpsit, defendant pleads nonassumpsit, and, with it, files affidavit to set-off, and the set-off, which is a note. This is a substantial compliance with the statute, the record showing that plaintiff had full notice of the character of the set-off, and that he was not taken by surprise. *Bell v. Crawford*, 8 Gratt. 133. See the title SET-OFF, RECOUPMENT AND COUNTER-CLAIM.

Items Not Plainly Mentioned.—Where the declaration does not plainly describe the items, and the account filed therewith merely mentions the sums paid, without any information about them, the account is not sufficient. *Johnson v. Fry*, 88 Va. 698, 12 S. E. 973. See *Burwell v. Burgess*, 32 Gratt. 472.

Failure to Specify All Claims.—An account, stating the several items of the claim in every action of assumpsit is required to be filed, and, if a bill of particulars is filed specifying only a note and no other claim, proof will not be received of any demand for a store account. *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 55.

Not Properly Designating Creditor.—In an action of assumpsit by an administrator, the count is for money had and received, and the bill of particulars merely states an account in which the defendant is debtor to the administrator for a stated sum of money received. The count and the bill of particulars are not sufficient to admit of proof of an admission by the defendant that he had received from a third person certain money belong-

ing to the estate of plaintiff's intestate. *Minor v. Minor*, 8 Gratt. 1. See *Mann v. Perry*, 3 W. Va. 581.

Variance between Declaration and Bill.—When the items of account are set forth in a bill of particulars in sterling money, but its value calculated and expressed in federal money, and the indebtedness is alleged in the declaration in money of account of the state, this is sufficient to admit evidence of transactions between the parties in sterling money. *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167; *Cappellar v. Insurance Co.*, 21 W. Va. 576.

Statement Vague and Constituting No Defense.—When the defendant in an action on a policy of insurance files a plea with required statement of particulars, the court must permit such plea and statement with the accompanying affidavit to be filed, and can not refuse to permit such statement or any part thereof to be filed, either because in the opinion of the court certain facts set out in said statement constitute no defense to the plaintiff's action, or because the statement is so vague as not to notify the plaintiff in effect of the nature of the defense intended to be set up against him. *Cappellar v. Insurance Co.*, 21 W. Va. 576. But see post, "Evidence," X.

The statement of particulars required to be filed in an action on insurance policy is not sufficient when the facts set out constitute no defense to the action. *Cappellar v. Insurance Co.*, 21 W. Va. 576. See the title INSURANCE.

VI. Amendments.

See generally, the title AMENDMENTS, vol. 1, p. 360.

VII. Joint Defendants.

If a declaration in assumpsit be filed against two defendants jointly containing the common counts, and a bill of particulars be filed purporting to be an account against both defendants jointly, but on the trial of the case on

the plea of nonassumpsit, the evidence shows that only a part of the items in the bill of particulars are charged against the two defendants jointly, and that the other items are charged against one of the defendants individually, the jury can only find a verdict on the items in the account, which are charges against the two defendants jointly, and can render no verdict against one of the defendants severally on the items of the account which are charges against him severally. *Enos v. Stansbury*, 18 W. Va. 477.

VIII. Demurrer

A. GENERAL RULE.

See generally, the title DEMURRERS.

The bill of particulars is not a part of the pleadings so as to be reached by demurrer. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696. See *Abell v. Pennsylvania Mut. Ins. Co.*, 18 W. Va. 400; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

And so it was held, in *Booker v. Donohoe*, 95 Va. 362, 28 S. E. 584, that, the account which the statute requires to be filed with an action of assumpsit, setting forth the items of the plaintiff's claim, is not a part of the declaration, so as to be subject to demurrer. See *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167, overruling *Wright v. Smith*, 81 Va. 779. See also, *King v. N. & W. R. Co.*, 99 Va. 626, 39 S. E. 701; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Columbia Accident Ass'n v. Rockey*, 93 Va. 683, 25 S. E. 1009.

It has been repeatedly decided by the supreme court of West Virginia that a bill of particulars or account filed with an action of assumpsit or with the plea of payment or set-off under W. Va. Code, if defective, could be taken advantage of by the opposite side, not by demurrer, but only by moving to exclude the evidence of the jury which might be offered to sustain such in-

perfect bill of particulars or account. *Cappellar v. Insurance Co.*, 21 W. Va. 576. See also, *Choën v. Guthrie*, 15 W. Va. 113; *Abell v. Pennsylvania Mut. Ins. Co.*, 18 W. Va. 413.

Failure to File Bill.—Failure to file a bill of particulars in an action of assumpsit is not ground for a demurrer. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

B. EXCEPTIONS TO RULE.

The rule is otherwise, where the parties agree in writing that the case made by the declaration may be supplemented by the bill of particulars for by such agreement the bill is supplemental to the declaration and comes a part of the pleadings. *King v. Norfolk, etc., R. Co.*, 99 Va. 625, 39 S. E. 701.

IX. Objections.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

Must Be Raised in Trial Court.—In action for damages, defendant's motion that plaintiff be required to file bill of particulars is denied, but at the next term it is allowed, and plaintiff files bill, and trial proceeds without defendant asking for time to consider his defense. He can not raise the objection in the appellate court. *Central Lun. Asylum v. Flanagan*, 80 Va. 114.

Objections to a bill of particulars should be made before the trial begins. *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

Objections Waived.—The appellate court will consider the objections to a bill of particulars or to its being filed as waived, no objections being made before trial. *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167. See also, *Smith v. Townsend*, 21 W. Va. 486.

Failure to Require Bill.—And in *Varner v. Core*, 20 W. Va. 479, it was held, that, if defendant fails, during trial, to ask the court to require plaintiff to file a statement setting out his objections to the settlement in con-

troversy, he can not be heard to complain in the appellate court.

X. Evidence.

It seems to be well settled that a party will be confined in his proof to matters set forth in his bill of particulars, except as to such matters as are plainly and particularly described in his declaration. See ante, "When Ordered," IV, B.

Variance.—Where the items of an account are set forth in a bill of particulars in sterling money, but its value calculated and expressed in federal money and the indebtedness is alleged in the declaration in money of account of the state, evidence will be admitted of the transaction between the parties as in sterling money. *Cappellar v. Insurance Co.*, 21 W. Va. 576; *Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167. See the title VARIANCE.

No Issue Taken.—When an unwritten plea of set-off is filed, with no bill of particulars and no issue taken upon it, no evidence can be received, and if issue had been joined the result would be the same. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

In any action on insurance policy where a statement of particulars is required to be filed, if the statement set out is so vague as not to notify the plaintiff in effect of the nature of the defense, the court at the trial of the case before the jury should on motion of the plaintiff exclude all of the evidence of the defense so offered. *Cappellar v. Insurance Co.*, 21 W. Va. 576. In this case it is said that evidence will not be admitted to prove immaterial facts, constituting no defense, set out in the bill.

XI. Bill as Evidence in Subsequent Proceedings.

In *Coville v. Giiman*, 13 W. Va. 314, it was held, that a bill of particulars is evidence to show the precise subject matter of the suit in which it was filed.

BILL OF PEACE.

CROSS REFERENCES.

See the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; EQUITY; JURISDICTION; MULTIPLICITY OF SUITS; QUIETING TITLE.

Definition.—A bill of peace is made use of, where a person has a right which may be controverted by various persons, at different times, and by different actions; or where several persons, having the same right, are disturbed; and the court will thereupon prevent a multiplicity of suits, by directing an issue to determine the right, and ultimately an injunction. *Randolph v. Kinney*, 3 Rand. 395.

When Bill Will Not Lie.—A bill of peace will not lie, where the rights and responsibilities of the several defendants neither arise from, nor depend upon nor are in any way connected with, each other. *Randolph v. Kinnney*, 3 Rand. 394.

BILL OF REVIEW.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 436; EQUITY; JUDGMENTS AND DECREES; NEW TRIALS.

I. Definition and General Consideration.

See post, "Purpose," II.

A. BILL OF REVIEW.

A bill of review is a proceeding to correct a final decree in the same court in which that decree was rendered. *Laidley v. Merrifield*, 7 Leigh 346; *Vanmeter v. Vanmeters*, 3 Gratt. 148; *Hancock v. Hutcherson*, 76 Va. 609; *Barnett v. Smith*, 5 Call 98; *Quarrier v. Carter*, 4 Hen. & M. 242; *McCall v. Graham*, 1 Hen. & M. 13; *Legrand v. Francisco*, 3 Munf. 83; *Sands v. Lynham*, 27 Gratt. 303; *Goolsby v. St. John*, 25 Gratt. 163; *Wroten v. Armat*, 31 Gratt. 260; *Carter v. Allan*, 21 Gratt. 241; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613; *Pracht v. Lange*, 81 Va. 711; *Parker v. Dillard*, 75 Va. 418; *West v. Shaw*, 32 W. Va. 195, 9 S. E. 81; *Heermans v. Montague*, 2 Va. Dec. 6; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102;

Dingess v. Marcum, 41 W. Va. 757, 24 S. E. 624; *Shenadoah Val. Bank v. Shirley*, 26 W. Va. 563; *Hill v. Maury*, 21 W. Va. 162; *Middleton v. Selby*, 19 W. Va. 167; *Custer v. Custer*, 17 W. Va. 123; *Nichols v. Nichols*, 8 W. Va. 174; *Thompson v. Edwards*, 3 W. Va. 659.

Nature.—A bill of review is in the nature of a writ of error. *Hyman v. Smith*, 10 W. Va. 298.

It Is Not a Part of the Cause—New Suit.—A bill of review is not regarded as a part of the cause in which the decree was rendered, but as a new suit having for its object the correction of the decree in the former suit. *Laidley v. Merrifield*, 7 Leigh 346. But see *Goolsby v. St. John*, 25 Gratt. 146, where it is stated that the bill of review was but a continuance of the original suit.

As to bill in nature of bill of review, see post, "Bill in Nature of Bill of Review," I, B.

Restraining Enforcement of Decree.

—Where a decree is obtained by vendor of lands against vendee for price of land which was to be paid upon delivery of deed, and in suit by a third party against vendor the court decides that the title to the land is not in vendor but in third party, a bill by vendee to restrain enforcement of the decree for the purchase price is a bill of review. *West v. Shaw*, 32 W. Va. 195, 9 S. E. 81.

B. BILL IN NATURE OF BILL OF REVIEW.

Where the decree is interlocutory the so called bill of review may be regarded as a supplemental bill in the nature of a bill of review. *Laidley v. Merrifield*, 7 Leigh 353; *Claytor v. Anthony*, 15 Gratt. 526; *Ellzey v. Lane*, 2 Hen. & M. 589. See also, *Heermans v. Montague*, 2 Va. Dec. 6.

The office of a supplemental bill, in the nature of a bill of review, is to bring before the court new matter discovered since the time when it could have been used in the cause at the original hearing. Such supplemental bill, it seems, can not be filed without the leave of the court, nor without an affidavit similar to that required in the like case of a bill of review. *Hyman v. Smith*, 10 W. Va. 298.

Distinction between Bill of Review and Supplemental Bill in the Nature of a Bill of Review.—"A bill of review, strictly speaking, is a proceeding to correct a final decree in the same court, for error apparent on the face of the decree, or on account of new evidence discovered since the final decree. The decree being final, the bill of review is not regarded as part of the cause in which the decree was rendered, but as a new suit having for its object the correction of the decree in the former suit. But where a decree is only interlocutory, but liable to the same objections, the party injured must seek his redress, not by a bill of review, as such, but by petition, or sup-

plemental bill in the nature of a bill of review. Such petition or supplemental bill is regarded as a part of the very cause the decree in which is sought to be corrected, and any order or decree of the court on the petition or bill is only interlocutory." *Laidley v. Merrifield*, 7 Leigh 346. See also, *Hyman v. Smith*, 10 W. Va. 298; *Carper v. Hawkins*, 8 W. Va. 301; *Bowyer v. Lewis*, 1 Hen. & M. 554. See the title JUDGMENTS AND DECREES.

New Suit.—A supplemental bill in the nature of a bill of review is but a continuance of the former suit. *Law v. Law*, 55 W. Va. 4, 46 S. E. 697. See also, *Nichols v. Nichols*, 8 W. Va. 174. An original bill in the nature of a bill of review is not a mere continuance of the former suit, but is a new suit. *Law v. Law*, 55 W. Va. 4, 46 S. E. 697.

A bill filed for the purpose of impeaching a decree for fraud is a bill in the nature of a bill of review. *Keran v. Trice*, 75 Va. 690.

A petition filed by a widow on behalf of herself and infant children, alleging that their property has been sold and sacrificed under decrees deceitfully obtained by a creditor of the deceased husband and father, should be treated as an original bill in the nature of a bill of review. *Silman v. Stump*, 47 W. Va. 641, 35 S. E. 833.

II. Purpose.

See ante, "Definitions and General Consideration," I.

The object of a bill of review is to procure an examination and alteration or reversal of a decree made upon a former bill, which decree has been signed and enrolled. *Hyman v. Smith*, 10 W. Va. 298.

To Set Aside a Final Decree.—There are but two ways known to the law whereby a final decree (not on a confessed bill) can be set aside; that is, by bill of review or by appeal. Bat-

taile *v.* Maryland Hospital, 76 Va. 63; Rawlings *v.* Rawlings, 75 Va. 76.

A cause may be reheard upon a petition presented before the term has passed in which the final decree was pronounced, but not afterwards, except by bill of review. Carper *v.* Hawkins, 8 W. Va. 291. See also, Hodges *v.* Davis, 4 Hen. & M. 400; Towner *v.* Lane, 9 Leigh 262.

Review of One Point.—A bill of review may pray simply, that the decree be reviewed or reversed in the point complained of, if it has not been carried into execution. Amiss *v.* McGinnis, 12 W. Va. 371.

New Issues.—It is not allowable in a bill of review to allege matters by way of amendment or supplement to the original bill which will have a tendency to create new issues. Such a course would be foreign to the object of a bill of review. Snyder *v.* Botkin, 37 W. Va. 355, 16 S. E. 591.

Bill as Notice to Correct Errors.—When a party files a bill of review for errors of law, which is barred by the statute of limitations, it is improper to treat it at the hearing as a notice to correct errors, under § 5, ch. 181, W. Va. Code, 1860, especially where one of the plaintiffs in the bill could not make such motion under said § 5, ch. 181. Amiss *v.* McGinnis, 12 W. Va. 371.

Petition for Rehearing.—It is the settled practice, to treat a bill of review which is filed to an interlocutory decree as if it was in name a petition for rehearing; and a petition for rehearing, which is filed to a final decree, as if it was a bill of review, provided it conforms to the ordinary requirements of such a bill. Summers *v.* Darne, 31 Gratt. 791, 808; Dillard *v.* Thornton, 29 Gratt. 392; Kendrick *v.* Whitney, 28 Gratt. 646-654; Ambrouse *v.* Keller, 22 Gratt. 769; Sands *v.* Lynham, 27 Gratt. 291; Mettert *v.* Hagan, 18 Gratt. 231; Hill *v.* Bowyer, 18 Gratt. 364; Diamond, etc., Co. *v.* Rarig, 93

Va. 595, 25 S. E. 894; Rawlings *v.* Rawlings, 75 Va. 91; Heermans *v.* Montague, 2 Va. Dec. 6; West *v.* Shaw, 32 W. Va. 195, 9 S. E. 81; Martin *v.* Smith, 25 W. Va. 583; Sturm *v.* Fleming, 22 W. Va. 413. See also, Laidley *v.* Merrifield, 7 Leigh 353; Deaton *v.* Mitchell, 45 W. Va. 670, 31 S. E. 968.

III. Form and Requisites.

Written.—A mere oral motion to review should not be received, but it should be in writing, contain the necessary averments and be presented in due form. Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595. See the title MOTIONS.

Must Show Interest.—To maintain a bill of review, the party filing the same must show by the allegations thereof that he is interested in the matter disposed of by the decree sought to be reviewed, what those interests are, and that he will be benefited by a reversal or modification of said decree. Riggs *v.* Huffman, 33 W. Va. 426, 10 S. E. 795; Hall *v.* Lowther, 22 W. Va. 570; Kanawha Valley Bank *v.* Wilson, 35 W. Va. 36, 13 S. E. 58; Laidley *v.* Kline, 25 W. Va. 208; Miller *v.* Rose, 21 W. Va. 291; Shrewsbury *v.* Miller, 10 W. Va. 115.

Defective Proceedings or New Evidence.—A bill is fatally defective as a bill of review, for failing to show defect in the proceedings, or to allege discovered evidence since the decree, that could not by reasonable diligence have been ascertained before and which is not merely cumulative. Carter *v.* Allan, 21 Gratt. 241. See also, Legrand *v.* Francisco, 3 Munf. 83; Connolly *v.* Connolly, 32 Gratt. 657; Douglass *v.* Stephenson, 75 Va. 747.

Former Bill and Proceedings Stated.—A bill of review should state the former bill, and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; for it is laid down, that no objec-

tion, but what has been assigned for error, shall be allowed to be made, and if it is not ground of law, then the new matter discovered, upon which the plaintiff seeks to impeach it, must be stated. *Amiss v. McGinnis*, 12 W. Va. 393; *Quarrier v. Carter*, 4 Hen. & M. 242; *Keran v. Trice*, 75 Va. 690; *Hatcher v. Hatcher*, 77 Va. 600.

Affidavit.—The well-established rule is, that whether the proceeding be by bill of review to a final decree or by a petition to rehear an interlocutory decree, if it be founded on after-discovered evidence, the bill or petition, as the case may be, must not only allege that the new matter was discovered after the rendition of the decree sought to be reviewed or reheard, but should be supported by an affidavit that the newly discovered evidence could not have been procured, with the use of due diligence, in time to have been used when the decree was rendered; and the affidavit must also state the substance of the evidence, which must be relevant, and not merely cumulative, and such as, if true, ought to produce a different result on another hearing. *Corey v. Moore*, 86 Va. 730, 11 S. E. 114; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901, citing *Kendrick v. Whitney*, 28 Gratt. 646; *Connolly v. Connolly*, 32 Gratt. 657; *Whitten v. Saunders*, 75 Va. 563; *Douglass v. Stephenson*, 75 Va. 747; 1 Bart. Ch. Pr. 126; *Auditor v. Pauly*, 5 Call 331; *Barnett v. Smith*, 5 Call 98; *Alexander v. Morris*, 3 Call 89; *Randolph v. Randolph*, 1 Hen. & M. 181; *Carter v. Allen*, 21 Gratt. 245; *Nuckols v. Jones*, 8 Gratt. 267; *Diamond, etc., Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Tate v. Tate*, 85 Va. 206, 7 S. E. 352; *Armstead v. Bailey*, 83 Va. 245, 2 S. E. 38; *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349; *Parker v. Logan*, 82 Va. 376; *Norfolk Trust Co. v. Foster*, 78 Va. 413; *Hatcher v. Hatcher*, 77 Va. 600; *Wethered v. Eliott*, 45 W. Va. 436, 32 S. E. 209; *Bloss*

v. Hull, 27 W. Va. 503; *Sayre v. King*, 17 W. Va. 562; *Nichols v. Nichols*, 8 W. Va. 174; *Lee v. Braxton*, 5 Call 459.

It is not sufficient that the party expects to prove certain facts. He must file the affidavits of witnesses in support of his averments. *Whitten v. Saunders*, 75 Va. 573; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Hatcher v. Hatcher*, 77 Va. 600; *Harman v. McMullin*, 85 Va. 191, 7 S. E. 349; *Nuckols v. Jones*, 8 Gratt. 267; *Brown v. Speyers*, 20 Gratt. 296; *Hale v. Pack*, 10 W. Va. 145.

Exhibited in Time Prescribed by Law.—It is not necessary to plead the act of limitation against a bill of review; for it ought to appear, in the bill itself, that it is exhibited within the time prescribed by law, or that the complainant is protected by some of the savings in the act. Otherwise it ought not to be received. *Shepherd v. Larue*, 6 Munf. 529. See post, "Plea and Answer," XI.

IV. Jurisdiction of Courts.

Courts of Different Counties.—A circuit court of one county sitting as a court of equity, has no jurisdiction to review a decree of a chancery court of another county. *Vanmeter v. Vanmeters*, 3 Gratt. 148.

Courts of Limited Powers.—The court in which a bill is filed under the statute to impeach or establish a will is not a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited, it may on a proper bill, review and correct errors in its proceedings after final decree in the cause. *Connolly v. Connolly*, 32 Gratt. 657.

Special Jurisdiction.—The decrees of one court can not be reviewed by another in the absence of special jurisdiction. The jurisdiction of the county courts in civil suits and in equity having been taken from them by the acts

of 1872-73, p. 383, jurisdiction was not thereby given the circuit courts to review the final decrees of the county courts in any cause by bill of review. *Hancock v. Hutcherson*, 76 Va. 609.

Inferior Courts.—The errors of the inferior court can always be corrected by the superior court; and the inferior courts themselves have no power of correction after the term has passed, except in suits in chancery, where a bill of review may be filed. *Towner v. Lane*, 9 Leigh, 262.

Pending Appeal—Conflict of Jurisdiction.—Is it proper for the circuit court to consider a bill of review while the cause is pending on appeal? If the questions raised are the same questions of law on the same state of facts presented on appeal to the supreme court, it would be improper; but, when new facts are presented by after-discovered evidence, there is no impropriety in the circuit court proceeding with the bill of review without regard to the pendency of the appeal, for the reason that the causes in the two tribunals are materially different, and there would be no conflict of jurisdiction. *Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882. See also, *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. 184. See the title APPEAL AND ERROR, vol. 1, p. 418.

V. What Decrees Reviewable.

A. FINAL DECREES.

See generally, the title JUDGMENTS AND DECREES.

A bill of review lies only to a final decree. *Hodges v. Davis*, 4 Hen. & M. 400; *Graves v. Graves*, 2 Hen. & M. 22; *Banks v. Anderson*, 2 Hen. & M. 20; *Ellzey v. Lane*, 2 Hen. & M. 589; *Bowyer v. Lewis*, 1 Hen. & M. 554; *Ellzey v. Lane*, 4 Munf. 66; *Mackey v. Bell*, 2 Munf. 523; *Royall v. Johnson*, 1 Rand. 427; *Laidley v. Merrifield*, 7 Leigh 353; *Claytor v. Anthony*, 15 Gratt. 526; *Diamond, etc., Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Dell-*

inger v. Foltz, 93 Va. 729, 25 S. E. 998; *Epes v. Williams*, 89 Va. 794, 17 S. E. 235; *Diffendal v. Virginia, etc., R. Co.*, 86 Va. 465, 10 S. E. 536; *Roanoke Nat. Bank v. Farmers' Bank*, 84 Va. 610, 5 S. E. 682; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613; *Nelson v. Kownslar*, 79 Va. 468-487; *Battaile v. Maryland Hospital*, 76 Va. 63; *Heermans v. Montague*, 2 Va. Dec. 6; *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Ruhl v. Ruhl*, 24 W. Va. 279; *Custer v. Custer*, 17 W. Va. 123; *McCoy v. Allen*, 16 W. Va. 724; *Hyman v. Smith*, 10 W. Va. 298; *Nichols v. Nichols*, 8 W. Va. 174; *Carper v. Hawkins*, 8 W. Va. 291. See also, *Suckley v. Rotchford*, 12 Gratt. 60, 65 Am. Dec. 240; *Nelson v. Jennings*, 2 Pat. & H. 369. See ante, "Bill of Review," I, A; "Purpose," II.

What Constitutes a Final Decree.—

See the title APPEAL AND ERROR, vol. 1, p. 437.

When the further action of the court in the cause is necessary to give completely the relief contemplated by the court, then the decree is to be regarded not as final but interlocutory. *Templeman v. Steptoe*, 1 Munf. 339; *Young v. Skipwith*, 2 Wash. 300; *McCall v. Peachy*, 1 Call 56; *Grymes v. Pendleton*, 1 Call 54; *Aldridge v. Giles*, 3 Hen. & M. 136; *Allen v. Belches*, 2 Hen. & M. 595; *Ellzey v. Lane*, 2 Hen. & M. 589; *William & Mary College v. Hodgson*, 2 Hen. & M. 557; *Bowyer v. Lewis*, 1 Hen. & M. 553; *Goodwin v. Miller*, 2 Munf. 42; *Mackey v. Bell*, 2 Munf. 523; *Hill v. Fox*, 10 Leigh 587; *Manns v. Flinn*, 10 Leigh 93; *Dunbar v. Woodcock*, 10 Leigh 628; *Richardson v. Duble*, 33 Gratt. 730; *Ryan v. McLeod*, 32 Gratt. 377; *Summers v. Darne*, 31 Gratt. 791; *Smith v. Blackwell*, 31 Gratt. 300; *Ewart v. Saunders*, 25 Gratt. 209; *Burch v. Hardwicke*, 23 Gratt. 56; *Ambrouse v. Keller*, 22 Gratt. 769; *Suckley v. Rotchford*, 12

Gratt. 70; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436; *Noel v. Noel*, 86 Va. 109, 9 S. E. 584; *Jameson v. Jameson*, 86 Va. 54, 9 S. E. 480; *Barker v. Jenkins*, 84 Va. 899, 6 S. E. 459; *Wayland v. Crank*, 79 Va. 602; *Brengle v. Richardson*, 78 Va. 412; *Miller v. Cook*, 77 Va. 817; *Johnson v. Wagner*, 76 Va. 587; *Wright v. Strother*, 76 Va. 857; *Elder v. Harris*, 75 Va. 68; *Camden v. Haymond*, 9 W. Va. 680. See also, *Banks v. Anderson*, 2 Hen. & M. 20.

A decree which disposes of the whole subject and gives all the relief that was contemplated, so that nothing remains to be done in the cause, is a final decree. *Battaille v. Maryland Hospital*, 76 Va. 63; *Alexander v. Coleman*, 6 Munf. 335; *Sheppard v. Starke*, 3 Munf. 29; *Royall v. Johnson*, 1 Rand. 421; *Tennent v. Pattons*, 6 Leigh 196; *Harvey v. Branson*, 1 Leigh 108; *Cocke v. Gilpin*, 1 Rob. 20; *Vanmeter v. Vanmeters*, 3 Gratt. 148; *Yates v. Wilson*, 86 Va. 625, 10 S. E. 976; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613; *Jones v. Turner*, 81 Va. 709; *Norfolk, etc., Co. v. Foster*, 78 Va. 413; *Johnson v. Anderson*, 76 Va. 771; *Pace v. Ficklin*, 76 Va. 292; *Thompson v. Brooke*, 76 Va. 160; *Rawlings v. Rawlings*, 75 Va. 76; *Nelson v. Jennings*, 2 Pat. & H. 369; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Core v. Strickler*, 24 W. Va. 695; *Ruhl v. Ruhl*, 24 W. Va. 279.

Adjudication of All Matters.—A decree made upon the hearing on the merits, which settles and adjudicates all the matters in controversy between the parties, is such a final decree that a bill of review will lie to it, although much may remain to be done before it can be completely carried into execution. *Fowler v. Lewis*, 36 W. Va. 130, 131, 14 S. E. 447; *Gallatin Land, Coal & Oil Co. v. Davis*, 44 W. Va. 109, 28 S. E. 748; *Core v. Strickler*, 24 W. Va. 689.

Reserving Liberty to Ask for Further Interposition.—A decree reserving liberty to the parties or one of them to

resort to the court for further interposition if it be found necessary is final to the extent that it may be reviewed on a bill of review for that purpose. *Sheppard v. Starke*, 3 Munf. 29.

Decree against One of Several Defendants.—Where a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may still be pending in court as to the rest. *Thorntons v. Fitzhugh*, 4 Leigh 219; *Noel v. Noel*, 86 Va. 113, 9 S. E. 584; *Ryan v. McLeod*, 32 Gratt. 367, and note.

Confirmation of Commissioner's Report.—In a cause land is sold and proceeds distributed as decreed. Commissioner makes his final report showing completion of his collections and a balance in his hands for final distribution. The cause is then heard on the bill, answers and other papers formerly read, and on the commissioner's report without exceptions. The court confirmed the report, and decreed in conformity with it, and that the cause be stricken from the docket. Held, this is a final decree. Hence a bill of review lies. *Battaille v. Maryland Hospital*, 76 Va. 63.

A decree for the distribution of property and payment of money is a final decree and subject to the statute of limitations relating to bills of review. *Kearfott v. Dandridge*, 45 W. Va. 673, 31 S. E. 947.

B. CONSENT DECREES.

Clerical Error.—A decree or order made by consent can not be set aside either by rehearing or appeal or by bill of review, unless by clerical error something has been inserted in the order as by consent, to which the party had not consented, in which case a bill of review might lie. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862; *Camden v. Ferrell*, 50 W. Va. 119, 40 S. E. 368.

Mutual Mistakes.—Where a consent decree was entered under a compromise and afterward plaintiff and defendant discover that they were laboring under mutual mistakes, the court held, that the decree should be set aside on a bill to review the proceedings. *Epes v. Williams*, 89 Va. 794, 17 S. E. 235. See the title COMPROMISE.

Consent Decree Beneficial to Infant.—Although an infant defendant may file, after becoming of age, his bill to review and reverse a decree, that was entered in a suit to which he was a party, and defended by guardian ad litem, beneficial to his interest as shown by the record, by consent of all the parties thereto, it will not be set aside. *Morriss v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383. See the title INFANTS.

C. DECREES BY DEFAULT.

See the title DEFAULTS.

New Evidence.—A bill of review based on newly discovered evidence does not lie to a decree by default. *Camden v. Ferrell*, 50 W. Va. 119, 40 S. E. 368.

But a final decree by default, may often be set aside at a subsequent term, for good cause shown in a case where relief can not be given by bill of review. *Erwin v. Vint*, 6 Munf. 267; *Callaway v. Alexander*, 8 Leigh 114; *Anderson v. Woodford*, 8 Leigh 316; *Hill v. Bowyer*, 18 Gratt. 375; *Craufurd v. Smith*, 93 Va. 623, 23 S. E. 235; *Legrand v. Francisco*, 3 Munf. 83.

D. VOID AND VOIDABLE DECREES.

May Be Reviewed.—A decree which is void, not merely erroneous, may be attacked directly by appeal or bill of review, or by collateral attack. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603. See the title JUDGMENTS AND DECREES.

Binding until Reversed.—When the circuit court, having jurisdiction of the parties and the subject matter of the

suit renders a decree in a cause, that decree, though erroneous is binding until reversed; and the remedy would be by a bill of review and not by an action of ejectment. *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189. See also, *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150.

E. DECREES APPEALED FROM.

Different Question Presented.—A decree from which an appeal is pending may be reviewed by the lower court upon a bill of review alleging new facts presented by after-discovered evidence, because the questions presented to the two tribunals are materially different. But if review is for error of law it can not be maintained while appeal is pending. *Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882. See also, *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. 184.

Pending Review.—Where a party has filed a petition for rehearing or bill of review for error of law in the circuit court, he can not, while it is pending undetermined, appeal to this court. *Maxwell v. Martin*, 35 W. Va. 384, 14 S. E. 7.

F. COMMISSIONER'S REPORT.

Where a commissioner's report shows that interest on a debt audited therein is calculated at six per cent., and the pleadings in the cause show, that the debt bore nine per cent. interest, and the report is not excepted to, such error may be corrected in the court below on notice under the statute or by bill of review or by petition for rehearing in a proper case or upon appeal in the appellate court. *Shenandoah Valley Bank v. Shirley*, 26 W. Va. 563. See ante, "Final Decrees," V. A. See the title APPEAL AND ERROR, vol. 1, p. 418.

G. DECREES OF SUPREME COURT.

Keith, J., in *Shepherd v. Chapman*, 2 Va. Dec. 88, says: "It is well settled that a bill of review will not lie to a decree of the supreme court for errors

apparent. It is also well settled that all decrees of the supreme court partake of the equality of finality, and that an interlocutory decree of that court can no more be reviewed in this or any other court for apparent errors than could a final decree. A bill of review, however, does lie to a decree of that court upon the ground of after-discovered evidence." See also, *McCall v. Graham*, 1 Hen. & M. 13.

Affirmation by Court of Appeals.—

When the court of appeals affirms a decree, whether interlocutory or final, and sends the cause back for further proceedings, there can not be a bill of review to correct any errors apparent on the record up to the time when such decree was rendered in the lower court. The maxim, "Interest rei publicæ res judicatas non rescindi" applies in such case. *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66; *Randolph v. Randolph*, 1 Hen. & M. 181; *McCall v. Graham*, 1 Hen. & M. 13; *Campbell v. Price*, 3 Munf. 227; *Kent v. Dickinson*, 25 Gratt. 817, 821; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 751, 3 S. E. 433; *Findlay v. Trigg*, 83 Va. 543, 3 S. E. 142; *Shepherd v. Chapman*, 2 Va. Dec. 88; *Davis Sewing Mach. Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Mason v. Bridge Co.*, 20 W. Va. 223. See also, *Campbell v. Campbell*, 22 Gratt. 649; *Henry v. Davis*, 13 W. Va. 256; *White v. Atkinson*, 2 Call 376; *Ambler v. Macon*, 4 Call 606.

But in such case a bill of review may be had on the ground of after-discovered evidence if such evidence is material, has been discovered since the decree was affirmed, could not have been discovered before by reasonable diligence and is of such character as would probably change the decision of the court. *Connolly v. Connolly*, 32 Gratt. 661, and note; *Reynolds v. Reynolds*, 88 Va. 152, 13 S. E. 598; *Davis Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Diamond, etc., Co. v. Rarig*, 93 Va. 601, 25 S. E. 894; *Shepherd v.*

Chapman, 2 Va. Dec. 88; *Curry v. Burns*, 3 Call 183; *Winston v. Johnson*, 2 Munf. 305; *McCall v. Graham*, 1 Hen. & M. 12.

VI. Grounds for Review.

A. ERROR.

1. Errors Apparent.

A bill of review lies on the ground of error apparent on the face of the decree. *Triplett v. Wilson*, 6 Call 47; *Quarrier v. Carter*, 4 Hen. & M. 242; *Braxton v. Lee*, 4 Hen. & M. 376; *Nelson v. Suddarth*, 1 Hen. & M. 350; *McCall v. Graham*, 1 Hen. & M. 13; *Randolph v. Randolph*, 1 Hen. & M. 181; *Laidley v. Merrifield*, 7 Leigh 353; *Connolly v. Connolly*, 32 Gratt. 657; *Mosby v. Mosby*, 9 Gratt. 584; *Niday v. Harvey*, 9 Gratt. 454; *Diamond, etc., Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613; *Thomson v. Brooke*, 76 Va. 160; *Battaile v. Maryland Hospital*, 76 Va. 63; *Shepherd v. Chapman*, 2 Va. Dec. 88; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Amis v. McGinnis*, 12 W. Va. 371; *Custer v. Custer*, 17 W. Va. 113; *Nichols v. Nichols*, 8 W. Va. 174. See also, *Brown v. Nutter*, 54 W. Va. 82, 46 S. E. 375.

What Errors Considered.—When the bill of review is for errors apparent on the face of the decrees, orders and proceedings in the cause, the error must arise on the facts admitted by the pleadings or stated as facts in the decrees. *Core v. Strickler*, 24 W. Va. 697; *Beatty v. Barley*, 97 Va. 11, 32 S. E. 794; *State Bank v. Blanchard*, 90 Va. 22, 17 S. E. 742; *Hancock v. Hutcherson*, 76 Va. 609; *Thomson v. Brooke*, 76 Va. 160; *Rawlings v. Rawlings*, 75 Va. 76; *Shepherd v. Chapman*, 2 Va. Dec. 88; *Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. 886. See *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S.

E. 250; *Nichols v. Nichols*, 8 W. Va. 174.

On a bill of review, the court will not only correct errors of law apparent in the decrees in the cause, but will look into all "the pleadings and proceedings," and correct whatever error of law there may be in the record. *Goolsby v. St. John*, 25 Gratt. 146; *Written v. Armat*, 31 Gratt. 260; *Pracht v. Lange*, 81 Va. 721; *Hancock v. Hutcherson*, 76 Va. 609; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599; *Parker v. Dillard*, 75 Va. 418. See also, *Rawlings v. Rawlings*, 75 Va. 88; *Shepherd v. Chapman*, 2 Va. Dec. 88; *Sharp v. Shenandoah Furnace Co.*, 100 Va. 34, 40 S. E. 103; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. See the title PLEADING.

By error apparent is meant such as appears upon the face of the proceedings, and that includes all that was involved in the issue. *Henry v. Davis*, 13 W. Va. 230.

Apparent on the Record.—A party to a suit who has a lien against land which is sought to be subjected, who has had notice of the time and place of ascertaining the liens against the same and the amounts and priorities thereof, who fails to attend before said commissioners at the time of settling said accounts, or to except to the same after it is stated, after the report of the commissioner has been confirmed and a sale decreed, reported, and confirmed, and the proceeds directed to be distributed in accordance with the priorities so ascertained, will not be allowed to have the order of said priorities changed on petition in the nature of a bill of review, unless the error complained of in ascertaining said priorities appears on the face of the decree, or he sufficiently accounts for his laches. *Keck v. Allender*, 37 W. Va. 201, 16 S. E. 520; *Shenandoah Valley Nat. Bank v. Shirley*, 26 W. Va. 563. See also, *Winston v. Johnson*, 2 Munf. 305.

Enforcing Judgment as a Lien.—An administrator de bonis non of D. C. confessed judgment in favor of the administrator of M. C., pursuant to a written agreement made between them. The administrator of M. C. then filed a bill in chancery against the administrator de bonis of D. C. and the widow and heirs of D. C. to enforce the said judgment as a lien against the lands of said D. C. Held, the decree showing upon its face that it was enforcing such a judgment as a lien against such land, may be reviewed and reversed upon a proper bill of review filed for that purpose by the heirs. *Custer v. Custer*, 17 W. Va. 113.

Dismissing Cause.—When decree placed money in hands of a trustee for the reimbursement of vendees for timber privilege not estimated, and reference was made to commissioner to find the value of those privileges, dismissing the cause without disposing of the money and without a report from the commissioners was error for which a bill of review should have been granted. *Thompson v. Edwards*, 3 W. Va. 659.

Where Some Parties Are Infants.—It is not error to decree in a cause in favor of the plaintiffs because some of them are infants, and though the infants are incapable of consenting to the decree, it is binding upon them, if for their benefit, and the court having the whole case before it, and being satisfied the decree is for their benefit, there is no error on the face of the decree for which it would be reviewed and reversed. *Harman v. Davis*, 30 Gratt. 461. See the title INFANTS.

Determination of Error of Law.—In determining what is error of law apparent on the face of the decree the court can not look into the evidence in order to see if the decree sought to be reviewed is erroneous, as that is the proper office of the court upon appeal. It can only examine errors apparent on the record. *Middleton v.*

Selby, 19 W. Va. 172; *State Bank v. Blanchard*, 90 Va. 27, 17 S. E. 742; *Davis v. Morriss*, 76 Va. 21; *Hancock v. Hutcherson*, 76 Va. 609; *Thomson v. Brooke*, 76 Va. 160; *Rawlings v. Rawlings*, 75 Va. 88; *Shepherd v. Chapman*, 2 Va. Dec. 88; *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66; *Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. 886; *Mason v. Bridge Co.*, 20 W. Va. 223; *Core v. Strickler*, 24 W. Va. 697; *Nichols v. Nichols*, 8 W. Va. 174; *Thompson v. Edwards*, 3 W. Va. 659; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Pracht v. Lange*, 81 Va. 711.

2. Errors of Judgment.

When the errors sought to be corrected by a bill of review are not errors of law but errors of judgment in the determination of facts the bill should be denied. The only remedy in such case is by appeal. *Rawlings v. Rawlings*, 75 Va. 76; *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Hancock v. Hutcherson*, 76 Va. 609.

3. Release of Errors.

A release of error in a decree will bar a bill of review to reverse it. *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187.

B. NEW EVIDENCE.

A bill of review lies on the ground of after discovered new evidence. *Triplett v. Wilson*, 6 Call 47; *Quarrier v. Carter*, 4 Hen. & M. 242; *Braxton v. Lee*, 4 Hen. & M. 376; *Nelson v. Sudarth*, 1 Hen. & M. 350; *McCall v. Graham*, 1 Hen. & M. 13; *Randolph v. Randolph*, 1 Hen. & M. 181; *Laidley v. Merrifield*, 7 Leigh 353; *Connolly v. Connolly*, 32 Gratt. 657; *Mosby v. Mosby*, 9 Gratt. 584; *Niday v. Harvey*, 9 Gratt. 454; *Diamond, etc., Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Par-*

ker v. Logan, 82 Va. 376, 4 S. E. 613; *Thomson v. Brooke*, 76 Va. 160; *Bat-taile v. Maryland Hospital*, 76 Va. 63; *Shepherd v. Chapman*, 2 Va. Dec. 88; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Amiss v. McGinnis*, 12 W. Va. 371; *Custer v. Custer*, 17 W. Va. 113; *Nichols v. Nichols*, 8 W. Va. 174. See also, *Brown v. Nutter*, 54 W. Va. 82, 46 S. E. 375; *Camden v. Ferrell*, 50 W. Va. 119, 40 S. E. 368.

Immaterial and Irrelevant Matter.—

Where a bill of review is filed to review and reverse a decree on the ground of newly discovered evidence, and the bill on its face shows that the facts stated as relied upon are immaterial and irrelevant, the bill should be dismissed on demurrer. *Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. 886; *Nichols v. Nichols*, 8 W. Va. 174; *Shepherd v. Larue*, 6 Munf. 529. See also, *Hyman v. Smith*, 10 W. Va. 298.

Confirmatory of Cumulative—Must Have Exercised Reasonable Diligence.

—A bill of review for newly discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character; such as ought, if true, upon rehearing, to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence. *Winston v. Johnson*, 2 Munf. 305; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Reynolds v. Reynolds*, 88 Va. 149, 13 S. E. 395; *Harman v. M'Mullin*, 85 Va. 191, 7 S. E. 349; *Akers v. Akers*, 83 Va. 633, 8 S. E. 260; *Booth v. McJilton*, 82 Va. 827, 1 S. E. 137; *Hatcher v. Hatcher*, 77 Va. 600; *Whitten v. Saunders*, 75 Va. 573; *Whitehurst's Case*, 79 Va. 556; *Sanders v. Burk*, 2 Va. Dec. 175; *Massey v. King*, 1 Va. Dec. 63; *Brown v. Nutter*, 54 W. Va. 82, 46 S. E. 375; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250. See also, *Shaffer v. Shaffer*, 51 W.

Va. 126, 41 S. E. 166; *Camden v. rerrell*, 50 W. Va. 119, 40 S. E. 368; *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Sewing Mach. Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Bloss v. Hull*, 27 W. Va. 503; *Nichols v. Nichols*, 8 W. Va. 174. See generally, the title EVIDENCE.

A person can not maintain a bill of review to set aside a decree by reason of the discovery of new evidence or a mistake in a long-settled account, existent at the time of the decree, and of which he was ignorant by reason of his own negligence and inattention to business. *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617. See also, *Sanders v. Burk*, 2 Va. Dec. 175; *White v. Drew*, 9 W. Va. 695, citing *Walker v. Com.* 18 Gratt. 13. See *Epes v. Williams*, 89 Va. 794, 17 S. E. 235, where mistake was ground for review for new evidence discovered since decree.

Mistake in Record Evidence.—A court of equity will review a decree founded on a mistake in the record evidence, not occasioned by the negligence or misconduct of the party complaining. *Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882; *Epes v. Williams*, 89 Va. 794, 17 S. E. 235. See the title MISTAKE AND ACCIDENT. And see ante, "Consent Decrees," V, B.

Advice of Counsel.—It is no ground for a bill of review, that the party was prevented from proving certain important facts, by wrong advice of one of his counsel. *Franklin v. Wilkinson*, 3 Munf. 112; *Jones v. Pilcher*, 6 Munf. 425.

Absence of Depositions.—Failure of a justice of the peace to forward depositions taken by him to the clerk of the court in which the cause is pending the cause having been heard and decided without them, is no ground for a bill of review on the score of newly discovered matter. *Niday v. Harvey*, 9 Gratt. 454.

VII. Filing Bill.

A. WHO MAY FILE.

1. In General.

Party Must Be Aggrieved.—A bill of review can only be filed by a person who was a party or privy to the former suit; and even persons having an interest in the cause, if not aggrieved by the particular errors assigned in the decree, can not maintain a bill of review, however injuriously the decree may affect the rights of third parties. *Heermans v. Mortgage*, 2 Va. Dec. 6; *Amiss v. McGinnis*, 12 W. Va. 371; *Chancellor v. Spencer*, 40 W. Va. 337, 21 S. E. 1011; *Hall v. Lowther*, 22 W. Va. 570; *Gibson v. Green*, 89 Va. 524, 16 S. E. 661; *Armstead v. Bailey*, 83 Va. 242, 2 S. E. 38. See the title PARTIES.

Heirs and Executors.—Parties and their privies, such as heirs, executors and administrators, can have a bill of review, strictly so called. *Amiss v. McGinnis*, 12 W. Va. 371.

Defendant.—A party defendant has no right, by bill of review or appeal, to contest a decree, dismissing the bill; for, in such case, the decision is in his favor. It seems that if he desires any relief he should have filed a cross bill. *Hopkins v. Baker*, 2 Pat. & H. 110.

2. Infants.

An infant may show cause against a decree by bill, bill of review, supplemental bill in nature of bill of review, petition, or answer. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. See also, *Zirkle v. McCue*, 26 Gratt. 517; *Morriss v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383. See ante, "Consent Decrees," V, B.

Probate of a Will—Infant Not a Party Nor Represented.—On a bill filed under the statute to invalidate the probate of a will, which had been admitted to probate as the will of C., there was a final decree in the cause establishing the paper as the will of C., and this was affirmed on appeal. A relation of C., interested in his estate,

who was an infant at the time, and was not made a party, or represented in the case, may file a bill to review the decree. *Connolly v. Connolly*, 32 Gratt. 657. See the title INFANTS.

3. Party by Petition.

See post, "Assignees," VII, A, 4.

4. Assignees.

Filed in Name of Assignor for Benefit of Assignee.—A petition filed in a chancery cause in the name of an assignor of an interest, asking that he may be made a party to protect that interest, and with a statement at the foot of the petition that it "is for the benefit of" the assignee, does not make the assignee a party to the suit, or entitle him to object to the decree by bill of review or appeal in his own name. *Hopkins v. Baker*, 2 Pat. & H. 110. See the title ASSIGNMENTS, vol. 1, p. 745.

Neither bills of review nor petitions for rehearing lie for assignees. *Armstead v. Bailey*, 83 Va. 242, 2 S. E. 38; *Gibson v. Green*, 89 Va. 524, 16 S. E. 661.

5. Administrator of Judgment Creditor.

Failure to Revive as to Administrator.—A decree for sale being entered in suit to enforce vendor's lien, a judgment creditor of vendee, whose judgment binds his real estate, agreed to a private sale provided that after paying vendor he should receive one-half the residue. Purchaser failed. A resale was ordered, without reviving the suit, though the judgment creditor had died. By the decree his rights were ignored, and the residue directed to be paid over to vendee. Held, by his consent to the first sale, the judgment creditor became a party to the suit, and it was error to enter the second decree without having first revived it as to his administrator, who may file a bill to review it. *Ayres v. Alphin*, 88 Va. 416, 13 S. E. 899.

B. TIME FOR FILING.

1. In General.

A bill of review can not be brought

until the decree, sought to be reviewed and reversed, is final, and the parties out of court. *Ellzey v. Lane*, 2 Hen. & M. 589.

Procured by Fraud.—If a decree in a cause has been procured by fraud, discovered after the decree is entered on the record, and after the adjournment of the term at which it is entered, it can be set aside, only by an original bill, in a new suit, and can not be annulled by a bill of review. *Law v. Law*, 55 W. Va. 4, 46 S. E. 697. See the title ADJOURNMENT, vol. 1, p. 179.

2. Statute of Limitations.

See generally, the title LIMITATIONS OF ACTIONS.

a. In General.

Prior to February, 1814.—Before the eleventh of February, 1814, a bill of review could not be received after five years had elapsed from the date of the decree. *Shepherd v. Larue*, 6 Munf. 529.

Old Rule in Virginia and West Virginia.—No bill of review is allowed to a final decree, unless it be exhibited within three years, next after such decree, except that of an infant, married woman, etc., may exhibit such bill within three years after disability removed. Va. Code, 1860, ch. 179, § 5; W. Va. Code, 1868, ch. 133, § 5; *Arnold v. Casner*, 22 W. Va. 455; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Hatcher v. Hatcher*, 77 Va. 600; *Hancock v. Hutcherson*, 76 Va. 609; *Nelson v. Jennings*, 2 Pat. & H. 369; *Amiss v. McGinnis*, 12 W. Va. 371-394; *Thorntons v. Fitzhugh*, 4 Leigh 209.

Virginia Code, 1887.—"No bill of review shall be allowed to a final decree unless it be exhibited within one year next after such decree, except that an infant, married woman, or insane person, may exhibit the same within one year after the removal of his or her disability." Va. Code, 1887, ch. 168, § 3435. Virginia Code, 1904, ch. 138, § 3435, is similar in every particular,

except there is no reservation in favor of married women.

West Virginia Code, 1899.—"A court or judge allowing a bill of review, may award an injunction to the decree to be reviewed. But no bill or review shall be allowed to a final decree, unless it be exhibited within three years next after such decree, except that an infant, or insane person, or a married woman in a case not relating to her separate property, may exhibit the same within three years after the removal of his or her disability." W. Va. Code, 1899, ch. 133, p. 890.

Where a bill in the nature of a bill of review is filed to correct a mistake which might have been relieved against as a matter of original jurisdiction, and such bill is filed within one year after the discovery of such mistake, the limitation prescribed by law as to bills of review will not apply. *Fore v. Foster*, 86 Va. 104, 9 S. E. 497.

Computing Limitation—Pendency of Appeal.—The time of the pendency of an appeal from a decree is not to be excluded in computing the period of limitation to a bill of review based on newly discovered evidence, but the time of pendency of an appeal, is to be excluded in computing the time limiting a bill of review for error of law. However, it is questioned whether the exclusion in the latter case begins at the allowance of the appeal or the date of the bond required to perfect it. *Ruley v. Foley*, 54 W. Va. 493, 46 S. E. 348. See ante, "Decrees Appealed From," V, E.

Tacking Disabilities.—One disability can not be tacked one to another to avoid the operation of the statute of limitations to proceedings by bill of review. *Hancock v. Hutcherson*, 76 Va. 609.

b. As to Infants.

Decree Binding upon Infant until Reversed.—An infant is as much bound by a decree, and it is as final upon his rights, while it stands, as it is upon an

adult; but he has until six months after attaining twenty-one years of age to show cause against it, by a bill of review showing such error, fraud, or surprise as would reverse or set it aside at the instance of an adult. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. See the titles JUDGMENTS AND DECREES; INFANTS. See also, ante, "In General," VII, B, 1.

C. LEAVE OF COURT.

1. Discretion of Court.

The granting of a bill of review for newly discovered evidence is not a matter of right; but it rests in the sound discretion of the court. *Nichols v. Nichols*, 8 W. Va. 174.

May Be Refused for Any Good Cause.—A bill of review may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause inadvisable. *Nichols v. Nichols*, 8 W. Va. 174.

Court Must Be Satisfied.—It is an established rule that, before allowing a petition for rehearing or bill of review to be filed on the ground of after discovered evidence, the court must be satisfied that the evidence relied on is new, and could not by ordinary diligence have been discovered prior to the date of the decree complained of. *Craufurd v. Smith*, 93 Va. 628, 23 S. E. 235, 25 S. E. 657; *Baker v. Watts*, 101 Va. 702, 44 S. E. 929.

2. Necessity for Leave.

"The Virginia and West Virginia practice has been to apply in the first instance for leave to file a bill of review, whether it be error of law apparent in the decree or upon discovery of new matter; but the general chancery practice elsewhere, while requiring leave to file a bill of review for matter newly discovered since the decree, does not require such previous

leave to file bills of review based on error in law. The matter has never been actually settled in this state, as Judge English states correctly in *Riggs v. Huffman*, 33 W. Va. 430, 10 S. E. 795; and I think that Judge English was right in indicating the opinion in that case that no good reason exists why the English practice, which dispenses with such previous leave, should be changed, and therefore I hold that such previous leave is not required. It is true that § 5, ch. 133, W. Va. Code, 1891, does contain the clause, 'A court or judge allowing a bill of review may award an injunction to the decree to be reviewed;' but the use of the word 'allow' in that clause does not necessarily mean that previous leave must in all cases be had. The clause may receive a reasonable construction in saying that it applies where the party wants not merely a bill of review, but also an injunction to supersede the execution of the decree complained of." *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

But there is quite a number of cases holding that a bill of review whether for error apparent on the record or on the ground of after discovered new matter can only be filed by leave of court. This rule is to prevent clamorous litigants who have no just cause of complaint from reopening a final decree on frivolous grounds. Especially is such leave of court necessary since an appeal lies to the refusal of the court to allow a bill of review in a proper case. *Lee v. Braxton*, 5 Call 459; *Ellzey v. Lane*, 2 Hen. & M. 591; *Bowyer v. Lewis*, 1 Hen. & M. 554; *Legrand v. Francisco*, 3 Munf. 83; *Williamson v. Ledbetter*, 2 Munf. 521; *Roberts v. Stanton*, 2 Munf. 133; *Connolly v. Connolly*, 32 Gratt. 660; *Ambrouse v. Keller*, 22 Gratt. 769; *Campbell v. Campbell*, 22 Gratt. 649; *Hill v. Bowyer*, 18 Gratt. 364; *Diamond, etc., Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Hatcher v. Hatcher*, 77

Va. 600; *Whitten v. Saunders*, 75 Va. 563; *Heermans v. Montague*, 2 Va. Dec. 6; *Davis Sewing Mach. Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Amiss v. McGinnis*, 12 W. Va. 399; *Nichols v. Nichols*, 8 W. Va. 174; *West v. Shaw*, 32 W. Va. 195, 9 S. E. 81.

It also seems that a supplemental in the nature of a bill of review can only be filed by leave of court. *Hyman v. Smith*, 10 W. Va. 298. See Va. Code, ch. 168, § 3435.

Original Bill in Nature of a Bill of Review.—An original bill in the nature of a bill of review may be filed without leave of the court, like any other original bill. *Law v. Law*, 55 W. Va. 4, 46 S. E. 697.

Not Necessary—Infants.—An infant can file a bill of review without the leave of court that is required in ordinary cases of bill of review. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. See also, *Lee v. Braxton*, 5 Call 459. See *Braxton v. Lee*, 4 Hen. & M. 376; *Connolly v. Connolly*, 32 Gratt. 657.

3. Application.

Averment Taken as True.—Upon application to file a bill of review every distinct averment therein must be taken to be true. *Brown v. Nutter*, 54 W. Va. 82, 46 S. E. 375; *Davis v. Morris*, 76 Va. 21. See also, *Connolly v. Connolly*, 32 Gratt. 657.

Affidavit.—As to necessity for affidavit, etc., see ante, "Form and Requisites," III.

The application to file a bill of review on the ground of newly discovered evidence must be supported by affidavit of the party, making such application, and this affidavit should set forth and satisfactorily prove, that the evidence is not only new, but such as the party, by the use of reasonable diligence, could not formerly have discovered. *Diamond, etc., Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E.

901; *Armstead v. Bailey*, 83 Va. 242, 2 S. E. 38; *Norfolk Trust Co. v. Foster*, 78 Va. 421; *Hatcher v. Hatcher*, 77 Va. 600; *Whitehurst v. Com.*, 79 Va. 561; *Nichols v. Nichols*, 8 W. Va. 174. The doctrine seems to be the same in regard to supplemental bills in the nature of bill of review. *Hyman v. Smith*, 10 W. Va. 298.

Nature of New Matter Must Be Stated.—The affidavit filed with application for leave to file a bill of review must state the nature of the new matter, that the court may exercise its judgment upon its relevancy and materiality. *Hyman v. Smith*, 10 W. Va. 298.

VIII. Parties.

As to parties plaintiff, see ante, "Who May File," VII, A. See generally, the title PARTIES.

A. WHO ARE PROPER PARTIES.

Generally, the parties to the original bill, if living, should be made parties to the bill of review. *Amiss v. McGinnis*, 12 W. Va. 371. See also, *Heermans v. Montague*, 2 Va. Dec. 6; *Silman v. Stump*, 47 W. Va. 641, 35 S. E. 833.

Purchaser at Sale Proper Party to Review of Decree Confirming Sale.—A bill of review to a decree confirming a sale made by previous order of court, which does not seek to bring in the purchaser at said sale, who was not a formal party to the suit, is defective for want of proper parties. *Heermans v. Montague*, 2 Va. Dec. 6.

Personal Representation of Decedent.—A bill of review is filed to review and reverse a final decree dismissing a bill to enforce a parol contract for the purchase of land. During the pendency of the bill of review the defendant in the original suit died. Thereupon the plaintiff in the bill of review filed a bill of revivor against the legal heirs of the decedent, to which the personal representative of the decedent was not made a party. It was

error not to make such personal representative a party to the bill of revivor, the cause not having otherwise been revived against him. *Nichols v. Nichols*, 8 W. Va. 175.

B. EFFECT OF WANT OF PROPER PARTIES.

Reversed and Remanded for Proper Parties to Be Made.—It is immaterial in what manner it is brought to the attention of this court that the decree complained of was rendered in the absence of proper parties; the cause will be reversed and remanded, in order that proper parties may be made. *Gallatin Land, etc., Co. v. Davis*, 44 W. Va. 109, 28 S. E. 747; *Hill v. Maury*, 21 W. Va. 162; *Sheppard v. Starke*, 3 Munf. 29. See generally, the titles APPEAL AND ERROR, vol. 1, p. 418; PARTIES.

It is error to dispose of an original bill in the nature of a bill of review, on mere ex parte affidavits, without appearance thereto, except by a disinterested party who demurs, and thereby admits the truth of the allegations of such petition. *Silman v. Stump*, 47 W. Va. 641, 35 S. E. 833.

IX. Process.

See the title SUMMONS AND PROCESS.

All the parties must be brought in by regular process. *Heermans v. Montague*, 2 Va. Dec. 6. See ante, "Who Are Proper Parties," VIII, A.

While leave will always be given any party to answer or deny the allegations of a petition for review, it is not usual to require service of process, for matters requiring such service should be presented by the regular pleadings; and where the parties have been served with process, or are before the court, there is no reason for a further process, and the practice in this respect is the same that prevails as to supplemental bills. *Heermans v. Montague*, 2 Va. Dec. 6. See the title PLEADING.

X. Amendments.

Where a bill of review is filed in a cause to set aside certain decrees therein, alleged to have been procured by fraud, and a demurrer is sustained to said bill as a bill of review; and the plaintiff therein asks leave to amend the same, and have it taken and treated as an original bill, for the purpose of setting aside said decrees, for fraud; and the bill can be so amended as to make it a bill, sufficient in substance for the purpose sought, it is error in the court to refuse to allow such amendment to be made therein, and to treat the same when so amended as an original bill. *Law v. Law*, 55 W. Va. 4, 46 S. E. 697. See the title AMENDMENTS, vol. 1, p. 316.

XI. Plea and Answer.

See generally, the title PLEADING. **No Plea of Statute of Limitation Necessary.**—It is not necessary to plead the statute of limitations against a bill of review. *Shepherd v. Larue*, 6 Munf. 529; *Amiss v. McGinnis*, 12 W. Va. 397; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 71. See ante, "Form and Requisites," III.

What May Be Alleged.—To a final decree for S. against T. the latter files a bill of review for errors in law in the proceedings and decree; S. can not, in an answer to the bill of review, allege any new matters of fact. *Thornton v. Stewart*, 7 Leigh 128.

Denial of Statements.—If the facts alleged to prevent the operation of the act of limitation be not true, it may be denied by the answer of the other party; and, on the proofs (if in his favor), the bill of review should be rejected. *Shepherd v. Larue*, 6 Munf. 529. See also, *Barnett v. Smith*, 5 Call 98.

Answer or Demurrer.—When new matter is alleged in the bill, it is better to answer than demur; because a demurrer admits the new mat-

ter, and may endanger the cause; whereas, by answering to the new matter, and insisting on the decree, the defendant avoids the danger of admitting the allegations of the bill, and has likewise the benefit of the decree. *Barnett v. Smith*, 5 Call 107.

XII. Answer as Evidence in Subsequent Proceedings.

Where a bill of review has been dismissed on the ground that it ought not to have been allowed, the decree not being final, the complainant in that bill is not authorized, in his subsequent defense, to make use of the answer to the bill of review, as evidence in his favor. *Ellzey v. Lane*, 4 Munf. 66.

XIII. Appeals.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

A. APPEALABLE DECREES.

A decree disposing of a bill of review will support an appeal if the other necessary requisites are present. *Deaton v. Mitchell*, 45 W. Va. 670, 31 S. E. 968. See also, *Martin v. Smith*, 25 W. Va. 579; *Crumlish v. Shenandoah, Val. R. Co.*, 40 W. Va. 659, 22 S. E. 90.

Interlocutory Decrees—Supplemental Bills.—A supplemental bill in the nature of a bill of review is regarded as a part of the very cause, the decree in which is sought to be corrected, and any order or decree of the court on the bill is only interlocutory, and can not be appealed from in England, however unjust it may be, until the decree which is sought to be corrected by the bill shall itself become final. But in Virginia and West Virginia statutes have been passed allowing appeals from interlocutory decrees and an appeal from such decree brings up every part of the cause. *Hyman v. Smith*, 10 W. Va. 298; *Laidley v. Merrifield*, 7 Leigh 353. But see Bow-

yer *v. Lewis*, 1 Hen. & M. 553; *Ellzey v. Lane*, 2 Hen. & M. 589, which were decided before these statutes were passed. See ante, "Definitions and General Consideration," I.

B. CORRECTION OF ERROR ON APPEAL.

Where a bill of review or petition for rehearing is dismissed in the circuit court, and an appeal is taken, this court may correct the error complained of without sending the cause back to allow the bill of review or petition to be heard. *Shenandoah Val. Nat. Bank v. Shirley*, 26 W. Va. 563. See also, *Cary v. Macon*, 4 Call 605. See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

C. LIMITATIONS.

See generally, the title LIMITATIONS OF ACTIONS.

Computation of Limitation.—Under Va. Code, 1887, § 3455, providing that, "If the final decree from which an appeal is asked is a decree refusing a bill of review to a decree rendered more than six months prior thereto, no appeal from or supersedeas to such decree so refusing a bill of review shall be allowed, unless the petition be presented within six months from the date of such decree" the statute of limitations begins to run and is to be computed from the actual date of the decree, and not from the beginning or the end of the term at which it was rendered. *Buford v. Land Co.*, 94 Va. 616, 27 S. E. 509; *Mason v. Mason*, 97 Va. 108, 33 S. E. 1015.

Virginia Code, 1887, § 3455.—The obvious prescription and policy of

§§ 3, 17, ch. 18, acts, 1884 (Va. Code, 1887, § 3455), is to limit the period allowed for appeals and supersedeas in cases of bills of review, to six months, whether the decree of refusal be to the filing of the bill of review or to the prayer of the bill. *Jordan v. Cunningham*, 85 Va. 420, 7 S. E. 540.

Pendency of Review More than Two Years.—When a bill of review is predicated on the sole ground of after discovered evidence, and during the pendency of said bill of review more than two years elapse after the date of the decree sought to be reviewed, and said bill of review is then dismissed, an appeal from the decree sought to be reviewed will be barred. *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 210.

XIV. Restitution on Determination of Review.

Erroneous Attachment and Decree.

—An attachment having been served to compel performance of a decree in chancery, which was erroneous, in consequence of a mistake of the chancellor, and was also improperly obtained against one of the defendants, on whom no process had been served; and the said defendant having been induced, under influence of the decree and duress of the attachment, without knowing of his rights, to pay a sum of money and execute an obligation for a farther payment; on a bill of review, the money was correctly decreed to be refunded, and the obligation to be surrendered. *Nelson v. Suddarth*, 1 Hen. & M. 350. See also, *Cary v. Macon*, 4 Call 605.

Bill of Revivor.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 48.

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See the title CONSTITUTIONAL LAW.

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I. Definitions and Distinctions.

A. DEFINITIONS.

1. Bill of Exchange.

A bill of exchange may be defined as an open letter of request, addressed by one person to another, desiring him to pay a certain sum of money to a third person mentioned therein, or to his order, or it may be made payable to bearer. *Fitzhugh v. Love*, 6 Call 5.

Bills of exchange whether foreign or domestic are instruments purporting a request or order from one person to another to pay a certain sum of money to a third person therein named or his order. *Dunlop v. Harris*, 5 Call 28.

By the Negotiable Instruments Law, a bill of exchange is defined as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Va. Code, ch. 133A, § 126.

The person who draws the bill of exchange is called the drawer; the person to whom it is addressed the drawee, and if he undertakes to pay it he is then called the acceptor; the person to whom it is ordered to be paid is the payee; and if he appoints another person to receive the money that other is called the indorsee, as the payee is in respect to him, the indorser. *Fitzhugh v. Love*, 6 Call 9.

2. Promissory Note.

Promissory notes are instruments purporting an absolute promise, by the maker, to pay to a person therein named, or his order, a sum of money therein named. *Dunlop v. Harris*, 5 Call 28.

It is provided by the Negotiable Instruments Law that "A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Va. Code, ch. 133A, § 184.

3. Check.

A check is an inland bill of exchange drawn on a bank or other house of deposit. *Purcell v. Allemon*, 22 Gratt. 739.

Checks are in legal effect inland bills of exchange payable to bearer on demand. *Cox v. Boone*, 8 W. Va. 506.

A check is a bill of exchange, though subject to some peculiar rules. *Billgerry v. Branch*, 19 Gratt. 393.

A check upon a bank is a commercial instrument in the nature of a bill of exchange payable on demand. *Bell v. Alexander*, 21 Gratt. 1.

It is provided by § 185 of the Negotiable Instruments Law that a check is a bill of exchange drawn on a bank payable on demand. *Baltimore, etc.*,

R. Co. v. First Nat. Bank, 102 Va. 757, 47 S. E. 837.

Except as therein otherwise provided, the provisions of the Negotiable Instruments Law applicable to a bill of exchange payable on demand, apply to a check. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 757, 47 S. E. 837.

B. DISTINCTIONS.

1. Distinction between Bills and Notes.

An essential difference between bills of exchange and promissory notes is in the form, the one being a request to another to pay, the other an absolute promise by the maker himself to pay. *Dunlop v. Harris*, 5 Call 28.

While a promissory note continues in its original shape of a promise from one person to another, it bears no similitude to a bill of exchange. But when it is indorsed the resemblance begins, for then it is an order by the indorser upon the maker of the note to pay the indorsee. This is the very definition of a bill of exchange. The indorser is the drawer; the maker of the note the acceptor; and the indorsee is the person to whom it is made payable. *Dunlop v. Harris*, 5 Call 28.

2. Bills and Notes Distinguished from Deeds.

Bills of exchange and promissory notes, are not deeds; and authority to execute them be given by parol, or inferred from circumstances, which is not true of deeds. A bail bond is a deed, which can not take effect without delivery; and this delivery can only be made by the party himself, or by some attorney legally constituted by deed, for that purpose. *Harrison v. Tiersans*, 4 Rand. 180. See the titles AGENCY, vol. 1, p. 240; BONDS; DEEDS.

II. Requisites and Validity.

A. COMPETENT PARTIES.

1. In General.

In order for a bill or note to be valid

the drawer or maker thereof must possess contractual capacity. *Hiett v. Shull*, 36 W. Va. 562, 15 S. E. 146.

A court of equity has power to decree the delivery up and cancellation of a promissory note given by an old man who is clearly shown to be mentally incapable of transacting such business. *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146.

2. Alien Enemies.

War operates as an interdiction of all commercial and other pacific intercourse and communication with the public enemy; and every species of private contract made with subjects of the enemy during the war is unlawful. The late rebellion was war, and citizens on opposite sides were alien enemies, and their relations under the constitution were suspended and superseded for the time by new relations under the laws of war. A check drawn by a citizen of one belligerent upon a citizen of the other during this war was unlawful and void. *Billgerry v. Branch*, 19 Gratt. 393; *McVeigh v. Bank of Old Dominion*, 26 Gratt. 785.

And a note made in June, 1861, by a person resident within the confederate lines, and discounted by a bank located within the union lines, was illegal and void; unless it was given in renewal of a note made before the war, and by an agent acting under authority conferred before the war. *McVeigh v. Bank of Old Dominion*, 26 Gratt. 785. See the title ALIENS, vol. 1, p. 291.

3. Married Women.

See the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

In Virginia married women may, unless restrained by the instrument of settlement, bind their equitable separate estate by the execution or indorsement of a promissory note. *Bain v. Buff*, 76 Va. 371; *Frank v. Lilienfeld*, 33 Gratt. 397.

But in order for a married woman to bind her separate estate by a bill or

note, it must appear that she intended to charge it, and a bill to subject her separate estate to the payment of the instrument must allege that she intended to charge her separate estate with its payment, otherwise it is demurrable. The first section, ch. 329 (acts of 1876-77) does not impair this principle. *McDonald v. Hurst*, 86 Va. 890, 11 S. E. 536, wherein it said: "The case of *Frank v. Lilienfeld*, 33 Gratt. 397, does not apply to this case; for, in that case, the wife did indorse the blank negotiable note intending to charge her separate estate, and she never recalled the note, nor warned others against it."

It has been held, that the separate estate of the feme covert will be bound by her bonds, bills, notes, and contracts in writing, even where they contain no reference to the separate estate upon their face, because, as her acts in executing these instruments would be nugatory unless done with reference to her separate estate, it will be presumed that she intended to charge that estate, in order to give these instruments validity and operation. *Geiger v. Blackley*, 86 Va. 330, 10 S. E. 43; *Burnett v. Hawpe*, 25 Gratt. 486; *Darnall v. Smith*, 26 Gratt. 878; *Bain v. Buff*, 76 Va. 371.

A father by will directed that certain part of his estate be paid over to his daughter for the sole and separate use of herself and child or children, during her life, and after her death to be vested in fee in her child or children. Afterwards, in 1871, daughter drew two drafts on her trustee for \$500 and for \$2,026.58, which were duly accepted by the trustee "payable when funds are in my hands payable to her." The money for which said drafts were given was due by her husband, or advanced by B to him to pay his debts, or to embark in business. Not being paid at maturity, suit was brought to subject her separate estate for their payment. It was held, that she had power

to bind her estate by the drafts, and as she could not bind herself personally, she must have meant, by drawing the drafts, to bind her estate, and that the drafts were not without consideration, being for loan of money to her or her husband at her request. *Bain v. Buff*, 76 Va. 371.

4. Persons Acting in Representative Capacity.

a. Agents.

See the title AGENCY, vol. 1, p. 240.

(1) Authority of Agents.

(a) To Execute Paper in Principal's Name.

In General.—The principles which ordinarily govern the authority of agents are applicable to agents to draw or indorse bills of exchange, promissory notes and checks. The principal is bound by the acts of the agents within the authority which he has actually given them, which not only includes the precise act which he expressly authorized them to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond this, he is bound by the acts of the agent within the apparent authority which the principal himself knowingly permits the agent to assume or which he holds the agent out to the public as possessing. *Hoe v. Oxley*, 1 Wash. 19; *Mann v. King*, 6 Munf. 428; *Hopkins v. Blane*, 1 Call 361; *Smith v. Lawson*, 18 W. Va. 212; *Richmond, etc., R. Co. v. Snead*, 19 Gratt. 354.

In all cases, even in cases of negotiable instruments, a party contracting with an agent must inquire into this authority; and either a state or a corporation is bound only when its agents keep within the limit of their authority. *Silliman v. Fredericksburg, etc., R. Co.*, 27 Gratt. 119.

Express Authority to Agent.—A general power of attorney to draw, indorse, and accept bills, and to make and indorse notes does not authorize

the attorney to draw a bill in the joint names of himself and principal. And such a power does not authorize the attorney to draw a bill in the name of his principal upon a person having no funds of the principal in his hands, and if such bill is accepted and paid by the drawee for the accommodation of the principal, there is no implied obligation of the principal to repay him. *Stainback v. Read*, 11 Gratt. 281.

And in the absence of anything to show a different intention, a power of attorney to draw, indorse or accept bills, and to make and indorse notes, negotiable at a particular bank in the name of the principal, must be construed as giving authority to act only in the separate individual business of the principal; and an indorsement of a bill by the agent for his own benefit in the name of his principal does not bind the principal. *Stainback v. Bank*, 11 Gratt. 269.

And a party who deals with an agent, with knowledge or means of knowledge that he is exceeding his authority by indorsing the name of his principal for his own benefit, is not entitled to recover from the principal. *Stainback v. Bank*, 11 Gratt. 269.

Implied Authority.—The power to make or indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred. Where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. He has implied authority to do whatever is ordinarily incident to the conduct of such business, whatever is necessary to the efficient execution of the duties, or whatever is customary in a particular trade. *Whitten v. Bank*, 100 Va. 546, 42 S. E. 309.

The authority to an agent to accomplish a definite end, carries with it the power to adopt the usual legal means to accomplish the object. A power to

settle a controversy carries with it the power to execute a note in the principal's name in settlement of that controversy. *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.

Acts within the Apparent Scope of Authority.—Thus a power of attorney in due form, authorized the party "to draw checks, indorse notes, and generally to do all and every act and deed, towards the execution of the donor's business at a certain bank." This power was deposited in the bank to be inspected, when called for, by any person interested in matters relating thereto. The donor was held bound to make good to a bona fide purchaser for a valuable consideration, an indorsement of a note negotiable at the said bank, which the party made in his name as attorney; notwithstanding the real object of the power, verbally declared at the time of its execution, was to authorize the attorney to renew certain accommodation papers then in the bank, and not to indorse any other paper. *Mann v. King*, 6 Munf. 428.

Authority to Execute a Joint Note No Authority to Execute an Individual Note.—Where several persons united in a power to authorize another to indorse their names upon a bill drawn in favor of one of them, it was held, that the power given did not warrant several and successive indorsements, but only a joint indorsement of and for them all, so that they should be jointly bound as indorsers to the holder, and equally and jointly bound among themselves. *Bank of U. S. v. Beirne*, 1 Gratt. 234.

Nine persons unite in a power, authorizing their attorney to indorse their names jointly on all bills, notes or drafts drawn by A. to be discounted at certain specified banks, for the accommodation of A. A. drew a bill, payable to the order of one of the principals in the power, upon which the attorney indorsed the names of all his principals; and then the note was

discounted at one of the specified banks, for the accommodation of A. The bill having been protested for nonpayment, the bank brought an action against the indorsers. It was held, that the bill being made payable to one of the principals in the power, the indorsement by the attorney was not such a joint indorsement as was authorized by the power. *Bank v. Beirne*, 1 Gratt. 539.

Effect of Special Agent Exceeding Authority.—But where an agent is authorized to draw bills of exchange only for certain specified purposes, this is a special agency; and if the agent exceeds his authority and gives bills of exchange for purposes not specified in his authority, they do not bind the principal. *Hopkins v. Blane*, 1 Call 361.

(b) To Fill Blanks.

See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 312. See post, "Instruments Delivered in Blank and Completed Fraudulently," VII, B, 2, c.

(2) Manner of Signing—Liability on Paper Executed in Agent's Own Name.

See the title AGENCY, vol. 1, p. 256.

(3) Ratification of, or Estoppel to Deny, Agent's Acts.

Express Ratification.—If one promises to pay a note, to which his name has been signed by one assuming, without authority, to act as his agent, it is an adoption of the act of the agent, and in law, is equivalent to an antecedent authority to execute the note. *Devendorf v. W. Va., etc., Co.*, 17 W. Va. 135.

But an express ratification of an isolated act beyond the authority of agent, is not sufficient to charge the principal for like acts in the future. Thus a letter authorized the addressee and another to use the name of the sender as indorser. With this letter in his possession the addressee indorsed the name of the sender upon his bills in

such manner that it did not appear by the paper to have been done by an agent. Some of these bills were protested, and afterwards the donor of the power by an indorsement on the letter, said: "The above is my signature and letter, the legal liabilities of which I hereby acknowledge." The addressee again indorsed the name of the donor of the power of other bills in the same manner. The donor of the power was held not liable upon these indorsements. *Union Bank of Maryland v. Beirne*, 1 Gratt. 226.

Implied Ratification of Power.—

And where in consequences of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmation of his power to draw, that the principal will be bound to pay other bills drawn by the agent, though the agent makes a misapplication of the money raised by such bills. *Hooe v. Oxley*, 1 Wash. 19, 1 Am. Dec. 425.

While the courts should generally refuse to allow a recovery against one person on a negotiable instrument made by another, on proof that the latter was acting as his agent, yet a person may make the signature of another his own by using or allowing it to be used as such in the course of his business, and he will and should, under such circumstances when clearly proved, be as much bound as if his own name was affixed to the bill or other negotiable instrument in question. But the court in applying this principle should be careful to limit its application to the class of cases to which it properly belongs, and not so apply it as to ignore other well established principles applicable to negotiable instruments. *Devendorf v. W. Va., etc., Co.*, 17 W. Va. 135.

Holding One Out as Agent.—S. did business as "O. D. P. Mills," with K. for manager. K. bought goods, gave notes, and conducted concern. September 1, S. leased the business to K.,

and so advertised in Richmond. August 29, K. went to New York, and, as usual, bought goods from W., who regarded S. as principal and solvent, and K. as agent and insolvent, no mention being made by K. to W. of intended lease. The goods were received at the mills, and K. writing on the usual paper headed "O. D. Paper Mills, S. Proprietor," sent W. a note for the price of the goods, signed, as usual, "O. D. Paper Mills, K. Manager," which was accepted by W., and placed to credit of S. Afterward, K. sent W. a circular announcing the lease whereof W. had never before heard. The note having been protested for nonpayment, W. sued S. on it. It was held, that under the circumstances, S. is liable on the note. *Smith v. Watson*, 82 Va. 712, 1 S. E. 96.

b. Partners.

See the title PARTNERSHIP.

(1) Power of One Partner to Bind Firm.

(a) In General.

The borrowing of money and negotiation of bills and notes being incident to, and usual in, the business of copartnerships formed for the purpose of trade, it follows that when a copartner borrows money professedly for the firm, and executes therefor a negotiable instrument in the copartnership name, it will bind all the partners, whether the borrowing were really for the firm or not, or whether he diverts and misapplies the funds or not, provided the lender is not himself cognizant of the intended fraud, and the burden will not be thrown on him to show that he was not cognizant of such fraud, or to prove value given for the paper. *Commercial Bank v. Miller*, 96 Va. 365, 31 S. E. 812; *Pettyjohn v. Nat. Exchange Bank*, 101 Va. 111, 43 S. E. 203.

If a partner in trade draw, indorse, or accept a bill in the name of the firm, it will be binding on the firm jointly in the hands of a bona fide holder.

This power of one partner to bind the firm, is implied by law from the principle, that members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership, so that by the contracts of the agent all his principals are bound. But to give to the act of one partner such an effect, it must be done in the name, and seemingly on behalf of the firm. *Cunningham v. Smithson*, 12 Leigh 42.

An acceptance of a bill by a partner of a firm, will bind the firm, if the bill be drawn on the firm, or if he accepts it in the name of the firm. *Cunningham v. Smithson*, 12 Leigh 54.

But where a bill is not drawn on the firm but on one of the partners in his individual character, and he accepts it by writing his own name across it, and not as a partner, it is his individual acceptance. The credit of a bill of exchange must appear on its face, and is not to be sustained, much less altered by extrinsic evidence. *Cunningham v. Smithson*, 12 Leigh 54.

A. B. C. and D. were partners in business in Virginia. The three first named partners resided in Virginia but D. resided in London. The partnership had no house established at London under any name. A bill of exchange was drawn on D. alone, but expressed in body of the bill, to be "on account of" the firm. D. wrote a general acceptance on this bill, in his own name, not in that of the firm and the bill was afterwards dishonored and returned to the drawer. It was held, that this was D.'s individual acceptance; that the firm were not parties to the bill, and not liable to the drawer by force of the bill itself; and that though if the drawer had proved, that the money for which the bill was drawn, was due on a contract with the firm, they might be held liable upon such original contract, yet failing to prove such original contract, he had

no claim against them on any ground. *Cunningham v. Smithson*, 12 Leigh 32.

(b) Accommodation Paper.

The power of partners to bind one another by commercial paper does not extend to indorsements or other contracts for the accommodation of a third person. Hence, the rule is well settled that when one member of a partnership becomes an accommodation maker or indorser, for the benefit of a third person, in the name of the firm, without the assent, express or implied, or the subsequent ratification of his copartners, such paper can not be enforced against them or the firm by the holder who takes with knowledge of its accommodation character. *Tompkins v. Woodyard*, 5 W. Va. 216.

(c) Paper Executed for Individual Purposes.

The indorsement of the partnership name on a negotiable note given for a debt for which the partnership is in no wise liable, does not create any liability on a partner who neither made the indorsement nor in any wise authorized it. *Frank v. Pringle*, 96 Va. 456, 31 S. E. 605.

Where a third party takes from a partner his signature of his firm upon his own private individual transaction he can not hold the firm without proof of authority, adoption, or ratification of the act. And the taker of the note under such circumstances must prove the assent of the other partners, for prima facie such a transaction is a fraud, both on the part of the debtor and the creditor. *Tompkins v. Woodyard*, 5 W. Va. 216.

(d) Sealed Instruments.

A partner, instead of executing a promissory note for a sum of money lent the firm, executed by mistake a penal obligation, in the name of the firm, under seal. Upon a suit in equity upon the instrument, it was held, that although at law there was no remedy on the sealed obligation, except against the partner who executed it, yet equity

had jurisdiction to correct the mistake, and hold all the partners as much bound as if there was no seal and it was an ordinary promissory note. *Galt v. Calland*, 7 Leigh 594. See the title SEALS AND SEALED INSTRUMENTS.

(e) Liability of Dormant Partner.

If an active partnership contains a dormant partner in one branch of its business, and the business of both is done in the name of the active firm, the dormant partner is not liable for a note made in the firm name where it appears that the active partners were alone dealt with, that credit was extended to them, that they were acting for themselves only, that the branch of the business in which the dormant partner was interested received no benefit from the credit, and that the dormant partner was not known or represented to be a member of the firm obtaining the credit. *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812.

(f) Effect of Dissolution.

After dissolution no partner can create a cause of action against the other partners except by a new authority conferred upon him for that purpose, whether the consideration be a pre-existing debt of the firm, or any auxiliary consideration that might prove beneficial to them. And where a note is issued by a partner after dissolution, it will not bind the other partners, even though given for a debt due by the firm. *Woodson v. Wood*, 84 Va. 482, 5 S. E. 277.

A partnership was dissolved, the notice of dissolution stating that either partner was authorized to use the firm name in liquidation. Later one member of the firm took from a debtor of the firm, in settlement, a negotiable note payable to the firm in liquidation. This note was transferred by the partner receiving it to the plaintiff by a like indorsement. On trial, the jury were instructed that the other

partner must prove that the note was not used for the firm purposes, else they should find for the plaintiff. It was held, that the instruction was erroneous; that the indorsement of the words "in liquidation" was sufficient to give notice of the dissolution of the partnership, and no recovery could be had on such indorsement against the other partners. *Woodson v. Wood*, 84 Va. 478, 5 S. E. 277.

Express Authority to Act after Dissolution.—If authorized verbally or in writing one expartner may bind the firm, after dissolution, as a party to a bill or note. *Woodson v. Wood*, 84 Va. 482, 5 S. E. 277.

But authority to settle or close up the business of the firm does not imply authority to one partner after dissolution to give a note in the name of the firm for the firm's debt, or to renew one given before the dissolution. Nor will authority to give or renew a note be implied by authority "to settle business of the firm and sign its name for that purpose;" "to use the name of the firm in liquidation of past business;" "to settle all demands in favor of or against the firm;" or by the use of any similar expression. 1 Daniel, Neg. Inst., § 373. *Woodson v. Wood*, 84 Va. 482, 5 S. E. 277.

Renewal of Note after Retirement of Some Members of Firm.—Where a partnership note is given, and renewed after the dissolution of the partnership by the remaining partner in the old firm name, such renewal does not bind the retiring partner, neither does its acceptance discharge the pre-existing debt; not being valid as to the retiring partner, the consideration fails, and the old debt remains. The renewal of the note in the firm name is strong evidence that the promisee did not intend to release the other partner and hold the partner who executed it liable alone. *Parker v. Cousins*, 2 Gratt. 372; *Miller v. Miller*, 8 W. Va. 542.

Thus, in *Miller v. Miller*, 8 W. Va. 542, a note was made by a firm and in-

dorsed at a bank for the firm's accommodation by a party who did not know all of the members composing the firm. After the execution of this note one of the members of the firm withdrew, the indorser not being notified of his withdrawal. The note was renewed at the request of the firm and the indorser again went on the note. Upon the maturity of the note and the failure of the firm to pay it, it was retired by the indorser. In an action by this indorser against the firm, the members of the firm, including the party who had withdrawn prior to the renewal of the note, were held liable to the indorser for the money paid by him upon his indorsement.

'3) Power of One Member to Sign Another's Name.

While each member of a trading partnership may, as a general rule, bind his associates by signing the firm name, he has no authority, by virtue of the partnership relation alone, to bind a copartner by signing his individual name to partnership paper. *Pettyjohn v. National Exchange Bank*, 101 Va. 112, 43 S. E. 203.

If a negotiable note be made by a firm payable to one of its members, and the payee's name be indorsed on the note without his knowledge or consent, by another member of the firm, and the note be discounted for the firm and the money placed to its credit, the payee member of the firm is not bound on the note either as joint maker or as indorser, nor is he estopped to deny his liability. The form of the note is itself notice of a restriction on the powers of the other members of the firm to negotiate the note without the indorsement or consent of the payee member. This is especially so where the party discounting the note knows that the payee in his individual capacity has theretofore been simply an accommodation indorser for the firm. *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203.

c. Executors and Administrators.

The indebtedness for which the estate of a decedent is liable is that which existed at the time of his death. An executor, as such, can not create a cause of action against his decedent's estate. *Whitten v. Bank*, 100 Va. 546, 42 S. E. 309.

Where an executor, as such, executes a note, in excess of his powers, and the proceeds are used in the purchase of property which is in his possession at the time of his death, such property may be subjected by the lender to the payment of his debt. *Whitten v. Bank*, 100 Va. 546, 42 S. E. 309. See the title EXECUTORS AND ADMINISTRATORS.

The personal representative of an accommodation indorser of a negotiable note protested for nonpayment, can only acquire the note, whether by purchase or payment, in his fiduciary character. And he can not in any event, either by purchase or payment, acquire larger rights than his testator or intestate would have had, had he paid the note in his lifetime and after protest. *Burton v. Slaughter*, 26 Gratt. 914.

d. Receivers.

See the title RECEIVERS.

In *State Bank v. Domestic Sewing Machine Co.*, 99 Va. 411, 39 S. E. 141, it was held, that under the evidence in that case, the receiver had authority to discount notes which came into his hands in the course of business, and to protect them by the hypothecation of other notes and securities as collateral; and, when he did so, such collaterals, to the extent necessary to protect the discounts, ceased to be assets of the receivership, and became the absolute property of the party discounting. The subsequent surrender of the collaterals to the receiver was for collection only, and as agent for the true owner, and, having applied such collections to expenses of the receivership, the same should be re-

stored out of the other funds in the hands of the receiver.

5. Corporations and Corporate Officers.

See the titles BANKS AND BANKING, ante, p. 254; CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Implied Authority of Treasurer of a Corporation.—The treasurer of a corporation has as an incident of his office the authority to draw checks unless such authority is taken away or restrained. But the power to bind the corporation by indorsing negotiable notes is not inherent in the treasurer, and he that takes such notes by indorsement from an officer of the corporation does so at his peril. *Davis v. Rockingham, etc., Co.*, 89 Va. 290, 15 S. E. 547.

President of Railroad Company.—The authority of a president of a railroad company to make contracts for necessary labor for the company is incident to his office, and he may furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put that evidence in the form of a due bill or promissory note, in his discretion, unless his authority is restricted by special legislation, or by regulations of the company known to the other contracting party. *Richmond, etc., R. Co. v. Snead*, 19 Gratt. 354.

Bills by Railroad President in Unusual Form.—And the fact that the president of a railroad company usually gave notes of the company on printed forms, and signed them as president, was held not sufficient to prevent a recovery against the company upon a due bill, not upon a printed form, and not signed as president, but was a mere circumstance to be weighed by the jury in determining whether or not the consideration passed to the company so as to make them liable. *Richmond, etc., R. Co. v. Snead*, 19 Gratt. 354.

Power of President to Change His Indorsement to That of Corporation.—

The substitution by the president of a corporation of its name as indorser, instead of his own, on a note for which it was, in its inception, in no way liable, if without consideration to the company and without authority from it, is ultra vires, and therefore void. *Triplett v. Fauver*, 103 Va. 124, 48 S. E. 875.

Officers and Agents of Banks.—See the title BANKS AND BANKING, ante, p. 254.

Parol Evidence to Show Benefits Received by Corporation.—Where the president of a railroad company signed in his own name a bill for "labor performed on cottage lot of railroad company," parol evidence was held admissible to ascertain whether the work was performed for the president or for the company. *Richmond, etc., R. Co. v. Snead*, 19 Gratt. 354.

6. Municipal Corporations.

A municipal corporation may lawfully purchase, on credit or otherwise, and hold, all the real estate necessary to the proper exercise of the powers conferred on it, and may bind itself by the execution of nonnegotiable notes as evidence of indebtedness for such real estate. *Richmond, etc., Improvement Co. v. West Point*, 94 Va. 668, 27 S. E. 460.

But in an action against a city on nonnegotiable notes given for land purchased from plaintiff by defendant, where defendant pleads nil debet, the burden is on plaintiff to show that such land was reasonably necessary to the exercise by defendant of the powers and duties conferred on it by the legislature in its charter. *Richmond, etc., Improvement Co. v. West Point*, 94 Va. 668, 27 S. E. 460.

Where under an ordinance in 1861, the city of Richmond issued notes to circulate as currency, and the evidence showed that one object of the issue was to aid the rebellion, it was held,

that the notes were void. *Isaacs v. Richmond*, 90 Va. 30, 17 S. E. 760. See the titles MUNICIPAL CORPORATIONS; MUNICIPAL SECURITIES.

B. CONSIDERATION.

See generally, the title CONTRACTS.

1. Presumption of Consideration.

In General.—In an action upon a bill of exchange or a promissory note, the party may recover without averring or proving that any valuable consideration has been received for it. Such an instrument is presumed to stand on valuable consideration, and prima facie imports it. *Averett v. Booker*, 15 Gratt. 163; *Terry v. Ragsdale*, 33 Gratt. 342; *Bank v. Simmons*, 43 W. Va. 79, 27 S. E. 300; *Ford v. McClung*, 5 W. Va. 164; *Power v. Finnie*, 4 Call 413; *Carr v. Summerfield*, 47 W. Va. 155, 34 S. E. 804.

It is never necessary to aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant, or that the law will be violated if the plaintiff recover. *Bank v. Simmons*, 43 W. Va. 79, 27 S. E. 299.

"The possession of a bill or note which is payable to bearer, or indorsed in blank, is prima facie evidence of ownership, and also that the holder received it upon a valuable consideration paid therefor in the usual course of trade or business. As a general rule, therefore, even where there is a failure of consideration or other equitable defense as between the defendant and the drawee or payee of the bill or note or his immediate indorser, he can not call upon the plaintiff to prove when or upon what consideration the bill or note upon which the suit is brought was transferred to him, or how it came into his

hands." *Bank v. Simmons*, 43 W. Va. 79, 27 S. E. 300.

Where a bill of exchange is indorsed with a restrictive indorsement, as "pay to A only" the inference is that the indorsement was not intended to be absolute, and the presumption arises that no consideration was paid for it but this presumption may be defeated by proof of consideration actually paid. *Power v. Finnie*, 4 Call 413.

Bills of Exchange.—The drawing or making of a bill of exchange implies the indebtedness of the drawer to the payee to, at least, the amount of the order. *Ford v. McClung*, 5 W. Va. 164; *Carr v. Summerfield*, 47 W. Va. 155, 34 S. E. 804. See also, the title ORDERS.

If the order is good as a bill of exchange it can not be questioned that there may be a recovery upon it without averring or proving that any value had been received for it, as such a bill is presumed to stand on valuable consideration and *prima facie* to import it. *Averett v. Booker*, 15 Gratt. 163.

But an instrument in the following form is not a bill of exchange, and does not import a valuable consideration: "Lynchburg, December 8, 1852. \$1,080.59 the trustee of N. and A. will pay to B. the sum of one thousand and eighty dollars and fifty-nine cents, with interest from 15th March, 1850, out of any moneys in his hands belonging to me. W. B. A." *Averett v. Booker*, 15 Gratt. 163.

Promissory Notes.—By statute (1 Rev. Code, p. 484, § 4; Code, 1845, ch. 144, § 10, p. 582; Code, 1887, § 2825), an action of debt may be brought on a promissory note and in such action it need not be averred or proved that there was a consideration for the note, though the defendant may go into evidence touching consideration. *Hollingsworth v. Milton*, 8 Leigh 52; *Jackson v. Jackson*, 10 Leigh 452, 453; *Peasley v. Boatwright*, 2 Leigh 195; *Snead v. Coleman*, 7 Gratt. 302; *Craw-*

ford v. Daigh, 2 Va. Cas. 521; *State v. Harmon*, 15 W. Va. 121, 122; *Cheuvront v. Bee*, 44 W. Va. 104, 28 S. E. 751.

"It seems to me, that the object and effect of this legislation was to put promissory notes on the same footing here, which they occupied in England, except giving to them the character of bills of exchange, which was prevented by the clause allowing discounts." *Peasley v. Boatwright*, 2 Leigh 199.

"The note itself imports consideration, as does a bond; the only difference being, that in the case of a bond the consideration can not be inquired into, but in the case of a note it may." *Snead v. Coleman*, 7 Gratt. 302.

Checks.—The drawing and delivery of a check imply the indebtedness of the drawer to the payee to the amount of the check, and in an action upon a check it is not necessary to aver in the declaration any further consideration. *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003.

A check upon a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of said check; and though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the said implication, and to establish the contrary fact. *Terry v. Ragsdale*, 33 Gratt. 342; *McVeigh v. Chamberlain*, 94 Va. 77, 26 S. E. 395.

Effect of Words "for Value Received."—The words, "for value received," in a note, *prima facie* establishes a valuable consideration, where it becomes necessary to prove such consideration. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917, citing *Averett v. Booker*, 15 Gratt. 163.

2. Legality of Consideration.

Notes Given in Compromise of Bastardy Proceedings.—A note given to a woman in compromise of a bastardy proceeding is binding and valid, and on sufficient consideration, and the payment thereof can not be avoided on the ground that the compromise of such proceeding is contrary to public policy, or against public morals. Nor can the innocence of the putative father be set up as a defense against the recovery of such note, in the absence of fraud on the part of the obligee in procurement thereof. *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. See the titles BASTARDY, ante, p. 334; COMPROMISE.

Notes Payable in Confederate Money.—A note made payable in confederate money was illegal and void and no payment of it could be enforced. Nor does it matter that it was made within the military lines of the late so called confederacy, as a question of illegality is to be tested not by the pretended authority of the late insurrectionists, but by the laws of the lawful government of the country. Where the parties to a contract to be paid in confederate money, are in pari delicto, a court of equity will equally withhold its aid from the guilty party who would invoke it to get rid of such illegal contract executed. *Brown v. Wylie*, 2 W. Va. 502; *Calfee v. Burgess*, 3 W. Va. 274. But notes given in renewal of notes which were given for confederate money, were held valid in *McLaughlin v. Beard*, 5 W. Va. 538.

A note given by an agent of the late confederate government, and binding himself for the price of cattle purchased for the support of the armies of such government and for the purpose of aiding and carrying on the war against the United States is a valid contract, and may be enforced against the obligor, after the end of the war. *Ruckman v. Lightner*, 24 Gratt. 19.

Notes Given for Hire of Slaves.—

During the year 1861, slavery was recognized as existing both by the United States and Missouri, and slaves owed no allegiance to either. There could be no demand for their services by the United States or the state, which could occasion a failure of the consideration of notes, made in the state of Missouri, and given for the hire of slaves. *Booker v. Kirkpatrick*, 26 Gratt. 145.

Gambling Consideration.—See post, "Illegality, Want or Failure of Consideration," VII, B, 8.

Consideration Affected with Usury.—See the title USURY.

3. Sufficiency of Consideration.

Necessity for Adequate Consideration.—Where the parties are competent to contract, relief will not be decreed on the ground of inadequacy of consideration, unless the inequality be so gross as to shock the conscience, and of itself to amount to proof of fraud. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Matthews v. Crockett*, 82 Va. 394.

So in a suit to enjoin the defendant from disposing of certain notes executed to him by the plaintiff, and to set aside a sale evidenced by the notes, a contention by the plaintiff that the contract of sale was unconscionable is of no force when it appears that the property will yield from twelve to twenty-two per cent. on the investment. *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749.

Payment of Stock Subscriptions.—When persons organize a company and appoint a treasurer, and, by agreement of the parties one makes a promissory note, payable to the person appointed treasurer, for his unpaid share, the previous liability and agreement constitute an adequate consideration for the note. *Kimmins v. Wilson*, 8 W. Va. 584.

Forbearance to Sue.—Forbearance to sue is valuable consideration, and if a

creditor take from his debtor and surety a note giving further time for payment, this is a valid consideration to bind the surety. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

Fraudulent and Voluntary Transfers Void as to Creditors.—Negotiable paper, like any other property, may be the subject of fraudulent transfer, as the law merchant can not protect a transaction mala fides from the operation of statutory law. Hence, the transfer of an overdue negotiable note with the fraudulent intent to delay, hinder, or defraud the maker of such note out of a just set-off, is void as to such set-off, unless made to a bona fide purchaser of value, without notice of such intent. *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791.

And every gift, assignment, or transfer of a negotiable instrument, on consideration not deemed valuable in law, is void as to existing creditors in the hands of such donee, assignee, or transferee, but not in the hands of a bona fide holder for value. *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

4. Want of Consideration.

A party who gives a renewal note after discovering that the representations which led him to sign the first were false, can not plead want of consideration of the first as a defense to the second. *Keckley v. Bank*, 79 Va. 458.

Where A held liens on two lots of B, and C bought the two lots, and, in consideration that A would release the liens, she paid A \$300 in cash, and accepted an order drawn by B on himself for \$400, to be paid out of funds that might be due on a certain contract, and A made the release, and accepted the money and the conditional order, and that contract failed, and no money was due on the contract, and C afterwards promised to pay the \$400, it was held that there was no consid-

eration for such promise, and, the order being conditional, and the condition having failed, no recovery could be had on the order. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

5. Failure of Consideration.

A leased a summer resort for five years agreeing to make repairs, and then subleased the premises to B nothing being said in the sublease as to the repairs. At the close of the hotel season B executed his note to A for part of the money due on the lease. In an action on the note B pleaded a partial failure of consideration on the ground that A had verbally agreed with him to make repairs in time for the summer season and had failed to do it. It was held, that under the original lease A had until the end of five years to make repairs; that parol evidence was inadmissible to prove a contract by A to make repairs in time for the summer season; that the fact that the note was executed after the close of the season was a strong circumstance to prove that the claim which grew out of the transaction was waived or settled and could not be asserted by way of defense to an action on the note. *Colhoun v. Wilson*, 27 Gratt. 639. See the titles LANDLORD AND TENANT; PAROL EVIDENCE.

Failure of Title to Land Paid for in Notes.—A purchaser of land under general warranty deed will not be compelled to pay notes given for purchase money when there has been a decree canceling the deed vesting title in his grantor because of fraud in such grantor in procuring such deed, and also canceling, for such fraud, the deed to such purchaser from such grantor. *Womensdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191.

Though one to whom land has been conveyed with general warranty deed, and who has lost the land by a decree canceling both the deed vesting title in his grantor and also the deed to such purchaser, on account of the

fraud of such grantor in procurement of the deed to him, has conveyed the land away, yet such purchaser will not be compelled to pay notes given to his grantor for purchase money, whether such purchaser has been made liable or not to his grantee on account of his own warranty. *Womensdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191.

Remedy of Maker of Note.—There is jurisdiction in equity to cancel promissory notes for total failure of consideration and enjoin an action at law thereon. *Womensdorf v. O'Connor*, 53 W. Va. 314, 44 S. E. 191. See the titles INJUNCTIONS; RESCIS-SION, CANCELLATION AND REFORMATION.

Effect as against Holder in Due Course.—Failure in the consideration does not affect the validity of a negotiable note in the hands of a bona fide holder for value. But the maker, upon paying the holder the amount of the instrument may recover it from the payee if the consideration between them has failed. *Wilson v. Lazier*, 11 Gratt. 477. See post, "Illegality, Want or Failure of Consideration," VII, B, 8.

C. THE PROMISE OR ORDER TO PAY.

1. Certainty.

a. As to Amount Payable.

A bill of exchange or promissory note must be certain as to the amount payable. *Averett v. Booker*, 15 Gratt. 167.

Agreements for Attorney's Fees.—But an agreement in a note to pay attorney's fees for collection does not destroy its negotiability but such stipulation is a penalty, and not enforceable. *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498. But where no objection is made to such penalty in the trial court, an objection in the appellate court comes too late. *Ronald v. Bank of Princeton*, 90 Va. 813, 20 S. E. 780.

b. Instrument Must Be Payable Absolutely and at All Events.

To constitute a good bill of exchange, the sum to be paid must not only be in money and certain in amount, but it must be payable absolutely and at all events. If it be payable out of a particular fund or upon an event which is contingent, or if it be otherwise conditional, it is not in contemplation of law a bill of exchange. *Averett v. Booker*, 15 Gratt. 165.

Order for Payment of Whole of Designated Fund.—So an order drawn on a particular fund or debt, and for the whole thereof, is not a bill of exchange because not payable absolutely, its payment being subject to the contingency that the fund shall remain in existence. Such an order only operates as equitable assignment of the fund on which it is drawn. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Jolliffe v. Higgins*, 6 Munf. 3; *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104; *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604.

And an order drawn by a legatee under a will upon the executors, for value received, directing them to pay to the order of the drawee a specific sum, the amount of the legacy, out of the funds in their hands, destined by the testator for the payment thereof, is an equitable assignment of the legacy and not a bill of exchange. *Anderson v. De Soer*, 6 Gratt. 363. See the title ASSIGNMENTS, vol. 1, p. 745.

Order to Pay Out of Designated Fund.—An order to pay out of a specific fund is not a bill of exchange. Thus it has been held that the following instrument does not constitute a bill of exchange, nor import a valuable consideration, and no promise is raised thereby, in favor of the payee against the drawer, from the failure of the drawer to accept or to pay: "Lynchburg, Dec. 8, 1852, \$1,080.59. The trustees of Norvell and Averett will pay to William T. Booker the sum of

one thousand and eighty dollars and fifty-nine cents, with interest from the first of March, 1850, out of any moneys in his hands belonging to me. Williams B. Averett." *Averett v. Booker*, 15 Gratt. 163, wherein the court said: "Here, the sum to be paid is not payable absolutely and at all events. It is payable out of a particular fund to wit the moneys, if any, in the hands of the drawee belonging to the drawer. The draft therefore can not be treated as a bill of exchange, nor can a recovery be had upon it as such."

And an order to "pay four hundred dollars out of funds that may be due me as per our contract" is not absolute, but conditional; and the acceptor's liability thereon is dependent on the contingency that the amount shall be due to drawer according to the terms of the contract between the drawer and drawee. *Riffe v. Gerow*, 29 W. Va. 462, 2 S. E. 104.

An order payable out of a particular fund is not a bill of exchange. *Jolliffe v. Higgins*, 6 Munf. 3.

But if an order is drawn on a particular fund or debt for but a part of such fund or debt, though not accepted, the order will be an equitable assignment of the fund or debt pro tanto, and may be enforced in a court of equity; but a court of law will not recognize such equitable assignment pro tanto by permitting the payer to bring suit at law in the name of the drawer against the drawee. *First Nat. Bank v. Kimberlands*, 16 W. Va. 556.

Generally, as to equitable assignments, see the title ASSIGNMENTS, vol. 1, p. 745.

2. Promise to Pay in Past Tense.

Where the note was worded in the past tense, "I promised to pay," it was held that it was still a negotiable note, though a bank might refuse to discount it because of its informality. *Perkins v. Com.*, 7 Gratt. 651.

"Nor is there any ground for the exception that the negotiable note, which

is truly set out, contained the acknowledgment of the promise to pay in the past tense, instead of the usual promise in the present tense. Whether it was in the past or present tense, it was equally a negotiable promissory note. Nor would the paper lose the character of a negotiable promissory note, as charged in the indictment, because there should be any thing in the frame of the note which might, for want of some conformity to the practice of the bank, deter the bank from discounting the note. It was not less a negotiable promissory note though the bank might refuse to negotiate it." *Perkins v. Com.*, 7 Gratt. 655.

D. NEGOTIABILITY.

1. Necessity of Negotiability.

Formerly it was doubted whether it was not essential to the character of a bill of exchange that it should be payable to order or bearer. But it is now well settled that it is not essential to the character either of a bill of exchange or of a promissory note that it should be negotiable. *Averett v. Booker*, 15 Gratt. 167.

2. What Paper Is Negotiable.

a. In General.

It was held that an order for "one hundred and twenty-five dollars on account of brick work done" by the drawer is not a negotiable instrument, and that an indorser thereon was not entitled to notice of dishonor. *Pitman v. Breckenridge*, 3 Gratt. 127.

Under act of March 22, 1837, a note for a sum certain, payable to order, and negotiable and payable at a bank out of the state of Virginia, is a note negotiable at a bank in Virginia, and therefore is placed on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against the maker and indorsers jointly, and with the like effect, except as to damages. *Hays v. Northwestern Bank*, 9 Gratt. 127.

b. Under Statute Requiring Instrument to Be Payable at a Bank.

By Va. Code, 1860, ch. 144, § 7, it was provided, that "every promissory note, or check for money, payable in this state at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or a savings bank shall be deemed negotiable." Under this statute a note made by residents of Alexandria and indorsed by the president of the Bank of the Old Dominion where it was discounted, was held negotiable although it did not appear upon its face that it was payable in the state of Virginia, as it was competent to show this by extrinsic evidence. *McVeigh v. Bank*, 26 Gratt. 785.

So in *Freeman's Bank v. Ruckman*, 16 Gratt. 126, a note which was payable at either of two banks in this state was held not negotiable under this statute because it did not appear from its face to be payable at a "particular bank in this state."

But under this statute a note which on its face was not negotiable because not payable at a particular bank, but which had a blank space left for the insertion of the bank, was held to be negotiable, where it was shown that the parties intended it to be negotiable and thought that they were executing negotiable paper, and there was a usage shown to leave notes blank as to the bank at which they were payable and for the holder to fill such blank. *Woodward v. Gunn*, Va. Law J., 1878, p. 243, 1 Va. Dec. 293.

The following order is upon its face an order for the payment of money out of the building fund levied for a year subsequent to the year in which the debt was incurred, and is not negotiable according to the law of this state. Order No. 44 reads as follows: "Ripley District, W. Va., Sept. 25, 1891. Sheriff of Jackson County: Pay

to the order of Educational Aid Association, or bearer, four hundred and twenty dollars, and charge to the building fund of Ripley district. By order of the board of education. Due Dec. 1st, 1892 (without interest). J. F. Coast, President. I. S. Little, Secretary. \$420.00." *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604.

"They are not negotiable, even apart from lacking the statutory requirement of being payable at a bank, etc. (§ 7, ch. 99, W. Va. Code), for the intention in such case, as a general rule, is to authorize the payment, and furnish vouchers to the proper disbursing officers, and not to put negotiable instruments in circulation; and they do not cut out equities as against the corporation, or in this case as against the resident taxpayers, and on the ground that there is no implied authority in such officers to execute negotiable instruments." *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604.

c. Under Statute Requiring Instrument to Be Payable "on Its Face" at a Bank.

But the revisors of the Va. Code of 1887, with full knowledge of the construction placed upon this statute by the court, altered the language so as to read, "Every promissory note which on its face is payable in this state at a particular bank," etc. Under this statute a note dated "Harrisonburg, Va.," and payable at the "First National Bank of Harrisonburg," was held not to be negotiable, because it did not show on its face that the bank at which it was payable was in this state. *Long v. Pence*, 93 Va. 584, 25 S. E. 593.

Under this statute an indorsement of an overdue note payable at a bank which had ceased to exist more than five years before the indorsement was made, was held to be merely an assignment of common-law paper and such indorsement was not to be gov-

erned by the rules of the law merchant. In this case it was held, that the assignee of the paper was bound to exercise due diligence in suing the maker and obtaining judgment and execution against him, as a condition precedent to his recourse against the indorser, unless the maker was notoriously insolvent. *Broun v. Hull*, 33 Gratt. 23.

And under this statute, which is the law of West Virginia as well as of Virginia, it has been held, that the bank at which the paper is payable must be an incorporated institution in order for the paper to be negotiable. *Bank v. Hysell*, 22 W. Va. 142.

d. Under Negotiable Instruments Law.

Under the Negotiable Instruments Law which is now in force in Virginia any paper which contains words of negotiability is negotiable if it possesses the other requisites of negotiable paper, such as certainty, etc. Section 1, Negotiable Instruments Law.

E. DELIVERY.

Making Distinguished from Delivery.—Where an instruction to the jury in an action on a promissory note was asked which was in effect that if an irregular indorser indorsed his name on the back of a note "after it was made" he became a guarantor, the trial court refused the instruction on the ground that the word "made" was ambiguous not showing whether it was meant in the sense of "delivery" or simply "prepared for delivery." It was held, that the instruction was properly refused. *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

Necessity of Delivery.—It is an elementary principle that delivery is essential to perfect the transfer of a promissory note. Until delivered to the payee it has no vitality; and not only must there be a delivery, but there must be an acceptance by the payee. *Wright v. Smith*, 81 Va. 777; *Howe v. Ould*, 28 Gratt. 1; *Grasswitt v. Con-*

nally, 27 Gratt. 19; *Rowan v. Chenoweth*, 49 W. Va. 288, 38 S. E. 544.

Where a firm on the eve of failure made a promissory note payable to their own order, secured by a deed of trust, to secure one of the partners for advances made to the firm, but the note was not indorsed or delivered, it was held, that the partner for whose benefit it was executed was not entitled to it though he took possession of it after the dissolution of the firm. The note created no liability without negotiation, and none of the partners could negotiate it after dissolution, and consequently the deed made to secure it was a nullity. *Grasswitt v. Connally*, 27 Gratt. 19.

A who was indebted to B, made his note payable to the wife of B but delivered it to B. She gave nothing for the note, and B was not her agent; the note was never delivered to her, but was lost or destroyed. In suit by B against A, upon the original cause of action, it was contended, as ground of demurrer, that the note mentioned in the account filed, having been made payable to B's wife, her husband was not entitled to recover on it in his own name, and that he was not a competent witness for the same reason. It was held, that the note never having been delivered, B's wife acquired no interest in it, and it had no vitality, and that since she had no interest in the suit, B was a competent witness. *Wright v. Smith*, 81 Va. 777.

Sufficiency of Constructive Delivery.

—It is not necessary that there should be a manual transfer of the note; a constructive delivery is sufficient if made with the intention of transferring title. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544; *Howe v. Ould*, 28 Gratt. 1.

Where it is clear that the maker of a note intended it to be a finished note and binding on him, without further act on his part, it will so operate, though not actually delivered in his

lifetime. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

Delivery after Makers' Death.—If a promissory note is not delivered in the lifetime of its maker it can not be delivered after his death. *Rowan v. Chenoweth*, 49 W. Va. 288, 38 S. E. 544.

Undelivered Instrument Found Among Decedent's Papers.—An action or suit can not be maintained on an undelivered writing or duebill found among the supposed debtor's papers after his death. Such writing, so found, is not a sufficient acknowledgment to prevent the bar of the statute of limitations, but may, if genuine, be admissible as evidence to establish a quantum meruit. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910.

Conditional Delivery.—The makers of notes, delivered to a corporation on conditions which have not been complied with, can not be held liable to creditors of the corporation whose debts were not contracted on the faith of such notes, and who did not know of their existence until after their debts were contracted. *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980.

Parol evidence is admissible between the original parties to show that notes were delivered on conditions which have not been fulfilled. This does not vary or contradict the notes. *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980. When such evidence in connection with written evidence shows that the purpose for which the notes was delivered has failed, there is no liability on the maker. *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. 789. See also, *Ronald v. Bank*, 90 Va. 813, 20 S. E. 780, where the bill averred that a note was delivered for one purpose and without the parties' consent was used for a different purpose, but it was held that the averment of fact was not sustained by the proof.

• Payments on notes delivered on con-

ditions before the conditions have been complied with will not be held to be a waiver of the conditions where the maker had the right to expect, and did expect, that the conditions would be complied with, and the money applied as he had stipulated it should be. *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980.

Necessity of Delivery to Complete Transfer by Indorsement.—See post, "By Indorsement," VI, A.

F. STAMPS.

As to the necessity for bills and notes to be stamped, when so required by the revenue laws, in order to be admissible in evidence, see post, "Admissibility," XI, G, 4. And see the title DOCUMENTARY EVIDENCE.

G. EFFECT OF SEAL.

At Common Law.—At the common law a single bill under seal was not a note, but a specialty; and, therefore, the drawers and indorsers of such single bill, though it be made payable and negotiable at a bank in the state, could not be sued jointly in debt or in assumpsit. *Mann v. Sutton*, 4 Rand. 253; *Laidley v. Bright*, 17 W. Va. 779.

But where an instrument has scrolls attached opposite the signatures which are intended as substitutes for seals, this is not sufficient to make them sealed instruments, unless the seals are recognized in the body of the instrument, and they still retain their original character and may be declared on as simple bills or notes. *Peasley v. Boatwright*, 2 Leigh 195; *Jenkins v. Hurt*, 2 Rand. 446; *Cromwell v. Tate*, 7 Leigh 301; *Clegg v. Lemessurier*, 15 Gratt. 108. See the titles BONDS; SEALS AND SEALED INSTRUMENTS.

Under Negotiable Instruments Law.—It is provided by the Negotiable Instruments Law that the validity and negotiable character of an instrument is not effected by the fact that it bears a seal. Va. Code, 1904, ch. 133A, § 6.

III. Maturity and Time of Payment.

Paper Payable "on Demand" or "on Call."—A note or bond payable "on demand" or "on call" (which is the same thing) is payable at once, and interest and the statute of limitations commence to run from its date. *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576, citing *Watson v. Hurt*, 6 Gratt. 633; *Omo-hundro v. Omohundro*, 21 Gratt. 626; *Bowman v. McChesney*, 22 Gratt. 609.

There is no legal difference between a bond payable when "demanded" or "on demand," and one payable "on call" or "at any time called for." In each case the debt is payable immediately. *Bowman v. McChesney*, 22 Gratt. 609.

In order to charge the indorser of a note payable on demand or on call it must be presented for payment within a reasonable time. *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576. See post, "Time of Presentment," VIII, B, 1, b.

Days of Grace.—A bill of exchange payable at sight is entitled to days of grace. *Thornburg v. Emmons*, 23 W. Va. 325.

IV. Acceptance of Bills of Exchange.

As to acceptance by partners, see ante, "Partners," II, A, 4, b. As to actions against acceptor, see post, "Actions," XI.

A. DEFINITIONS.

It is provided by § 132 of the Negotiable Instruments Law that the acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 757, 47 S. E. 837.

An acceptance is an engagement to pay a bill of exchange according to the terms of the acceptance. *Bennett v. Maule, Gilmer* 305.

B. FORM.

Necessity of Writing.—It is provided

by § 132 of the Negotiable Instruments Law that the acceptance of a bill of exchange must be in writing and signed by the drawee. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 757, 47 S. E. 837.

Must Be for Payment of Money.

Under § 132 of the Negotiable Instruments Law the acceptance of a bill of exchange must not express that the drawee will perform his promise by any other means than the payment of money. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 757, 47 S. E. 837.

C. EFFECT OF ACCEPTANCE.

In General.—The effect of the acceptance is to give credit to the bill, and to render the acceptor liable as the maker of a note; it implies an acknowledgment that he has effects of the drawer in his hands, and the circumstance that there were no effects in the hands of the acceptor is of no consequence, for by making himself a party to the instrument he has contributed to its currency and that perhaps was one reason, on which the holder parted with his money. *Bennett v. Maule, Gilmer* 305.

Acceptance Is Conclusive as to Signature of Drawer.—It is a well established rule of commercial law, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and if he accepts or pays the bill, although the drawer's name has been forged, he is bound by the act and can not recover back the money so paid. *Johnston v. Com. Bank*, 27 W. Va. 343.

Where the Consideration for Acceptance Fails.—The general acceptance of an order binds the acceptor, in favor of a payee who took the note bona fide and for a valuable consideration, notwithstanding the consideration, which induced the acceptance, afterwards fails, without any fault on the part of the payee. *Corbin v. Southgate*, 3 Hen. & M. 319.

Acceptance on Faith of Funds.—

Where a bill of exchange is drawn on one, who accepts it on the faith of funds of the drawer in his hands, he acquires an equitable interest in those funds, and is entitled to set off his liability on the acceptances, against his obligation to pay those funds, and to retain them pro tanto for his indemnity. *Lambert v. Jones*, 2 Pat. & H. 144.

Right of Acceptor to Charge Bill to Drawer before Payment.—Acceptance of a bill does not entitle the acceptor to charge it in account against the drawer from the date of the acceptance, unless he pays the whole money at the time, or discharges the drawer from all responsibility. *Braxton v. Willing*, 4 Call 288.

When Acceptor May Sue Drawer on His Acceptance.—And the acceptor of a bill of exchange does not become entitled to sue the drawer of the bill upon acceptance. When he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received. *Christian v. Keen*, 80 Va. 369; *Braxton v. Willing*, 4 Call 288.

D. REVOCATION.

An acceptance can not be revoked after it has been made. *Bennett v. Maule*, Gilmer 305.

E. PROMISE TO ACCEPT.

Where the drawee of a bill of exchange promises to accept a bill of exchange drawn on him, this promise to accept is not binding unless supported by a valuable consideration, or unless some party has taken the bill on the faith of his promise to accept. *Brown v. Ferguson*, 4 Leigh 37.

A bill of exchange was drawn by a creditor on his debtor, payable sixty days after date; the drawee being advised thereof, before acceptance, wrote to the drawer, that he would be unable to pay the bill at its maturity; whereupon the drawer, by letter to the

drawee, authorized him, when the bill approached maturity, to redraw on himself, in order to raise funds to honor the bill; the drawee redrew accordingly, and then the drawer refused to accept his bill; but no credit was given, by the holder or any other person, to the drawee, on the faith of the drawer's authority to him so to redraw. It was held, that there was no assumpsit to the holder, but only a promise to the drawee, which being without consideration was not binding. *Brown v. Ferguson*, 4 Leigh 37.

V. Acceptance or Certification of Checks.

See generally, the title BANKS AND BANKING, ante, p. 254.

Right of National Bank to Certify Checks.—The act of Congress passed March 3, 1869, making it unlawful for a national bank to certify checks, unless the drawer has, at the time, an amount of funds on deposit in said bank equal to the amount specified in the check, does not invalidate an oral acceptance of a check, or an oral promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. *National Bank v. National Bank*, 7 W. Va. 544.

Nor does it invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, but that it will pay the same whenever a draft, left with it for collection by the drawer, and sufficient in amount for the purpose, shall have been paid. *National Bank v. National Bank*, 7 W. Va. 544.

"Because the act of congress prohibits a bank certifying a check, when the drawer has no funds, why should that invalidate a promise on its part, to pay a check, when the drawer shall have funds for the purpose, in its possession? This is but acting in accordance with the spirit of the act itself, refraining from making any promise, which is operative, until the bank is in

the condition contemplated by the act. It is not seen how any interests of the bank are endangered by pursuing this course. Indeed such a promise seems to be implied in the very existence of the bank, and the nature of the business it transacts. It says to the public and customers, by the very laws of its being, I will pay all checks drawn upon sufficient funds of the drawer, in my possession, and such is its legal and moral obligation." *National Bank v. National Bank*, 7 W. Va. 549.

Necessity of Certification in Order to Permit Holder to Sue Bank.—Under § 127 of the Virginia Negotiable Instruments Law the drawee of a bill does not become liable to the holder unless and until he accepts the same, and under § 132 such acceptance must be in writing. By § 185 the foregoing provisions are made applicable to checks, and under § 189 a check does not operate as an assignment, and the drawee is not liable to the holder unless and until he accepts or certifies such check. There is no privity of contract, therefore, between the payee or holder of a check and the bank upon which it is drawn unless the bank has in writing accepted or certified such checks. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837.

Where checks made payable to plaintiff company are, by its agent, endorsed and presented to the bank on which they are drawn, and by it paid, and the several amounts charged to the accounts of the respective drawers of such checks and credit received therefor by the defendant bank, there can be no recovery by plaintiff against defendant under a count for money had and received, although such agent was not authorized to endorse or collect such checks, and the bank therefore paid the money to an unauthorized person. Under the facts stated above, there was no privity between plaintiff and defendant, and the action of as-

sumpsit for money had and received could not be maintained. *Baltimore, etc., R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837.

But in West Virginia it has been held, that a check operates as an equitable assignment pro tanto from the time it is drawn and delivered, as between the drawer and the payee or holder, and that a general assignment for the benefit of creditors does not defeat the check holder, although the check be not presented to the bank for payment until after such assignment. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 621. See the title **ASSIGNMENTS**, vol. 1, p. 745.

VI. Negotiation.

A. BY INDORSEMENT.

See post, "Indorser," IX, F.

1. Definitions.

Indorsement is a term known in law which, by the custom of merchants, transfers the property of a bill of exchange to the indorsee. *Fitzhugh v. Love*, 6 Call 9.

When a bill of exchange is payable to order it is necessary, in addition to delivery, that there should be something by which the payee appears to express his order. This additional circumstance is an indorsement. *Fitzhugh v. Love*, 6 Call 9.

In a declaration upon a nonnegotiable note, an averment that a person "indorsed" it, instead of the word "assigned" it, is equivalent to the word "assigned" on demurrer. *Smoot v. McGraw*, 48 W. Va. 144, 35 S. E. 914.

Where the payees in a negotiable note make the following indorsement on the back of the note, "For value received, we hereby guarantee the payment of the within note at maturity, waiving demand notice of nonpayment, and protest. (Signed) A. G. Lee & Co.;" it was held, that this operated as a transfer of the note, and as an indorsement thereof, with enlarged lia-

bility. *National Exchange Bank v. Mfg. Co.*, 48 W. Va. 407, 37 S. E. 541.

Indorsement Both a Transfer and a Contract.—An indorsement on a note, bill, or draft is not merely a transfer, but is a fresh and substantive contract, embodying all the terms of the instrument indorsed, and binding the indorser, though the instrument be void. *Nichols v. Porter*, 2 W. Va. 13.

Distinguished from Assignment.—Assignment as to bonds or notes, implies more than indorsement. It means indorsement by one party, with intent to assign, and an acceptance of that assignment by the other party. *Bank v. Pindall*, 2 Rand. 465. See the title ASSIGNMENTS, vol. 1, p. 745.

2. Necessity of Indorsement.

Where bills are payable to order it is necessary, in addition to delivery, that there be an indorsement by the payee. *Fitzhugh v. Love*, 6 Call 5.

An indorsement is necessary where a check is payable to order. *Anable v. Com.*, 24 Gratt. 563.

When Indorsement by Maker Necessary.—Where a note is drawn to the maker's own order it is not complete till indorsed by him. Va. Code, 1904, ch. 133A, § 184; *Pettyjohn v. National Exchange Bank*, 101 Va. 112, 43 S. E. 203.

A note drawn by a firm, and made payable to a member of the firm or order, is the same in legal effect as a note made by a person payable to himself or order, and is invalid and inoperative until indorsed by the maker. When so indorsed, it becomes payable to bearer, or to the indorsee or order, according to the terms of the indorsement. Such a note can take effect only when indorsed and delivered by the maker. *Pettyjohn v. National Exchange Bank*, 101 Va. 119, 43 S. E. 203.

3. Form and Requisites.

a. Instrument Payable to Two or More Persons.

Where a negotiable note is made

payable to two persons, the title is in them jointly, and in order to pass the title it is necessary for both of them to indorse it. *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890.

"If several persons, not partners, are payees or indorsees of a bill or note, it should be indorsed by all of them, unless it be expressed to be payable to the order of either of them, or to the order of certain ones of them, in which cases their indorsement would suffice. Either one of the joint payees may authorize the other to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority." *Citizens' Nat. Bank v. Walton*, 96 Va. 439, 31 S. E. 890.

b. Delivery.

Delivery is absolutely essential to the transfer by indorsement of negotiable paper, but such delivery may be either actual or constructive. Whether a purchaser or indorsee of negotiable paper has acquired such possession actual or constructive as is sufficient for all the purposes of the transfer, must always depend upon the particular circumstances of each case. *Howe v. Ould*, 28 Gratt. 1.

The payee of a note indorsed it in blank and deposited it with a bank as collateral security for a loan, and afterwards sold the same for value and gave an order on the bank therefor to the purchaser, who presented the order to the bank and was informed that the president was absent from town. Some days later the purchaser had an interview with the president at the bank, and was told by him that the loan for which the note was pledged was nearly paid, and that he would deliver the note to the purchaser but for the service of attachment upon the bank. The loan was afterwards paid in full. Before the sale of the note an attachment had been served upon the maker at the suit of a creditor of the payee, but the purchaser had no notice thereof at the

time of the purchase. After the sale and notice to the bank by him, an attachment was served on the bank by another creditor of the payee. It was held, that these circumstances amounted to indorsement and constructive delivery to the purchaser, and that he was entitled to the note as against the attaching creditor. *Howe v. Ould*, 28 Gratt. 1.

4. Kinds of Indorsement.

a. Indorsement in Full.

An indorsement in full is one which mentions the name of the person in whose favor it is made, and to whom or to whose order the sum is to be paid. For instance, "Pay to B or order," signed "A," is an indorsement in full by A, the payee or holder of the paper, to B. An indorsement in full prevents the bill or note from being indorsed by any one but the indorsee, and none but the special indorsee or his representative can sue upon it. *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

b. Indorsement in Blank.

In General.—A blank indorsement is in legal effect a direction to the maker or drawee to pay the amount of the instrument to bearer, and therefore renders the paper transferable by delivery, without further indorsement. It also carries the right to any holder to insert his own name above the blank indorsement, and thus make the paper payable to himself. This will, however, release all subsequent indorsers. 1 *Daniel*, Negl Inst. 694, 694a; *Rees v. Conococheague Bank*, 5 Rand. 326; *Orrick v. Colston*, 7 Gratt. 189; *Frank v. Lilienfeld*, 33 Gratt. 377, 385; *Ritchie v. Moore*, 5 Munf. 388; *Jordan v. Neilson*, 2 Wash. 164.

If a promissory note be signed and sent to the payee with a blank for him to insert the amount, it is good evidence on the plea of nil debet. *Jordan v. Neilson*, 2 Wash. 164.

What Is Equivalent to Blank Indorsement.—An indorsement by one of

two payees of a negotiable note to the other by which the indorser "assigns and transfers all right, title and interest" in the note to such other is equivalent to a blank indorsement of the note, and carries with it the consequences of an indorsement without restriction or limitation, and can not be varied or contradicted by evidence of any contemporaneous parol agreement between the parties. *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890.

Effect as Transferring Title.—A blank indorsement of a note is sufficient to vest a title in the holder, though it be not filled up before the judgment. *Rees v. Conococheague Bank*, 5 Rand. 326.

But a blank indorsement upon a note, does not per se transfer a title, but is an authority for the holder, either to hold it as the agent of the indorser, or to claim it as his own by assignment, at his election, without any further act to be done by the assignor. The blank indorsement is conclusive proof of the assent of the indorser to transfer the note to the holder, if he elects to take it as a transfer. The assent and election of the holder to treat the indorsement as a transfer, was held to be as well proved by suing upon it in his own name, as if he had written over it an assignment to himself, as it is the assent of both parties to the transfer, which perfects it, and not the form in which the assent is evidenced. *Rees v. Conococheague Bank*, 5 Rand. 326.

Filling Blank Indorsements.—A paper signed in blank, and indorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who indorsed it in blank will be liable on his indorsement to a holder for value. If the paper is filled up as a common promissory note to a third person, who advances the money to the maker, he may treat the indorser as an original security of the note. If after the note is filled up and delivered to the

payee, the holder fills up the indorsement without a guaranty, he may afterwards erase it, and proceed against the indorser as original security. *Orrick v. Colston*, 7 Gratt. 189.

And the plaintiff's attorney may fill up a blank indorsement and make it payable to the plaintiff during the trial of a cause. *Hooe v. Wilson*, 5 Call 61.

Right to Strike Out Indorsements.—

The holder of a bill of exchange, with indorsement in blank, may strike out the indorsement subsequent to the first, and may write over the first indorsement an assignment to himself, or the bill, without such assignment, will be considered the property of the holder, he having the power to make it. *Ritchie v. Moore*, 5 Munf. 388, 7 Am. Dec. 688; *Spence v. Robinson*, 35 W. Va. 319, 13 S. E. 1006; *Bank v. Simmons*, 43 W. Va. 82, 27 S. E. 300.

But where there were two indorsers to a promissory note and the last indorsee struck out the second indorsement, and filled up the first to himself, it was held, that he could not charge the first indorser upon an execution against the maker returned "no effects" because there was no privity between them. *Hooe v. Wilson*, 5 Call 61.

c. Restrictive Indorsement.

Where the payee of a bill of exchange indorses it "Pay to A or his order only" such indorsement restricts the negotiability of the instrument, and the drawer may prove that no consideration was paid for the instrument when sued upon it. *Power v. Finnie*, 4 Call 411.

d. Indorsement "without Recourse."

Where a number of negotiable notes were transferred "without recourse," it was held, looking to all the circumstances of the case, that the words were to be construed in their literal sense; and that the transferrer was not liable for the failure to recover from the indorser, and that if the transferee intended that the words should be used

in this instance in their restricted and limited sense, he should have been careful to express his meaning, or have it expressed in plain and unmistakable terms. *Ober v. Goodridge*, 27 Gratt. 878.

5. Effect of Indorsement.

a. In General.

The effect of indorsing the payee's name upon a negotiable instrument is perfectly understood in the commercial world. It is in the nature of a warranty that the maker will pay the note upon presentment at maturity, and if not so paid, he, the indorser, will upon due and reasonable notice of the dishonor of the note, pay the same to the holder. The term "indorsed," when applied to bills of exchange and other negotiable instruments, imports a transfer for the legal value. But with respect to bonds and other securities not negotiable, the equitable title passes by assignment only. *Welsh v. Ebersole*, 75 Va. 651.

b. Indorsement after Maturity.

The indorsement of negotiable notes, though made after maturity, passes the legal title without notice to the maker. But in case of transfers of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee until he has notice of the transfer. *Davis v. Miller*, 14 Gratt. 1; *Smith v. Lawson*, 18 W. Va. 212.

Effect of Indorsement after Maturity.—When a note is indorsed after it becomes due it is considered as a note newly drawn by the person so indorsing it. *Broun v. Hull*, 33 Gratt. 29.

Indorsement of Overdue Paper Does

Not Relate Back.—The indorsement of an overdue note does not relate back to the date of a note; but is a new and independent contract only taking effect from the time it is made, and must be determined by the laws and circumstances then existing. *Broun v.*

Hull, 33 Gratt. 23. See post, "Transfer before Maturity," VII, A, 3.

B. BY ASSIGNMENT.

See the title ASSIGNMENTS, vol. 1, p. 743.

C. BY DELIVERY.

An instrument which is payable to bearer, or which has been indorsed in blank, may be transferred without any formal indorsement or assignment. The title to such instrument passes by the delivery of the instrument and no other act is necessary to give the holder title to the instrument. *Howe v. Ould*, 28 Gratt. 1; *Myers v. Friend*, 1 Rand. 12; *Branch v. Commissioners*, 80 Va. 427; *Fitzhugh v. Love*, 6 Call 9. See post, "Transferrer by Delivery," IX, H.

VII. Rights of Holder.

A. WHAT CONSTITUTES ONE A BONA FIDE HOLDER FOR VALUE.

1. Valuable Consideration.

a. Necessity.

In order to constitute one a holder for value in the due course of trade, he must have taken the instrument upon a valuable consideration. *Smith v. Lawson*, 18 W. Va. 212; *Davis v. Miller*, 14 Gratt. 1.

b. Sufficiency.

(1) In General.

The assumption of indebtedness of the transferrer by the transferee constitutes the latter a holder for value to that extent. *Fant v. Miller*, 17 Gratt. 82.

Where negotiable notes made for the accommodation of the payee were indorsed by him to the holders in consideration of money previously advanced by them to him, of money advanced to him at the time of the transfer, and of notes of the payee falling due at a future day, which they undertook to pay, and did pay as they became due, all of which amounted to the full amount of the notes so in-

dorsed to them, it was held, that the holders were held to be holders for value. *Fant v. Miller*, 17 Gratt. 47. See ante, "Consideration," II, B.

(2) Payment of Pre-Existing Debt.

There is no doubt that a pre-existing debt of the drawer, maker or acceptor is a valid consideration for his drawing or accepting a bill or executing a note, and indeed is as frequently the consideration of negotiable paper, as a debt contracted at the time, and it is equally valid and sufficient consideration for the indorsement and transfer to the creditor of the bill. Sections 25, 27 Neg. Ins. Law; *Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 176; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Fant v. Miller*, 17 Gratt. 82; *Bennett v. Maule*, Gilmer 307.

(3) Collateral Security for Pre-Existing Debt.

One who receives the bill or note of a third party from his debt or either in payment of, or as collateral security for his debt, is entitled to the full protection of a bona fide holder for value, free from all equities which might have been pleaded between the original parties. Sections 25, 27 Neg. Inst. Law; *Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 175; *Hotchkiss v. Fitzgerald, etc., Co.*, 41 W. Va. 357, 23 S. E. 576; *Shepherd v. Anderson*, 2 Pat. & H. 203; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Fant v. Miller*, 17 Gratt. 82; *Mercantile Bank v. Boggs*, 48 W. Va. 289, 37 S. E. 587. See also, *Smith v. Lawson*, 18 W. Va. 212. See the title PLEDGE AND COLLATERAL SECURITY.

Where a negotiable instrument is transferred as collateral to secure a valid pre-existing debt, by being properly indorsed and delivered, or by delivery only when indorsed in blank or made payable to bearer, so that the transferee becomes a party to the instrument, and he takes the same before maturity, in good faith and without notice of equities, he thereby be-

comes, without more, a holder for value in the usual course of business. *Hotchkiss v. Fitzgerald, etc., Co.*, 41 W. Va. 357, 23 S. E. 576.

A valid pre-existing debt is prima facie a valuable consideration for the transfer before maturity of a negotiable note in the hands of a bona fide holder for value, without notice of latent equities between the maker and first indorser, although such note be held merely as collateral security for the payment of such debt. *Mercantile Bank v. Boggs*, 48 W. Va. 289, 37 S. E. 587.

In *Pennsylvania*, the holder of a negotiable note taken as collateral security, holds it subject to all the equities of the maker against the party from whom he receives it, and it has been held in cases governed by the law of *Pennsylvania* that the holder can not recover unless the party from whom he receives the note took it for value, without notice of any matter that rendered the note invalid as between the maker and the payee. *Prentice v. Zane*, 2 Gratt. 262; *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025. See also, *Davis v. Miller*, 14 Gratt. 14.

In *Mercantile Bank v. Boggs*, 48 W. Va. 289, 37 S. E. 588, it was held, that one who took commercial paper as collateral security for a pre-existing debt was a holder for value, and the court said: "Apparently the court took the opposite view in the case of *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025. But in that case the court was construing a negotiable note which was subject to the laws of the state of *Pennsylvania*, and not the laws of this state; and the syllabus by misadventure fails to show this, as it should have done, as will be made clear by an examination of the opinion. In that case, also, the holder failed to show want of notice of the equity making its title bad, so the two first points in the syllabus should be read, and

construed together. The second point alone construes the law properly according to *Pennsylvania* decisions."

Amount of Recovery.—But the holder of a negotiable note, which has been transferred to him, as collateral security for a debt, by a person who could not have recovered against the maker in an action on the note, can not recover in an action of debt on the note against the maker, more than the amount of the debt for which the note was taken as security. Sections 25, 27 *Neg. Inst. Law*; *Shepherd v. Anderson*, 2 Pat. & H. 203; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

2. Good Faith and Want of Notice of Defenses.

In General.—In order to stand upon a better footing than his transferrer, the holder must acquire the instrument without notice of fraud, defect of title, illegality of consideration, or other fact which impeaches its validity in his transferrer's hands. *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576; *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609; *Smith v. Lawson*, 18 W. Va. 214; *National Valley Bank v. Harman*, 5 Va. 608; *Andrews v. Fidelity, etc., Trust Co.*, 103 Va. 196, 48 S. E. 884; *Pettyjohn v. National Exchange Bank*, 101 Va. 119, 43 S. E. 203; *Commercial Bank v. Cabell*, 96 Va. 552, 32 S. E. 53; *DeVoss v. Richmond*, 18 Gratt. 347; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Frank v. Lilienfeld*, 33 Gratt. 377; *Cussen v. Brandt*, 97 Va. 2, 32 S. E. 791; *Chalmers v. McMurdo*, 5 Munf. 252.

The word "notice" when used in this connection means knowledge. *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576.

Knowledge of Want of Capacity of Parties.—A party who acquires a note with full knowledge of facts, which in law show that the party from whom he took the note had no authority to transfer it, can not be regarded as acquiring it bona fide, though under a

misconception of law he may have supposed that the party from whom he acquired it had a right to make the transfer. *Smith v. Lawson*, 18 W. Va. 212.

If the transfer by the cashier of a bank of one of its negotiable notes was proven to have been made to a third person in a transaction, which was plainly out of the usual course of business, and the transaction on its face showed, that the transferee must have known, that the cashier was assuming a power and transacting business outside of his duties as cashier and was transferring a negotiable note of the bank for a purpose, for which he as such cashier had no right to transfer a negotiable note belonging to the bank, such transfer would be regarded as unauthorized, and the transferee could not be held to be a bona fide holder, even though he did give a valuable consideration for the note. *Smith v. Lawson*, 18 W. Va. 227.

Knowledge of Facts Showing Failure of Consideration.—Where there has been a total failure of the consideration of a negotiable note, which was transferred before maturity for value, but it appears that such holder had notice of every fact affecting the transaction as between the original parties to the note at the time of the transfer, such holder is affected by all the equities existing between the original parties at that time. *Andrews v. Fidelity, etc., Trust Co.*, 103 Va. 196, 48 S. E. 884.

This rule was applied in a case where the transferee knew when he acquired title to a note, that it was given for a deferred payment on a lot purchased of the then holder of the note, and that there was a prior lien on the lot for much more than its value, which such holder was endeavoring to get released, and that unless it was released there would be a failure of the consideration of the note. *Andrews v. Fidelity, etc., Trust Co.*, 103 Va. 196, 48 S. E. 884.

Knowledge Derived from Indorsement "for Collection."—The purchaser of negotiable paper indorsed "for collection" is charged with notice of the title of the holder, although the indorsement, which is still legible, be erased. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791.

The purchaser, from an agent to collect, of one of a series of negotiable notes secured by a deed of trust on real estate and payable in the order of their maturity, is postponed to the holder of the notes thereafter maturing, where the note sold bears the indorsement "for collection," which is still legible, though erased. *Cussen v. Brandt*, 97 Va. 2, 32 S. E. 791.

Knowledge Derived from Indorsement as "Attorney."—Where a negotiable note is payable on its face to a payee with the word "attorney" suffixed to his name, and he indorses it to a party suffixing his own name "attorney" in his signature to the indorsement, and the note is owned by the payee and other parties, the word "attorney" indicates an interest in such other parties, and puts the purchaser upon inquiry as to their rights and the right of the payee to sell the note. *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609.

Knowledge Derived from Discount by Maker of Paper Indorsed for Accommodation.—"The fact that a note was presented for discount by the maker has been held notice to the discounter that an indorsement thereon was for accommodation." *Pettyjohn v. National Exchange Bank*, 101 Va. 119, 43 S. E. 203.

Constructive Notice.—If the purchaser of commercial paper has no actual notice of defenses existing between the prior parties, it is well settled that in order to invalidate his title to an instrument, not absolutely void by statute law, acquired for value, in the due course of trade and before maturity, it is not sufficient to show

circumstances in the acquisition of the instrument affecting the purchaser with suspicion merely, or that he was guilty of ordinary or even gross negligence, but it is necessary to show that he was guilty of bad faith. *Frank v. Lilienfeld*, 33 Gratt. 377; *DeVoss v. Richmond*, 18 Gratt. 347; *National Valley Bank v. Harman*, 75 Va. 608; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Andrews v. Fidelity, etc., Trust Co.*, 103 Va. 196, 48 S. E. 884.

If the purchaser was guilty of gross negligence and took the instrument under such circumstances as would have excited suspicion in the mind of a prudent man, he may nevertheless recover thereon, if he was in fact acting in good faith and without notice of the defenses against the paper. *Smith v. Lawson*, 18 W. Va. 235.

Gross negligence in the receipt of a note may be evidence of mala fides, and as such may be received in evidence. *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; but it does not of itself show mala fides, and the holder can not be deprived of his right to recover, unless he acquired the note mala fide. *Smith v. Lawson*, 18 W. Va. 214.

A party will not be charged with constructive notice, unless the circumstances are such that the court can say that it was his duty to acquire the knowledge in question, and that his failure to obtain it was the result of culpable negligence. It is not enough that he should, from a want of prudent caution, have neglected to make inquiries; but he must have designedly abstained from such inquiries, for the purpose of avoiding knowledge; there must be a willful blindness, and not mere want of caution. *DeVoss v. Richmond*, 18 Gratt. 347.

A party will not be considered as having notice unless the circumstances are such that the courts can say, not only that he could have acquired, but that he ought to have acquired the notice but for his gross negligence in

the conduct of the transaction in question. *National Valley Bank v. Harman*, 75 Va. 608, citing *McClanachan v. Siter*, 2 Gratt. 313.

"It is now settled, both here and in England, that even gross negligence on the part of a holder of a negotiable note in the receiving of it does not impair his title, if he nevertheless acquired it bona fide. At one time, it is true, it was held, that though the bona fide holder for value had acquired a note, yet if in acquiring it he was guilty of gross negligence and took the note or bill under circumstances which ought to excite the suspicions of a prudent man, his title would be thereby affected." *Smith v. Lawson*, 18 W. Va. 235.

Notice to Agent as Notice to Principal.—Where a party, through his agent, loans money to a third party, and said agent takes from the borrower a negotiable note payable to his own order, but pays no part of the consideration therefor, and the party loaning the money looks after the deed of trust by which the note is secured, and has the same recorded, and then said agent indorses said note to the party lending the money, who has full knowledge of the transaction, such indorsee can not be regarded as a holder for value, and protected against equities arising between the maker of said note and said agent, such as a payment of the note by the maker to the agent without taking up the paper. *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576.

But if a note of a third person payable to a wife be loaned by her to her husband for the purpose of enabling him to pledge it as collateral for a loan, and he so pledges it, and, after the lapse of two years, renews the loan and substitutes a forged note for the genuine, and returns the genuine to his wife, and if it appears that he did not act as her agent, nor with her knowledge or acquiescence in the substitution, and that she was without

fault or negligence in the premises, her title will be deemed superior to that of the former pledgee. *Commercial Bank v. Cabell*, 96 Va. 552, 32 S. E. 53. See the title AGENCY, vol. 1, p. 240.

3. Transfer before Maturity.

A negotiable note may be transferred any time while it remains a good, subsisting, unpaid note, whether before or after maturity; and, in the latter case, even though it be protested for nonpayment, and bears upon its face the stamp of dishonor. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328. See ante, "Indorsement after Maturity," VI, A, 5, b.

A note may be transferred after maturity and after protest for dishonor. *Nichols v. Porter*, 2 W. Va. 13; *Ritchie v. Moore*, 5 Munf. 388.

But in case of a transfer of overdue paper the holder takes it as a dishonored instrument, subject to all the defenses and equities to which it was subject in the hands of his immediate indorser, whether he has any notice thereof or not; such holder takes nothing except the title and right of his immediate indorser. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Davis v. Miller*, 14 Gratt. 1; *Karn v. Blackford*, 1 Va. Dec. 841; *Smith v. Lawson*, 18 W. Va. 212.

In Virginia it is provided by statute (See Va. Code, § 2860), that, "the assignee of any bond, note or writing not negotiable, may maintain thereupon any action in his own name which the original obligee or payee might have brought, but shall allow all just discounts, not only against himself, but against the assignor, before the defendant had notice of the assignment." In *Davis v. Miller*, 14 Gratt. 1, it was argued that this statute was applicable to negotiable paper which had been transferred after maturity; but the court held that the statute did not include such paper.

Where, after the acceptance of a

note, the payee, in a composition of the creditors of the maker, agrees that the note shall be paid according to the terms of a trust deed, one who acquires the note after maturity holds the same subject to the provisions of the trust deed, though the deed was not recorded when the note was acquired. *Karn v. Blackford*, 1 Va. Dec. 841.

"Mr. Daniel, in his work on Negotiable Instruments, treating of this subject, says that the indorsee of overdue paper takes it subject to two defenses: '(1) That it was affected in its inception with some inherent vice; as, for instance, fraud, illegality or duress; or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction at the time of the indorsement, or that there was some equitable defense arising out of the transaction in which the paper was given which disabled his indorser, in whole or in part, to recover. Any of these defenses is called an equity attaching to the instrument.' 1 Daniel, Neg. Inst. 725." *Karn v. Blackford*, 1 Va. Dec. 841.

Purchaser from an Agent for Collection.—The purchaser of overdue negotiable paper, from an agent for collection, acquires only such title as the agent had. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791.

Subject to Defense of Payment.—And one who purchases a note after maturity is not a bona fide holder, and takes it subject to the defense of payment in whole or in part. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Davis v. Miller*, 14 Gratt. 1; *Arents v. Com.*, 18 Gratt. 750.

Not Subject to Set-Off.—But a bona fide purchaser for value of an overdue negotiable instrument holds it subject to only such equities as attaches to the note itself at the time of the transfer. He takes it in the same manner that he would take any other personal property. The right of set-off was un-

known to the common law, but is of modern statutory creation, and is neither an equity nor a lien recognized by the law merchant as attaching to a negotiable instrument. Hence, a bona fide purchaser of an overdue negotiable note is not required to take notice of existing set-offs in the absence of legislative enactment; and this, though the indorsee gave no consideration for the paper, and had notice of, and took the paper on purpose to defeat the set-off. *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791; *Davis v. Miller*, 14 Gratt. 1; *Ritchie v. Moore*, 5 Munf. 388, 7 Am. Dec. 688.

Title of Indorsee of Overdue Accommodation Paper.—An indorsee of an accommodation note taken after maturity, with or without knowledge of its consideration, may enforce it against prior parties to the same extent as if it had been executed for value, if his immediate indorser was entitled to so enforce it. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328.

And if a person for whose benefit accommodation notes were made, pays them off as they fall due, but, instead of canceling them passes them to a third person, they can not be enforced by him, and if they are enforced by means of the sale of property under a trust deed given to secure their payment, such sale is fraudulent and will be vacated in equity. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328.

But accommodation paper transferred after maturity is subject to the same defenses as if it had been given for value, including the defense of payment before such transfer by the person for whose benefit it was made. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328.

B. DEFENSES AVAILABLE AGAINST HOLDER.

1. General Rule as to Equities.

A bona fide holder for value of a negotiable instrument not void, taken in due course of business, takes the

same free from all equities existing between the maker and payee of which he has not notice. He may recover on the note, although it was without legal validity between the antecedent parties. *First Nat. Bank v. Johns*, 22 W. Va. 520; *Leonard v. Dougherty*, 22 W. Va. 536; *Smith v. Lawson*, 18 W. Va. 212; *Hurlburt v. Straub*, 54 W. Va. 304, 46 S. E. 163; *Lomax v. Picot*, 2 Rand. 247; *Norton v. Rose*, 2 Wash. 233; *McNiel v. Baird*, 6 Munf. 316; *Davis v. Miller*, 14 Gratt. 1; *Lake v. Tyree*, 90 Va. 720, 19 S. E. 787; *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Branch v. Com.*, 80 Va. 427.

The holder of a negotiable bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equities to which the original party was subject. If this rule was applied to bills and promissory notes, it would stop their currency. *Norton v. Rose*, 2 Wash. 233.

The provision in the Code of Virginia, 1860, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. *Farmers' Bank v. Willis*, 7 W. Va. 32. See the titles **BANKS AND BANKING**, ante, p. 254; **PAYMENT**.

2. Fraud.

See the title **FRAUD AND DECEIT**.

a. Fraud Affecting Consideration.

In the sale of a lease of a house and tenement, the vendor failed to show the

lease to the vendee, and did not inform him of a covenant therein, that in case of destruction of the house by fire, the lease should terminate and become void. This was held such a concealment as to vitiate the contract, and the house being destroyed by fire, a court of equity relieved the vendee by injunction the vendor from collecting the purchase money, and by directing his notes for the same to be given up and canceled. *Snelson v. Franklin*, 6 Munf. 201; *McNiel v. Baird*, 6 Munf. 316.

The representation by the vendor of a patent right that he has been offered a given sum for it is the statement of a material fact, as the chief element of its value is the readiness with which it may be sold, and to an action on a note given therefor, brought by the payee, he may recover damages under a special plea under § 3299, Va. Code, 1887. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

Where a plea avers that the defendant had been induced by the plaintiff to make a note, for which the note in suit is a renewal, and which was given for another's debt, by representing to defendant that the debt was amply secured by a deed of trust on real estate, while the plea on its face shows that the note was renewed several times after the defendant knew that the deed of trust would not satisfy the debt, and that the defendant had changed the debt by dropping the original debtor, and giving the note in suit; such facts constitute no defense to the note in the suit. *Keckley v. Union Bank*, 79 Va. 458.

But the renewal of notes after knowledge of fraud in the procurement of the original notes will not be deemed a ratification of the original transaction where it satisfactorily appears that the maker did not thereby intend to waive his defense or ratify the transaction, in consequence of an understanding with the holder that in a certain contin-

gency, he would surrender them. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

The plaintiff induced the defendant to buy certain lots by representing them to be level and suitable for building on. Neither had ever seen them. The same day the defendant found the lots deeply gullied—one thirty feet below level of street, the other on a steep declivity. Seeing this, he demanded his check given for the price. The plaintiff used no artifice to prevent the defendant from examining the lots, which were accessible. It was held, that the defendant was without remedy. *Lake v. Tyree*, 90 Va. 720, 19 S. E. 787.

b. Fraud in Execution of Paper.

It has been held in West Virginia that a bona fide holder of negotiable paper has a valid title and can recover against the maker thereof, unless at the time he purchased the note it was absolutely void, although the maker was induced to sign such note by fraud, not intending to sign such a note but a paper of entirely different character. In such case the question of negligence in the maker forms no legitimate subject of inquiry. *First Nat. Bank v. Johns*, 22 W. Va. 520; *Leonard v. Dougherty*, 22 W. Va. 536, disapproving *Morehead v. Bank*, 5 W. Va. 74; *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179.

"This rule is absolutely necessary to the protection of innocent holders of commercial paper. And the interest of the whole country demands, that the rule be strictly adhered to. It is much better to suffer a few individuals to be defrauded out of their property, than to relax this salutary rule, and let the whole country suffer. It is feared that some courts, in their earnest desire to protect the citizen from the frauds of vendors of patents, have unwittingly struck the law merchant a fearful blow, and at the same time visited the sin of the defrauder upon the innocent

holders of the very paper, which by their trust and overweening confidence in these same dishonest adventurers they have placed upon the market." *First Nat. Bank v. Johns*, 22 W. Va. 535.

c. Instruments Delivered in Blank and Completed Fraudulently.

See generally, the title ALTERATION OF INSTRUMENTS, vol. 1, p. 307.

In General.—"When a party puts his paper in circulation, he invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none. It is the duty of the maker of a negotiable note to guard not only himself, but the public, against frauds and alterations by refusing to sign negotiable paper made in such form as to admit of fraudulent practices upon them with ease, and without ready detection. The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration. *Daniel on Neg. Insts.*, § 1405." *Hoffman v. Planters' Nat. Bank*, 99 Va. 485, 39 S. E. 134.

A paper signed in blank and indorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who indorsed it in blank will be liable on his indorsement to a holder for value. *Orrick v. Colston*, 7 Gratt. 189.

The authority implied by a signature to a blank note, and the credit given, are so extensive, that the party so signing will be bound, although the holder was only authorized to use it for one purpose and has perverted it to another. But the holder can not alter the material terms of the instrument by erasing what is written or printed as

part of the same; or pervert its scope and meaning by filling blanks and stipulations repugnant to what is clearly expressed in the note before it is delivered by the indorser in blank. *Frank v. Lilienfeld*, 33 Gratt. 377; *Guerrant v. Guerrant* (Corporation Court of Danville), 7 Va. Law Reg. 639. See also, *Brummel v. Enders*, 18 Gratt. 877.

Instrument Incomplete at Time of Delivery to Holder.—While it is a rule of the law merchant that where a negotiable instrument is intrusted to another with an unfilled blank, the person in possession has authority, so far as concerns a holder in due course, to complete it, consistently with the written or printed terms of the instrument, although he may thereby violate his actual authority, this rule has been altered by the Negotiable Instruments Law, in the case where the holder takes the instrument before the blank is filled. In such case, he is put on notice, and must ascertain the real authority of the person intrusted with the incomplete instrument, and takes it at his peril. *Guerrant v. Guerrant* (Corporation Court of Danville), 7 Va. Law Reg. 639.

3. Duress.

The maker of a note forged the name of two parties as indorsers on the note, one of whom was his son-in-law. The holder of the note discovering the forgery informed the son-in-law that unless he procured the maker to make a new note with the parties whose names had been forged as indorsers, that he would prosecute the maker. The new note was accordingly given and the prosecution did not take place. The note was repeatedly renewed and a note was given by the indorser (the maker having dropped off) for the balance, after sundry payments. These facts were held not to constitute such duress as would avoid the note. *Keckley v. Union Bank*, 79 Va. 458.

4. Want of Capacity of Parties.

Agent without Authority.—If com-

mercial paper is executed by one acting as agent of another, but in excess of his authority, a bona fide holder can not recover unless the principal was at fault in inducing him to believe that the agent had authority. *Pettyjohn v. National Exchange Bank*, 101 Va. 121, 43 S. E. 203.

Issuance by Municipality for Ultra Vires Purposes.—Although negotiable coupon bonds of a municipal corporation, or the proceeds of such bonds, may have been used to discharge an ultra vires contract of the corporation, this defense can not be set up by the corporation against a bona fide holder for value of such bonds, acquired before maturity, without notice of such defense. If the corporation had power to execute the bonds, and the power has been executed in a lawful manner, and the bonds are free from condition, and exhibit all the requisite features of negotiability, the bona fide purchaser of such bonds, for value, acquires good title. *Clifton Forge v. Brush Electric Co.*, 92 Va. 289, 23 S. E. 288.

The bona fide purchaser for value of negotiable coupon bonds of a municipal corporation is in no sense bound to see to the application of the purchase money, nor to determine whether the proceeds were or were not to be used in the discharge of an ultra vires contract of the municipality. If the municipality had power to issue the bonds, and that power has been properly exercised, and the bonds are regular on their face, it is immaterial to what use the proceeds of the bonds are applied, so long as the purchaser has acted in good faith. *Clifton Forge v. Alleghany Bank*, 92 Va. 283, 23 S. E. 284. See the title MUNICIPAL SECURITIES.

5. Alteration.

See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 306.

6. Forgery.

Where a signature is forged it is wholly inoperative, and no right to retain the instrument, or give a discharge

thereof against any party thereto, can be acquired through or under such signature unless the party against whom it is sought to enforce such right is precluded from setting up the forgery. In such case the bona fide holder can not enforce it, for the defendant has only to say: "This is not my contract, non hæc in fædera veni." *Pettyjohn v. National Exchange Bank*, 101 Va. 122, 43 S. E. 203.

7. Usury.

Since the passage of the act now embodied in § 2818, Va. Code, 1887, which declares that usurious contracts shall be deemed to be for an illegal consideration, as to the excess beyond the principal sum loaned or foreborne, the plea of usury can not be sustained in an action on negotiable paper brought by a bona fide holder for value, who acquired the same before maturity in due course of trade. The only effect of such plea is to cast the burden of proof on the plaintiff to show that he is a bona fide holder for value. When he has shown this he is entitled to recover. *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487.

A note which was valid in its inception, was afterwards indorsed by a party to whom it had regularly come, to a third person, at a greater discount than legal interest. This transaction was held not to be usurious, as an intermediate indorsement of a note, for a usurious consideration as between indorser and indorsee, does not vitiate the note in the hands of a subsequent bona fide holder without notice of the usury. *Whitworth v. Adams*, 5 Rand. 333; *Taylor v. Bruce*, Gilmer 42; *Bailey v. Hill*, 77 Va. 492.

In an action of assumpsit upon a negotiable note it was set up by a special plea that the note was made for a balance of a note given by one party to the suit, for the aggregate of sundry notes, one of which was undue, and that there was no allowance made for that fact in ascertaining such aggre-

gate, and that interest having been twice exacted for the sum of the undue note, the note for the aggregate was usurious, and tainted the note sued upon. It was held, that the failure to include the present worth only, instead of the face value of the undue note, did not constitute usury in the note for the aggregate; but if it did, the taking of the note in suit was such change of parties as purged the transaction of usury, and the new note was valid. *Keckley v. Union Bank*, 79 Va. 458. See the title USURY.

8. Illegality, Want or Failure of Consideration.

Gaming Consideration.—See ante, "Consideration," II, B.

A note or check payable to the winner in a gaming transaction is void under § 1, ch. 97, W. Va. Code, and no suit can be maintained thereon even by an innocent holder for value unless the maker has induced the purchase thereof by promising payment. In such case the maker is estopped as against such innocent holder from setting up the gaming consideration for such note or check. *Hurlburt v. Straub*, 54 W. Va. 304, 46 S. E. 163.

"Under a similar but more explicit section the court of appeals of Virginia when this state was a part thereof, held, 'That the assignee of a bond for money won at gaming can not recover, though the assignment was for a valuable consideration and though he had no notice of the origin of the bond, unless the obligor before the assignment induce him to take the bond by promising to pay him the money.' *Woodson v. Barrett*, 2 Hen. & M. 80. And in *Buckner v. Smith*, 1 Wash. 299; *Hoomes v. Smock*, 1 Wash. 389, the doctrine was established that if an assignee is induced by assurance of payment from the obligor to become the purchaser of the note, he can enforce payment thereof." *Hurlburt v. Straub*, 54 W. Va. 307, 46 S. E. 163.

Loan of Money to Pay Gambling Debt.—The loaning of money to pay a gaming debt at the time thereof but after such debt has been incurred, is not forbidden by the statute against gaming, ch. 97, W. Va. Code, even though the lender has knowledge for what purpose the money is going to be used. Thus where the alleged loser in a game of poker gave the winner a check for \$500 payable to an innocent merchant firm, and the firm refused to accept it, until the loser promised payment thereof on maturity, it was held, that the check was not void under § 1, ch. 97, W. Va. Code, as it represents a debt between the firm and loser with which the winner has nothing to do. *Hurlburt v. Straub*, 54 W. Va. 304, 46 S. E. 163. See the titles GAMBLING CONTRACTS; GAMING.

Want of Consideration.—In debt, on a promissory note, by the assignee against the drawer, the note appearing to be "for value received," but no consideration for the assignment being alleged; parol evidence on the part of the defendant was admitted to prove that before the plaintiff paid to the assignor any consideration for the note, he, the defendant, gave the plaintiff notice not to take it, or to pay anything for it, for that he had made it without any consideration, and should not pay it, and also gave notice at the bank, that it might not be discounted; that the plaintiff had acknowledged that he had never paid anything for it, and was not interested in it; and that the same was made as an accommodation note. *Norvell v. Hudgins*, 4 Munf. 496.

Failure of Consideration.—Failure of consideration is no defense to an action on a promissory note by a bona fide holder against the maker. *Wilson v. Lazier*, 11 Gratt. 477.

A general acceptance of an order binds the acceptor to the payee by whom the same was taken, bona fide, and for a valuable consideration paid

by him; notwithstanding the consideration, which induced the acceptance, afterwards fails, without any fault on the part of the payee. *Corbin v. Southgate*, 3 Hen. & M. 319.

9. Set-Off and Counterclaim.

The General Rule.—The right of offset, being of modern statutory creation, is neither an equity nor lien recognized by the law merchant as attaching to a negotiable instrument; and therefore the bona fide purchaser of an overdue negotiable note is not required to take notice of existing offsets, in the absence of legislative enactment. *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791; *Davis v. Miller*, 14 Gratt. 1.

Bill Can Not Be Set Off against a Party without Notice.—And so in an action by an indorsee against the maker of a promissory note, it was held, that the latter could not set off a bill of exchange on which the plaintiff was responsible, unless it appeared that the defendant had received such bill before notice of the indorsement of the note to the plaintiff. *Ritchie v. Moore*, 5 Munf. 388, 7 Am. Dec. 688. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Unliquidated Claim.—An action of assumpsit was brought against the assignor of a note to collect the amount of the note assigned, on the ground that the obligor was insolvent when the note fell due. At the trial the assignor alleged that the assignment was without recourse and proved that there was a written contract, which was lost, that the assignee was to attend a certain sale of real estate belonging to the obligor, which sale was to take place under a decree of the circuit court, and make his money, but the witness could not remember the exact terms of the contract. The assignor then offered to prove the value of the land, and that the assignee did not attend the sale. It was held, that the assignor could not set off the damage which he had sustained by the

breach of this collateral contract, in an action on the note, such claim being for unliquidated damages. *McSmith v. Feamster*, 4 W. Va. 673.

10. Lost Instruments Payable to Bearer.

When a note payable to bearer, which has once become operative by delivery has been lost or stolen from the owner and has subsequently come to the hands of a bona fide holder for value, the latter may recover against the maker and all indorsers on the paper when in the hands of the loser, and the loser must sustain the loss. *Branch v. Commissioners*, 80 Va. 427. See the title LOST INSTRUMENTS AND RECORDS.

C. PRESUMPTIONS IN HOLDER'S FAVOR.

In General.—As a general rule possession of commercial paper, regular upon its face, by the indorsee, is prima facie evidence that he holds it bona fide and for value, and the burden of proving that he is not a purchaser in the due course of trade is upon him who seeks to impeach his title. *Fant v. Miller*, 17 Gratt. 82; *Wilson v. Lazier*, 11 Gratt. 477; *Duerson v. Alsop*, 27 Gratt. 229; *Vathir v. Zane*, 6 Gratt. 246; *Supervisors v. Randolph*, 89 Va. 619, 16 S. E. 722; *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505; *Dashiell v. Bank*, 2 Va. Dec. 120. See generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

The general rule that fraud is never presumed, but must always be proved by clear and satisfactory evidence, is applicable to negotiable instruments, and the possession of a note being prima facie proof of ownership, the burden of proof is on the plaintiff to show that it has been fraudulently obtained. *Dashiell v. Bank*, 2 Va. Dec. 120.

D. executed a note secured by trust deed, which at maturity was taken up by defendant, his brother, and defendant afterwards proceeded to sell the

property under the trust deed to satisfy the note. Plaintiff claimed to succeed to D.'s interest in the land, through a conveyance from him made after maturity of the note, and alleged that D., or defendant, as his agent, paid the note; that D. had possession thereof, but defendant wrongfully obtained the same, and claimed to be the owner thereof. Plaintiff's one witness testified that D., at the time defendant took up his note, gave defendant checks to the amount of the note, and that defendant afterwards obtained possession of D.'s papers wrongfully. Defendant admitted receiving the checks from D., but testified that they were to be applied on D.'s past indebtedness to him, and that he was to take up the note, and hold the same together with the right of lien, and that he had continuous possession of the note from the time he took it up. Defendant was partially corroborated by another witness. The note was not marked "Paid." It was held, that possession of the note being prima facie proof of ownership, and the burden of proof being on plaintiff to show that the note had been fraudulently obtained by defendant, the evidence was insufficient to sustain a decree for plaintiff. *Dashiell v. Merchants', etc., Sav. Bank*, 2 Va. Dec. 120.

Presumption of Consideration.—See ante, "Presumption of Consideration," II, B, 1.

Presumption of Transfer before Maturity.—"Daniel in his work on Negotiable Instruments §§ 784, 812, states, that when the payee's name is indorsed on the negotiable note, this raises a presumption that such indorsement was made before its maturity, and that the holder acquired it bona fide for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity. But he further says: 'That the presumption as to the time of acquiring the instrument is not a strong

one. The indorsement is almost invariably without date, and without witnesses. The transaction by delivery merely leaves no footprint upon the paper by which the time can be traced. And the presumption in favor of the holder at the time of the transfer, being without any written corroborative testimony, is of the slightest nature, and open to be blown away by the slightest breath of suspicion.'" *Hatch v. Calvert*, 15 W. Va. 97.

Where Failure of Consideration Is Shown.—A total failure of consideration of a negotiable note does not impose on the innocent holder the burden of proving that he gave value for it. *Wilson v. Lazier*, 11 Gratt. 477.

Where Fraud or Illegality Is Shown.—Although the general rule is that the holder of a negotiable note, regular upon its face, is presumed to have acquired it before maturity for value and without notice of any infirmity in the paper, yet if the maker or party primarily liable for its payment, or any party bound by the original consideration, proves that it was obtained by fraud or illegality in its inception, or if the circumstances raise a strong suspicion of fraud or illegality, the burden of proof is shifted, and the holder of the note must show that he acquired it bona fide for value in the usual course of business while current, and under circumstances which create no presumption that he knew of the facts which impeach its validity. *Piedmont Bank v. Hatcher*, 94 Va. 231, 26 S. E. 505; *Vathir v. Zane*, 6 Gratt. 246; *Wilson v. Lazier*, 11 Gratt. 477; *Duerson v. Alsop*, 27 Gratt. 248.

Where a note is shown to have been procured by fraud in the procurement on the part of the payee, the holder in order to entitle himself to recover, must prove that he is a bona fide holder for value. *Vathir v. Zane*, 6 Gratt. 246.

Where Misappropriation of the Instrument by Payee Is Shown.—And

where it is shown in evidence that a negotiable note was made and delivered to the payee at his instance, and for his accommodation for a specific purpose, and that such payee, without the knowledge or consent of the maker, used such note for a different purpose, the burden is on the holder to show that he received it in the ordinary course of business, before maturity, for value, and without notice of its wrongful misuse by the payee, before he can recover from the maker. *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025.

Where Accommodation Paper Is Held Eight Years without Suit.—In *Duerson v. Alsop*, 27 Gratt. 249, a holder of a note indorsed for the accommodation of the maker, gave no notice to the indorser or his personal representative that he held the note, for eight years after maturity of the note. The holder made no effort to collect from the maker, though for the greater part of the time he was able to pay it. Under these circumstances the presumption that the holder of the note was a holder for value failed, and the burden of proof was held to be upon him to show that he gave value for the note.

D. AMOUNT RECOVERABLE BY HOLDER.

If a bond be given, without any consideration, but to be used as an article of traffic to raise money, the bona fide purchaser, though at a large discount, of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount. *Hansbrough v. Baylor*, 2 Munf. 36.

Where the plaintiff purchases a note after maturity and dishonor by purchase at a sale of the effects of the bank which had discounted it, he is not thereby prevented from recovering from the indorser the whole amount of the note, though he paid for it much less than its nominal amount. *McVeigh v. Allen*, 29 Gratt. 589.

Instrument Taken as Security for Pre-Existing Debt.—The holder of an instrument taken as security for a pre-existing debt from a person who could not have recovered against the maker, can not recover from the maker more than the amount secured thereby. Sections 25, 27, Negotiable Instruments Law; *Shepherd v. Anderson*, 2 Pat. & H. 203; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

VIII. Presentment, Protest and Notice of Dishonor.

A. PRESENTMENT FOR ACCEPTANCE.

Necessity.—Bills of exchange must be presented to the drawee for acceptance. *Thornburg v. Emmons*, 23 W. Va. 326; *Nelson v. Fotterall*, 7 Leigh 179.

Bills of exchange payable at sight are not usually presented for formal acceptance only but for payment; yet as such bills are entitled to grace it would seem to follow that payment thereof is not demandable when first presented. *Thornburg v. Emmons*, 23 W. Va. 325. See ante, "Maturity and Time of Payment," III.

Time of Presentment.—In case of bills payable at sight or of paper payable at a given time after sight, the courts have declined to lay down any rule prescribing what is a reasonable time in which they must be presented for acceptance, leaving the question in every case as it arises, to be determined by its peculiar circumstances, and if the bill is not presented within a reasonable time the drawer is discharged, although the party continue solvent and no damage is caused by the delay. *Thornburg v. Emmons*, 23 W. Va. 325.

One of the circumstances affecting the question of what is a reasonable time, in such case, is whether the bill has been put in, and kept in circulation, for if it has been kept in circulation the delay of a year or even more,

would not necessarily amount to negligence. But if the holder retains possession of the bill for an unreasonable time and thus locks it up from circulation, he makes it his own, and has no remedy against antecedent parties from or through whom he derived title. *Thornburg v. Emmons*, 23 W. Va. 325.

A bill of exchange payable at sight was drawn in Huntington, W. Va., which is distant from New York by railroad not more than sixty hours, on August 25, 1873, upon the drawee at 54 Williams street, New York, who, at that time, and thence until September 19, 1873, had in his hands sufficient funds applicable to the payment thereof, which would have been so applied had the bill been presented at any time before September 19, 1873, when the drawee suspended payment, the drawee having between the date of the bill and the time of such suspension paid out said funds upon similar bills drawn by the same drawer, after August 25, and before September 19, 1873; and the payee, having indorsed the bill to the holders on August 30, 1873, who withheld it from circulation until September 15 or 16, when they had the same discounted for their accommodation at a bank at Ironton, Ohio, and the bill was not presented to the drawee, either for acceptance or payment, until September 25, 1873, when it was dishonored and protested for nonpayment and notice thereof given to the drawer; upon an action brought by the holders, who were the indorsees of the payee of the bill, against the drawer. It was held, that under such circumstances such laches on the part of such holders discharged the drawer from the payment of the bill. *Thornburg v. Emmons*, 23 W. Va. 326.

Presentment Should Be during Business Hours.—In cases where it is necessary to present a bill of exchange to the drawee for acceptance, the presentment should be made during the

usual hours of business. *Nelson v. Fotherall*, 7 Leigh 179.

To Whom Presentment Should Be Made.—The presentment of a bill of exchange for acceptance should in all cases be made to the drawee himself or his duly authorized agent. *Nelson v. Fotherall*, 7 Leigh 179.

It seems that it is not necessary to prove that the clerk at the drawee's counting house is the clerk of the drawee authorized to accept or refuse acceptance of bills drawn on the drawee. But parol evidence has been held admissible to show that the clerk was authorized to refuse acceptance. *Stainback v. Bank*, 11 Gratt. 260; *Nelson v. Fotherall*, 7 Leigh 179.

B. PRESENTMENT FOR PAYMENT.

1. Presentment of Bills and Notes.

a. Necessity of Presentment.

(1) To Fix Liability of Maker

In an action against the maker of a promissory note, the plaintiff is under no obligation to aver or prove a presentment and demand at the place and on the day specified in the note for payment. The only consequence of his neglect to present is that the maker, if he was ready at the time and place to make the payment, may plead that matter in bar of damages and costs; but he must at the same time bring the money into court, which the plaintiff will be entitled to receive. A further consequence indeed might follow, if any loss had been sustained by occasion of his failure to present; but this must be set up as matter of defense. *Armistead v. Armisteads*, 10 Leigh 525; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888. See post, "Maker of Note," IX, A.

In an action against the maker and indorser of a note negotiable and payable at the Farmers' Bank of Virginia, it was held not necessary to aver and prove due presentment of the note and demand of payment at the

bank, in order to entitle the plaintiffs to recover of the maker, but it was necessary, in order to entitle them to recover against the indorser. *Watkins v. Crouch*, 5 Leigh 522.

In debt against the makers of a promissory note (made in Virginia) negotiable and payable at the United States branch bank at Washington City, the first count of the declaration, after describing the note, averred that the same was duly presented at the bank, and payment there required. At the trial, there being no proof of a demand of payment at the bank, the circuit court instructed the jury that the plaintiff could not recover on this count. The second count of the same declaration merely set forth the note, without any averment of presentment at the place; and the defendants having demurred thereto, the circuit court sustained the demurrer. It was held, that the circuit court erred in sustaining the demurrer, and also in its instruction to the jury. *Armistead v. Armisteads*, 10 Leigh 512.

"This decision does not embrace the case of a note of obligation payable, in terms, on demand at a particular place, without specification of time, or payable, in terms, on demand at a particular place after the lapse of a specified time. In such cases, it would probably be held that there is no default of the maker or acceptor until such demand be made, and consequently that no action would accrue to the payee until such demand should be made." *Armistead v. Armisteads*, 10 Leigh 512.

In an action of debt on a promissory note, by the indorsee against the maker, the declaration stated that the note was only made negotiable at the bank of Virginia, and averred that the note at maturity was duly presented at the bank, and protested for nonpayment. The note offered in evidence, was made negotiable at the bank, and there was no proof that it was pre-

sented at the bank for payment. It was held, that a note made negotiable at a bank is not necessarily payable there also, and so the averment of presentation at the bank was wholly immaterial, and need not be proved. *Barrett v. Wills*, 4 Leigh 114.

Under Code of 1868 of West Virginia, ch. 99, § 1, a declaration against the maker of a promissory note payable at a particular place, need not aver presentment for payment at the time or place specified. *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

(2) To Fix Liability of Drawer of Bill.

The contract between the drawer and drawee of a bill of exchange is not an absolute promise by the drawer to pay the money mentioned in the bill at all events, but is conditional. He is only responsible to the holder after default made on the part of the acceptor, and the holder must first demand payment or exercise due diligence to demand it for the acceptor, before he can resort to the drawer. *Thornburg v. Emmons*, 23 W. Va. 325; *Ford v. McClung*, 5 W. Va. 165. See post, "Drawer of Bill of Exchange," IX, B.

In *Payne v. Britton*, 6 Rand. 101, it was held, that a special demand need not be made before the writ issued on a single bill under a penalty; and interest may be recovered without such demand.

(3) To Fix Liability of Indorser.

The indorser's liability is conditional upon the exercise of due diligence by the holder in making presentment and demand, as well as in giving notice of dishonor. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Thornburg v. Emmons*, 23 W. Va. 325; *Waring v. Betts*, 90 Va. 46, 17 S. E. 739; *Dunlop v. Harris*, 5 Call 16. See post, "Indorser," IX, F.

b. Time of Presentment.

Paper Payable at a Particular Time.

—When a note is made payable at a

particular time due diligence requires that it shall be presented at that time and it is incumbent on the holder of the note to show a compliance with this on his part by suitable averments in his declaration, and by proper proofs at the trial. To charge the indorser it is indispensable that the notes should be presented for payment, and payment thereof demanded at the time designated in the note, and that due notice be given him that the demand is ineffectual; and it is necessary to prove that the presentment for payment was then made, otherwise the indorser will be absolutely discharged. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Paper Payable on Demand.—A note payable on demand or on call is payable at once, and interest and the statute of limitations commence to run from its date. In order to charge the indorser of a negotiable note so payable, it must be presented for payment within a reasonable time. No fixed rule can be laid down as to what will constitute a reasonable time, but this must be determined by the facts of the particular case. *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576.

Time of Payment Limited—Must Be Presented before the Expiration of That Time.—Under the authority of an ordinance a city issued notes for the purpose of raising money. The time within which these notes were redeemable was limited in the ordinance. Some of these notes not having been presented for payment within the prescribed time, it was held, that the holders of them were not entitled to set them off against taxes due the city, after the fund which had been provided for their payment by the city had perished, and after the expiration of the time limited for their redemption. *Miller v. Lynchburg*, 20 Gratt. 330.

Presentment on Fourth Day of Grace.—Where a bill is payable at a

place or bank, at which there is a special established usage, that bills there payable shall be presented on the fourth and not on the third day of grace, such special usage must be alleged in the declaration upon such bill, otherwise proof of presentment on the fourth day of grace is not admissible. *Jackson v. Henderson*, 3 Leigh 196.

At What Hour of Day Presentment Should Be Made.—Where presentment is made at the place of business of the maker it must be during such hours when such places are customarily open, or at least, while some one is there competent to give an answer. *Waring v. Betts*, 90 Va. 46, 17 S. E. 739; *Nelson v. Fotterall*, 7 Leigh 179.

When the note is not made payable at bank, but to an individual, presentment may be made at any reasonable time during the day during what are termed business hours, which, it is held, range through the whole day to the hours of rest in the evening. *Waring v. Betts*, 90 Va. 46, 17 S. E. 739.

When an instrument is payable at bank it must be presented during banking hours; and the payer is allowed until the expiration of banking hours for payment. *Waring v. Betts*, 90 Va. 46, 17 S. E. 739.

“‘Days’ in banking parlance, means simply the few hours set apart by usage as banking hours. Banking hours are so far recognized by the courts that any transaction in the ordinary course of banking business which is to be had with the bank on any day, must be had within banking hours of that day.” *First Nat. Bank v. Payne*, 85 Va. 890, 9 S. E. 153. See the title **BANKS AND BANKING**, ante, p. 254.

c. Place of Presentment.

Paper Payable at a Particular Place.—Where paper is payable at a particular place due diligence requires that it shall be presented at that place, and it is incumbent upon the plaintiff to show compliance with this rule at the

trial by suitable evidence. To charge the indorser it is indispensable that the instrument in question should be presented at the place therein designated, and unless this is shown by satisfactory evidence the indorser will be absolutely discharged. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Presentment at Bank Excused Where Bank Has Ceased to Exist.—Although the note is made payable at a bank, presentment and demand for presentment at the bank within banking hours is excused if the bank has ceased to exist, and in such case presentment to and demand on the indorser of such note and manager of the bank made at his residence at 5:30 P. M. is sufficient to charge him. *Waring v. Betts*, 90 Va. 46, 17 S. E. 739.

Presentment to Cashier Must Be Made at His Bank.—In an action on a negotiable note payable at a bank, it is not sufficient to show that such note was presented for payment to the cashier of the bank at which it was payable, unless it further appears that such presentment was made to the cashier at the bank. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Paper Payable at One Bank and Negotiated at Another.—A note negotiable and payable at the Farmers' Bank of Virginia, was in fact negotiated at the bank of the United States, with the knowledge and assent of the maker and indorser. Presentment of the note at the latter bank was held not sufficient to charge the indorser, though he assented to the negotiation of the note there; nor could any usage of the bank of the United States dispense with due presentment at the Farmers' Bank where it was payable. *Watkins v. Crouch*, 5 Leigh 522.

Presentment at the Office of an Authorized Agent of Defunct Bank.—A bank upon the cessation of its banking operations in a city, to wind up its

affairs in that place put its notes, etc., falling due at that place in the hands of a private banker in that city, for collection, and made his office of discount and deposit, and of this the maker and indorsers of the note had notice. The presentment and demand of payment at the office of this private banker was held a sufficient presentment and demand. *Crews v. Farmers' Bank*, 31 Gratt. 348.

d. Mode of Making Presentment.

Instrument Must Be at Hand.—Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself; or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case. This is requisite in order that the maker or acceptor may be able to judge of the genuineness of the instrument and of the right of the holder to receive payment, and that he may immediately reclaim possession of it upon paying the amount. *Waring v. Betts*, 90 Va. 46, 17 S. E. 739.

Formal Exhibition of Instrument Not Necessary unless Required.—But where, on demand for payment of a note, exhibition of the instrument is not asked for, and the party on whom the demand is made declines to pay on other grounds, a formal actual presentment of the instrument is waived. *Waring v. Betts*, 90 Va. 46, 17 S. E. 739.

Paper Payable at Bank and Held by It for Collection.—So where paper is payable at a bank and is held by that bank for collection, presentment in the ordinary way—by exhibiting the paper—is not required; the maker or acceptor must have provided funds there with which to pay, and if he has not done so, it only remains to say that the note has not been paid, to show or to indicate the dishonor. All that can be done, or ought to be required,

is that the books of the bank should be examined to ascertain whether the maker had any funds in their hands; and, if not, there is a default which gives the holder a right to look to the indorser for payment. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *McVeigh v. Old Dominion Bank*, 26 Gratt. 785.

Where Personal Presentment Is Impossible.—Though the holder of a check is disabled, so that he can not go in person to present the payment, yet, if he could have sent it by mail, he will not be excused for not presenting it. *Purcell v. Allemong*, 22 Gratt. 739.

2. Presentment of Checks.

a. Necessity of Presentment.

(1) To Fix Liability of Drawer.

Presentment of a check to the bank for payment is not absolutely necessary in order to hold the drawer. But the fact that a check is presumed to be drawn on funds, makes it extremely important to the drawer that the check should be promptly presented for payment and the drawer notified if there is a refusal to pay, so that he may inquire into the cause of the refusal. Therefore, it is a general and well established rule that where the holder of a check fails to present it for payment within a reasonable time, during which time the bank fails, the drawer is discharged to the extent of the prejudice he may suffer through such failure. But where a check is presented for payment, and payment refused, and notice is given to the holder at any time before the bank fails the drawer is not discharged, if it be shown that he is not prejudiced by the delay; and if prejudiced he is only discharged pro tanto. *Purcell v. Allemong*, 22 Gratt. 739; *Bell v. Alexander*, 21 Gratt. 1; *Cox v. Boone*, 8 W. Va. 500; *Compton v. Gilman*, 19 W. Va. 312; *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003. See post, "Drawer of Check," IX, C.

It was held in one case that unless a check is promptly presented at the bank for payment, the drawer is discharged from liability whether any injury has been sustained by him by reason of the failure to present or not. *Ford v. McClung*, 5 W. Va. 156. But this case is overruled in *Compton v. Gilman*, 19 W. Va. 312.

Presumption of Injury to Drawer.—Where a check is not presented in time, and notice of nonpayment is not given, injury to the drawer will be presumed; but a check is always presumed to be drawn on actual funds; and while if the holder has been guilty of laches in not presenting it in due time, or in failing to give notice of nonpayment, it becomes incumbent upon him to show that the drawer has not been injured by the dereliction, yet, on the other hand, if he shows that the drawer had no funds in the bank against which he drew, the burden of proving actual damages is shifted upon the drawer, and in the absence of such proof the plaintiff is entitled to recover. *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003.

Effect of Failure of Bank before Presentment.—If the holder of a check fails to present it for payment, when he might do it, until after the bank fails, the drawer is not responsible, if he had funds in the bank for its payment. *Purcell v. Allemong*, 22 Gratt. 739; *Bell v. Alexander*, 21 Gratt. 1; *Cox v. Boone*, 8 W. Va. 510; *Compton v. Gilman*, 19 W. Va. 312.

Effect of Inability to Make Presentment.—If the holder of a check is disabled, so that he can not go in person to present the check for payment, yet if he might have sent it by mail, he will not be excused for not presenting it. *Purcell v. Allemong*, 22 Gratt. 739. See post, "Waiver and Excuses," VIII, E.

If by reason of the removal of the bank and the condition of the country, the holder of a check is not able to

present it, he should give notice of the fact to the drawer, and offer to return it. And if he fails to do so the drawer is not liable. *Purcell v. Allemong*, 22 Gratt. 739.

(2) To Fix Liability of Indorser.

"As between the holder of a check and an indorser of it, or the transferer and the drawer, there can be no doubt that it must be presented for payment within a reasonable time; and it seems by the best authority, that this is the same time as required in the case of a bill or note." *Parsons on Notes and Bills*, 72. Quoted in *Cox v. Boone*, 8 W. Va. 507.

b. Time of Presentment.

Subject to the rule that a drawer is not discharged unless prejudiced, a check upon a bank must be presented for payment within a reasonable time, in order to charge the drawer or the indorsers. *Purcell v. Allemong*, 22 Gratt. 739; *Bell v. Alexander*, 21 Gratt. 7; *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003; *Cox v. Boone*, 8 W. Va. 510; *Compton v. Gilman*, 19 W. Va. 112, wherein it was said that a check must be presented "promptly."

The holder is not bound to send the check for presentment by post, and not having done so, he is at liberty to present, or cause the same to be presented, in any other mode convenient, within the time allowed by post, and if the institution fails and closes its doors before that time expires and the money is lost in whole or part by reason of such failure, it can not be held that the holder is guilty of unreasonable delay, and that the money is lost by his negligence. *Cox v. Boone*, 8 W. Va. 501.

A creditor received on account of his debt, at his own dwelling on Wednesday evening, his debtor's check on a bank in a town fifteen miles away. The mail for that town closed at the postoffice nearest to and three or four miles from the creditor's residence at 7:30 o'clock the next morn-

ing, and the next following mail closed on the same hour on Saturday, arriving at the town in which the bank was located between eleven A. M. and noon. The check was not sent by either mail. The bank stopped payment at noon on Saturday. It was held, that there was no laches in not sending the check on Thursday, nor on Saturday, because if the creditor had then sent it to his agent, the latter would have had at least all that day in which to present it, and that, therefore, the debtor was not discharged. *Cox v. Boone*, 8 W. Va. 500.

C. PROTEST.

1. Definition.

By the law merchant the protest was a formal declaration by a notary of the presentation, demand and dishonor of the bill or note, and that the holder looked to all the parties for payment; but the notice was no part of the protest. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Walker v. Turner*, 2 Gratt. 534.

2. Necessity of Protest.

Foreign Bills.—By the law merchant, which is a part of the common law, protest of a dishonored foreign bill of exchange is ordinarily indispensable. *Nelson v. Fotherall*, 7 Leigh 179; *Corbin v. Planters' Bank*, 87 Va. 661, 13 S. E. 98; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Bills of exchange drawn by a person in one state upon a person in another are foreign bills of exchange. *Brown v. Ferguson*, 4 Leigh 37.

Notes and Inland Bills.—But the rule does not extend to promissory notes and inland bills. *Corbin v. Planters' Bank*, 87 Va. 661, 13 S. E. 98; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Protest is not required in order to fix the liability of the maker of a note. He is bound absolutely. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Watkins v. Crouch*, 5 Leigh 522; *Armistead v. Armisteads*, 10 Leigh 525;

Hays v. Northwestern Bank, 9 Gratt. 127; *Hansbrough v. Gray*, 3 Gratt. 356.

It is provided by statute that inland bills of exchange and promissory notes and checks for money, so drawn as to be negotiable under the statutes regulating negotiability, may be protested. Va. Code, 1887, § 2849; W. Va. Code, 1899, § 7, ch. 99. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98.

In *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888, the court said: "As in the case of foreign bills of exchange, so now, by virtue of our statute, due diligence requires that, if a negotiable note be dishonored for nonpayment, the holder is required to protest the same in order to charge the indorser. * * * In order to charge the indorser, it is not only necessary to aver and prove that the note at its maturity was presented for payment, and payment thereof demanded, at the place of payment designated in the note, but it must also be averred and proved that the note was protested for nonpayment thereof and that notice of the dishonor of the note was duly given to the indorsers."

And it has been held, that in order to hold an indorser of a negotiable note liable in an action of debt, with the maker, it must appear that the note was duly and formally protested for nonpayment, and that the indorser was duly notified of such nonpayment and protest. *Shields v. Farmers' Bank*, 5 W. Va. 254.

In the absence of proof that a bill or note sued on in Virginia was protestable by the law of the state where it was made payable, the presumption prevails that it was not. *Corbin v. Planters' Bank*, 87 Va. 661, 13 S. E. 98.

3. Time of Making Protest.

Protest can not be made until after the instrument becomes payable, and where a bill of exchange is protested for nonpayment and notice thereof

given to the drawer before the bill according to its tenor and effect becomes payable, such protest and notice are premature, and fix no liability on such drawer to pay the bill, and the drawer's liability upon the bill is the same as if no protest had ever been made. *Thornburg v. Emmons*, 23 W. Va. 326.

In an action by an indorsee against the drawers of a foreign bill of exchange drawn by merchants in Virginia on Liverpool, it appeared that the bill was presented to the drawee at Liverpool, and acceptance refused, on March 27, and that the bill was put into the hands of a notary for the purpose of protest on March 28. It was held, a proper question for the jury to decide, upon the evidence, whether the refusal of the drawee to accept was within or after business hours of March 27, so that the bill could be put into the notary's hands on that day, or not until the next day. *Nelson v. Fotterall*, 7 Leigh 179.

A bill of exchange payable at sight, is entitled to days of grace, and if such a bill be protested for nonpayment, and the protest does not show, that, at the time it was made, the time for the payment of said bill had expired, the protest and notice thereof to the drawer are not sufficient to show the dishonor of the bill and thus charge the drawer with the payment thereof. *Thornburg v. Emmons*, 23 W. Va. 325.

4. Contents and Sufficiency.

Where the protest of a foreign bill of exchange, states that the notary took the bill to the counting house of the drawee and there exhibited it to a clerk of the drawee and demanded acceptance thereof; and that the said clerk replied that the same could not be accepted, it was held, that the protest was sufficient to bind the indorser, and parol evidence was admissible in an action by the holder against the indorser to prove that the clerk was au-

thorized to refuse acceptance. *Stainback v. Bank*, 11 Gratt. 260.

As to sufficiency of statements contained in certificate, as proof of presentment and notice, see post, "Certificate of Protest as Evidence," VIII, C, 5.

5. Certificate of Protest as Evidence.

Protest of What Instruments May Be Admitted in Evidence.—Under the law merchant, which is a part of the common law, protest of a dishonored foreign bill of exchange is ordinarily indispensable, and the notary's certificate of protest proves itself; that is, it is *prima facie* evidence of presentment and nonacceptance, or nonpayment. But the rule does not extend to promissory notes and inland bills. As to these, the protest is not regarded as an official act, and accordingly, in the absence of statute, is not receivable as evidence of dishonor. *Corbin v. Planters' Nat. Bank*, 87 Va. 664, 13 S. E. 98.

A protest of a foreign bill of exchange in a foreign country is proved by the notarial seal, and the protest is admissible in evidence. *Nelson v. Fotterall*, 7 Leigh 179; *Bohn v. Zeigler*, 44 W. Va. 402, 29 S. E. 983.

"By the commercial law, as recognized in all civilized countries, a protest of a foreign bill of exchange, by a foreign notary, under his hand and official seal, is everywhere received as primary evidence. Upon the general principles of the common law, the certificate under the official seals of foreign officers, acting as the agents and instruments of private parties, would not be received as primary evidence. But an exception, for public convenience, has been always made in favor of protests of foreign bills of exchange, by foreign notaries." *Second Nat. Bank v. Chancellor*, 9 W. Va. 70.

Section 2849, Va. Code, 1887, provides that every promissory note or check for money which on its face is

payable in this state at a particular bank, or at a particular office thereof for discount or deposit, or at the place of business of a savings institution or savings bank, or at the place of business of a licensed banker or broker, may upon being dishonored for nonacceptance or nonpayment be protested, and the protest, being made, shall be evidence in like manner as in case of a foreign bill of exchange. *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98.

Where a note is made in New York, payable there, it is not within § 2849 of the Virginia Code of 1887, permitting the protest of promissory notes, payable in this state at a particular bank, or at a particular office thereof for discount and deposit, etc., as to which the protest is made *prima facie* evidence of what is stated therein. *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98; *McVeigh v. Bank*, 26 Gratt. 785.

"The legislature has not seen fit to make the notarial certificate of protest of a promissory note, or of an inland bill, payable outside of the state, admissible in evidence in our courts as an official act, and we have not the power, even if we were so disposed, to give to it an effect not sanctioned either by the common law or by the statute." *Corbin v. Planters' Nat. Bank*, 87 Va. 666, 13 S. E. 98.

Section 7, ch. 99, of the West Virginia Code provides that: "Every promissory note, or check for money, payable in this state at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution, or savings bank, and every inland bill of exchange payable in this state, shall be deemed negotiable, and may, upon being dishonored for nonacceptance or nonpayment, be protested, and the protest be in such case evidence of dishonor in like manner as in the case of a foreign bill of exchange." *Peabody*

Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

Under §§ 7, 8, ch. 99, of the West Virginia Code inland bills of exchange and negotiable promissory notes are placed on a level with foreign bills of exchange. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 897.

Of What Protest Is Evidence in General.—It is provided by statute that the protest shall be prima facie evidence of what is stated therein or at the foot or on the back thereof in relation to presentment, remand, dishonor and notice thereof. Va. Code, 1887, § 2850; W. Va. Code, 1899, § 8, ch. 99; *Corbin v. Planters' Nat. Bank*, 8 Va. 661, 13 S. E. 98; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Sufficiency of Averments Contained in Certificate.—When the protest is the only evidence relied on to establish due presentment, dishonor, and notice, such protest must contain averments sufficient to show that every requisite has been done on the part of the holder or his agent to authorize the demand upon the indorser. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Where the only evidence introduced to prove presentment, dishonor and notice is contained in the notarial certificate of protest, the court, upon a demurrer to the evidence, will not infer that any step was regularly taken, or that any fact existed, which is not certified to in such protest. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 890.

Where such protest simply states that notice was addressed to the indorsers at a certain place, without adding that such place was the postoffice or residence of the indorser, the court, upon a demurrer to evidence, will not infer that such was the fact, and such certificate is therefore insufficient to prove due notice. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 890.

And where a protest simply states

that notice of dishonor was sent by mail to the indorser, directed to their "several addresses," such certificate, in the absence of all other evidence is insufficient to prove due notice. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

A certificate of a notary that he gave notice of a protest of a note for non-payment sent by mail to the place of residence of the indorser while there was a mail communication between the place of starting and the residence, though not by the direct route, was held to be sufficient evidence of notice. *Slaughters v. Farland*, 31 Gratt. 134.

In an action of debt against the indorsers of a protested note discounted at the bank, the protest of the notary stated that "he placed in the postoffice of this place four written notices, one directed to the payer, and one directed to the two indorsers, at Blacksburg, Virginia, informing them," etc. On demurrer to the evidence it was held, that as the jury would have been warranted to infer from this evidence that the residence of the defendants was in Blacksburg the court must make the same inference upon a demurrer to evidence. *Linkous v. Hale*, 27 Gratt. 668. This case overrules the law as laid down in a headnote to *Raine v. Rice*, 2 Pat. & H. 529.

But this case is disapproved by the West Virginia court, and it is held, that where the only evidence introduced to prove presentment, dishonor, and notice is contained in the notarial certificate of protest, the court, upon a demurrer to evidence, will not infer that any step was regularly taken, or that any fact existed, which is not certified to in the protest. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Aiding Protest by Extrinsic Evidence.—Where the protest itself did not state that notice of the dishonor of the note was given to the indorser,

the affidavit of the notary stating that notice had been given, was held not competent evidence. *Walker v. Turner*, 2 Gratt. 534.

But parol evidence that the clerk to whom the protest states the instrument was presented for acceptance was authorized to refuse acceptance of the bill, is admissible in an action by the holder against the indorser. *Stainback v. Bank*, 11 Gratt. 260.

In an action of debt upon a negotiable note the plaintiff offered in evidence the protest of the notary, which stated the due presentment and demand of the note, the failure to pay, the protest for nonpayment, and the fact that notice of the protest had been forwarded to the makers of the note. It omitted to state that the notice had been forwarded to the indorser, who was the defendant. He then offered in evidence the ex parte affidavit of the notary, that he had forwarded it by mail, informing him of the protest and dishonor of the note. It was held, that such affidavit was not admissible to prove notice, in a case where the protest did not state that notice of the dishonor had been sent to the indorser. *Walker v. Turner*, 2 Gratt. 534.

Admissibility of Unsealed Certificate.

—The want of a notarial seal is not sufficient to prevent the receipt of a certificate of protest signed by a notary of this state in evidence. *Second Nat. Bank v. Chancellor*, 9 W. Va. 69.

Copy of Protest.—A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original was lost or mislaid, was held not to be legal evidence to charge the drawer. *Wright v. Hencock*, 3 Munf. 521.

Province of Court.—A notarial certificate of protest is in the nature of documentary evidence, and the proper construction as well as the legal effect thereof, as an instrument of evidence of the facts stated therein, are questions of law, to be determined exclusively

by the court. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Weight as Evidence.—The certificate of protest, where it is admissible at all, is only prima facie evidence of the facts stated therein. Va. Code, 1887, § 2850; W. Va. Code, 1899, § 8, ch. 99; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

The protest of a foreign bill of exchange in a foreign county is not conclusive, but only prima facie evidence of the dishonor of the bill. *Nelson v. Fotherall*, 7 Leigh 179.

6. Right of Holder to Recover Damages on Protested Bill.

Where a bill of exchange had fallen due and been protested before the act allowing 3 per cent. damages, and interest upon the costs of protest, went into operation, such damages and interest are not recovered in action upon a bill. *Friend v. Wilkinson*, 9 Gratt. 31.

D. NOTICE OF DISHONOR.

1. Necessity of Notice.

a. To Fix Liability of Maker.

The maker of a note is liable for the amount of it, without presentment, demand, protest or notice of dishonor. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Watkins v. Crouch*, 5 Leigh 522; *Armistead v. Armisteads*, 10 Leigh 525; *Hays v. Northwestern Bank*, 9 Gratt. 127; *Hansbrough v. Gray*, 3 Gratt. 356.

A note for a sum certain, payable to order, and negotiable and payable at a bank out of the state of Virginia, is a note negotiable at a bank in Virginia, and therefore is placed on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against the maker and indorsers jointly, and with the like effect, except as to damages. In such case demand and notice of protest for nonpayment is not necessary to subject the maker of the note. *Hays v. Northwestern Bank*, 9 Gratt. 127.

Accommodation Maker.—The maker

of a note for the accommodation of the payee, is not released by the failure to protest the note and give him notice; though it is known to the holder that he is an accommodation maker of the note. *Hansbrough v. Gray*, 3 Gratt. 356.

b. To Fix Liability of Drawer of Bill.

The contract of the drawer of a bill of exchange is that he will pay the bill provided it be duly presented and payment duly demanded of the person upon whom it is drawn, and in the event of nonpayment by the drawee he be given due notice thereof. *Ford v. McClung*, 5 W. Va. 156; *Brown v. Ferguson*, 4 Leigh 37.

In case of failure to give notice to the drawer of a bill upon its dishonor, the law implies injury to the drawer. *Ford v. McClung*, 5 W. Va. 156.

In case of the dishonor of a bill of exchange by a failure of the drawee to accept, it is just as essential that the drawer have notice of the dishonor by such failure to accept, as it is for him to have notice of the failure to pay when presented for payment. *Thompson v. Cumming*, 2 Leigh 321.

In *Willock v. Riddle*, 5 Call 358, it was held, that the penalty for not giving notice of the protest of an inland bill of exchange, is the loss of interest and damages; but the principal is nevertheless recoverable.

c. To Fix Liability of Drawer of Check.

The contract of the drawer of a check differs materially from the contract of the drawer of a bill of exchange. In order to hold the drawer of a check liable, the holder is not absolutely bound to present the check for the payment promptly, and the drawer is not absolutely entitled to notice of its dishonor. But the fact that a check is presumed to be drawn against deposited funds makes it of great importance that a check should be presented, and that the drawer should be notified of its nonpayment, in order that he may speedily inquire the cause

of refusal and be placed in a position to secure his funds which are deposited in bank. Therefore, where the holder of a check fails to present the check at the bank for payment within a reasonable time, or fails to give notice to the drawer of its dishonor, the drawer is discharged to the extent that he is prejudiced by such failure. *Bell v. Alexander*, 21 Gratt. 1; *Purcell v. Allemong*, 22 Gratt. 739; *Cox v. Boone*, 8 W. Va. 510; *Devendorf v. W. Va. Oil, etc., Co.*, 17 W. Va. 174; *Compton v. Gilman*, 19 W. Va. 312.

d. To Fix Liability of Regular Indorser.

The indorser's liability is conditional upon the exercise of due diligence by the holder in making presentment and demand and in giving due notice of dishonor. The general rule is well established, that an indorser is entitled to prompt notice of the nonacceptance or nonpayment, in order that he may take the necessary steps to secure himself; and that upon the failure to receive such notice, he is discharged from liability. *Thompson v. Cumming*, 2 Leigh 321; *Willock v. Riddle*, 5 Call 358; *Davis v. Poland*, 92 Va. 225, 23 S. E. 292; *Early v. Preston*, 1 Pat. & H. 228; *Wood v. Luttrell*, 1 Call 232; *May v. Boisseau*, 8 Leigh 181; *Bank v. McVeigh*, 29 Gratt. 546; *Brown v. Ferguson*, 4 Leigh 37; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515; *Shields v. Reynolds*, 9 W. Va. 487.

The burden of proof that due presentment of a note for payment has been made, and due notice of protest thereof given to the indorser, or that due diligence has been used to give such notice, rests upon the plaintiff; and clear proof on his part of such presentment, dishonor, and notice is a condition precedent to his right to recover against the indorser. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Early v. Preston*, 1 Pat. & H. 228.

Accommodation Indorser.—An indorser is chargeable without notice if he indorsed for the drawer for accommodation only, and had no expectation that the drawee would pay: *Farmers' Bank v. Vanmeter*, 4 Rand. 553.

Paper Made for Indorser's Accommodation.—Where notes are made for the accommodation of the payee, the payee is liable upon his indorsement without having been served with notice of protest and dishonor. *McVeigh v. Bank*, 26 Gratt. 785.

Indorser of Nonnegotiable Paper.—It is a well-settled rule that a party whose name appears on the back of a nonnegotiable instrument, as assignor or indorser, is not entitled to notice of the dishonor of the instrument. *Pitman v. Breckenridge*, 3 Gratt. 127. See the title **ASSIGNMENTS**, vol. 1, p. 745.

e. To Fix Liability of Irregular Indorser.

Where a negotiable promissory note is first indorsed by a stranger and then delivered to the payee, such irregular indorser, according to the West Virginia rule, is *prima facie* an original promisor or guarantor as the holder may elect. His liability is not governed by the strict rules of the law merchant, but is determined by the manner in which the holder elects to treat him. If the holder elects to treat him as a joint maker or guarantor, instead of an ordinary indorser, protest and notice of nonpayment are not necessary in order to bind him. *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512.

It has not been decided in Virginia whether an irregular indorser is entitled to notice of dishonor or not; but it is certainly necessary now under the provisions of § 63 of the Negotiable Instruments Law. See *Call v. Scott*, 4 Call 402; *Fitzhugh v. Love*, 6 Call 5; *Frank v. Lilienfeld*, 33 Gratt. 377.

f. Necessity of Notifying Parties Having Knowledge of Dishonor.

Notice of dishonor means notifica-

tion of dishonor; and knowledge of nonpayment of the instrument by the party to be charged is not sufficient. *Bank v. McVeigh*, 29 Gratt. 546; *McVeigh v. Bank*, 26 Gratt. 847; *Brown v. Ferguson*, 4 Leigh 37.

In an action by a bank against an indorser of negotiable notes which were discounted in Alexandria and fell due during the war, when the indorser was within the confederate lines, to prove notice of protest to the indorser within a reasonable time after the war ceased, the plaintiff offered in evidence a resolution of the stockholders, adopted at a meeting held on July 18, 1865, at which the indorser was present at a previous period of the meeting, though it did not appear he was present when the resolution was adopted, by which payment of these notes and others made by the maker at a branch of the plaintiff's bank within the confederate lines are declared to be still due to the bank. It was held, that as there was no proof that the indorser had any knowledge of the resolution, it was not due notice to him of the dishonor of the notes; that even if he had knowledge of the resolution it was not sufficient, for he must have been notified that he was looked to for payment. *Bank v. McVeigh*, 29 Gratt. 548.

2. Upon Whom Notice May Be Served.

Where Indorser Is Dead and No Representative Has Qualified.

Where Indorser Is Dead and No Representative Has Qualified.—An indorser on a negotiable note died intestate before the note became due. When the note became due it was regularly protested for nonpayment, and no person having then qualified as administrator on the estate of the indorser, the notary on the same day deposited in the postoffice of the town in which the note had been made payable, and discounted, the notice of protest directed to "the legal representative," of the indorser. This was held sufficient notice. *Boyd v. City Sav. Bank*, 15 Gratt. 501. The reason upon

which this case is based is, that as no person had qualified as administrator on the estate, there was no one on whom personal service could be made, and it was, therefore, excused.

3. Time and Manner of Giving Notice.

a. Personal Service.

When Necessary.—The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling house. Depositing a notice in the postoffice affords but presumptive evidence of its reception, and is permitted to be substituted for the former only where the latter would be too inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purposes of the transmission, as where the parties reside in the same city or town, there is no reason for its use, or for waiving the more stringent and certain evidence of notice. Therefore, where the parties reside in the same city or town the general rule is that notice must be delivered in person to the party to be charged, or left at his residence or place of business. *Brown v. Bank*, 85 Va. 95, 7 S. E. 357; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

And this rule holds good even though the party to be charged resides outside of the town, but in the vicinity, if he receives his mail at this town. And in the absence of proof of a usage known to him at the time of entering into the contract notice must be left at his residence or dwelling; and notice deposited in the postoffice is not sufficient to charge him in the absence of proof of its actual receipt. *Brown v. Bank of Abingdon*, 85 Va. 95, 7 S. E. 357; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

The distinction between the different modes of giving notice is this: That where the holder and indorser reside

in different places, if the holder deposit the notice in the postoffice in due season, he has no further burden on him as to the actual receipt of it by the latter; but when the parties both live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season, or left at his dwelling house, which in that case, is deemed equivalent to personal service. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

Time of Giving.—Where the indorser lives in the same place where the note is payable, notice of protest given him on either the same day the demand is made or the next day is sufficient. *Brown v. Ferguson*, 4 Leigh 37.

The resolution of the stockholders of a bank, one of whom is an indorser on certain notes, declaring the notes still due and unpaid having been adopted July 18, 1865, at least two months after communication had been opened between the bank and the indorser, it was not in time if it had been sufficient as a notice. *Bank v. McVeigh*, 29 Gratt. 546.

It was held, that if notice of the protest of a foreign bill of exchange be given within eighteen months from the date of the bill, it will be sufficient under the act of 1848 (See Hen. Sts. 85), unless there be particular circumstances to warrant a departure from the general rule. *Stott v. Alexander*, 1 Wash. 331.

b. Service by Leaving Copy at Residence.

Virginia Code, 1860, ch. 167, § 1, provides that "a notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy, and giving information of its purport to his wife, or any white person found there, who is a member

of his family, and above the age of sixteen years; or, if neither he nor his wife, nor any such white person be found there, by leaving such copy posted at the front door of said place of abode." It has been held, that this statute does not apply to a notice of the dishonor of negotiable paper. *McVeigh v. Bank*, 26 Gratt. 785.

Where Indorser Has Changed His Residence.—Where the holder and indorser reside near to each other in a small city like Alexandria, the jury may presume from the proximity of the parties and the frequency of their communication, and the circumstances of notoriety attending the removal, that holder was appraised of the change of domicile. *McVeigh v. Allen*, 29 Gratt. 596. And in such case, the fact that the indorser had a residence in Alexandria at the time the note was protested, and that a written notice of said protest was left at his residence is not sufficient to render the indorser liable. *McVeigh v. Allen*, 29 Gratt. 588.

In suit against indorser of negotiable note, it appeared that defendant, at and for a time prior to maturity and protest of note, was with his family within the confederate lines because of the presence of the federal army in the city of his residence, and did not return until the close of the war. Notice of protest was left with the servant in charge of his house in said city. It was held, not to be sufficient to fix his liability as such indorser, if defendant's absence was, or might, by reasonable diligence, have been known to the holder of the note. *Alexandria Sav. Inst. v. McVeigh*, 84 Va. 41, 3 S. E. 885; *McVeigh v. Bank*, 26 Gratt. 785.

c. Service by Mail.

(1) Right to Serve Notice by Mail.

(a) Where Parties Reside in Same Town.

Where the parties reside in the same town the general rule is that notice

must be personal, or must be served by leaving a copy at his residence or place of business. *Brown v. Bank*, 85 Va. 95, 7 S. E. 357; *McVeigh v. Bank*, 26 Gratt. 785; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

So, if the party to be charged resides outside of the town but receives his mail at that town and lives in the vicinity, notice deposited in the post-office is not sufficient to charge him unless it be proved that he actually received it. *Brown v. Bank*, 85 Va. 95, 7 S. E. 357; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

(b) Where Parties Reside in Different Towns.

Where the parties live at a distance from each other and in different cities or towns, so that personal service would be inconvenient and expensive, notice sent by mail to the nearest post-office is sufficient to bind the party. *Brown v. Bank of Abingdon*, 85 Va. 95, 7 S. E. 357; *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

The deposit of the notice in the post-office, properly addressed and in proper time, is all that is required to charge the party so notified, and the sender has no further duty on him as to the actual receipt. *Friend v. Wilkinson*, 9 Gratt. 31; *Farmers' Bank v. Gunnell*, 26 Gratt. 137; *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

(2) Time within Which Notice Should Be Mailed.

If the party to be charged reside at a different place from the holder, the notice must be sent to him by the first mail which leaves after the day of the dishonor is passed, and does not close before early and convenient hours of the day succeeding the day of dishonor, directed to him at the place of his residence, or to his nearest post-office, or to the postoffice where he usually receives his mail matter, advising him of the protest. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Corbin v. Planters' Nat. Bank*,

87 Va. 661, 13 S. E. 98; *Brown v. Ferguson*, 4 Leigh 37.

"The holder is bound to forward the notice as early as by a mail of the day after dishonor, which does not start at an unreasonably early hour; and if there is no mail which leaves on that day after a reasonably early hour, the notice is to be forwarded by the next mail which starts thereafter. With respect to what is not a reasonably early hour, no precise rule can be laid down, except that in general the limit must be defined by business hours, which depend upon the particular habits of the mercantile community in each place, and from this fact arises much of the discrepancy which we find in the cases upon the point." *Cox v. Boone*, 8 W. Va. 509.

Any party to a bill of exchange, or a notary who protests it may give notice of its dishonor; and such notice will be sufficient, if it be sent by the notary on the day after or the next mail day after protest; or by any party thereto, on the day thereafter, or the next mail day after such notice is received by mail—excluding Sundays in both cases. *Early v. Preston*, 1 Pat. & H. 228.

The courts will not take judicial notice of the fact that the next day after the protest, or receipt of notice thereof, is not a mail day; or the time it requires for a letter to go by mail between two given points. Such matters if material, must be proved. *Early v. Preston*, 1 Pat. & H. 228.

Where a note was due on the 14th of the month in New York, and on the 17th the holder received notice of its dishonor in Richmond, Virginia, which on the same day he forwarded to the indorser, there is no proof of due notice of dishonor, as it does not appear when the notice was mailed in New York. *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98.

Burden Proving That Notice Was Mailed in Proper Time.—In an action upon a bill of exchange by an indorsee

against an indorser, it appeared to be a proper case in which to send notice of protest by the mail, and it also appeared that such protest had not arrived at as early a date as in the regular course of the mail it might have come if started at the proper time. The burden of proof was held to be upon the plaintiff to prove that it was put into the mail at the proper time. *Friend v. Wilkinson*, 9 Gratt. 31.

(3) Place to Which Notice Should Be Mailed.

The letter containing the notice to an indorser may be directed to him at his place of residence, or to the postoffice nearest thereto, or at a particular postoffice directed by him, or that at which he usually resorts for his letters. If he is in the habit of receiving letters at two postoffices, notice directed to either will be sufficient. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 903.

Party Equal Distance from Two Postoffices.—Where an indorser resided in a country district passing under a particular name, and having a postoffice within it; and being the same distance from that office and another out of the bounds of the district, a notice of protest sent to the first mentioned office, was held sufficient, though in fact he was accustomed to receive his letters and papers from the other office. *Rand v. Reynolds*, 2 Gratt. 171.

Temporary Residence.—Where a party has an actual domicile and a temporary residence it is a general rule that notice sent to such temporary residence will bind him. But where the party to be charged has ceased to reside at his temporary place of residence, notice there will be insufficient. Thus, where notice was left at the dwelling house of a member of congress in Washington after the adjournment of congress and after he had left the city, notice there was held to be

insufficient. *Bayly v. Chubb*, 16 Gratt. 284.

Notice Sent to Wrong Place after Due Inquiry.—Where the holder using due diligence to ascertain the place of residence of the indorser is wrongly informed, and transmits notice by mail according to such information, the liability of the indorser becomes thereby fixed and absolute, and the holder is not bound to give any other notice, even though he may afterwards be informed correctly as to the residence of the indorser. *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

(4) By What Mail Route Notice Should Be Sent.

Notice Sent by One of Two Equally Good Routes.—A bill drawn in Petersburg, Va., on a house in London, was protested for nonacceptance on April 5, 1843. The next Cunard steamer sailed from Liverpool for the United States on April 19, and notice of the dishonor of the bill was sent by that steamer. At that time these steamers carried the mail between the two countries under a contract with the British government, and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London postoffice, and such packets sailed from London or Liverpool on April 7, 10, 17, 1843. But it was probable that the steamer of April 19 would arrive before any of them. The notice was held sufficient. *Stainback v. Bank*, 11 Gratt. 260.

(5) Notice Deposited in Mail During War.

Where the holder and indorser resided in different localities at the time of the dishonor, and for months before and afterwards, the usual and ordinary intercourse by mail being intercepted by a state of war, it was held that the holder did not prove due diligence by simply proving that he deposited in

this postoffice at the day of dishonor of the note, a notice of dishonor addressed to the indorser at his place of residence. *Farmers' Bank v. Gunnell*, 26 Gratt. 131.

And so notice of dishonor of a check deposited in the postoffice at New Orleans while that city was under permanent federal occupancy and control, and addressed to Petersburg, Va., during the pendency of the civil war was of no avail, unless it was shown that the law or a general usage required the letter containing the notice to be preserved by the postmaster until the restoration of mail communication, and then forwarded to its destination. *Billgerry v. Branch*, 19 Gratt. 393.

Where the holder and indorser reside in different states or countries at the time of the indorsement and maturity of the note, and war arises between such states or countries between those periods, and continues to exist at the time of such maturity, the impossibility which thus arises of their giving such notice is a legal excuse for not doing so. The excuse, however, is not permanent, but is only for a delay until the impossibility ceases when due notice must be given. *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785; *Farmers' Bank v. Gunnell*, 26 Gratt. 131; *Tardy v. Boyd*, 26 Gratt. 631.

d. Notice by Successive Indorsers.

Where there are several successive indorsers of a note, the holder may and ordinarily does, give notice to all, with a view to preserve his recourse upon all. But he is not bound to do so. He may, if he pleases, give notice to any one of the indorsers; and that indorser, if he desires to have recourse upon any antecedent indorser, must use due diligence in giving notice of the dishonor of the note. *Cardwell v. Allan*, 33 Gratt. 166.

If due notice is given by the holder to his immediate indorser, who, on receiving notice, transmits notice reason-

ably to his immediate indorser, the holder may recover against the latter, although he has never given him any notice, as notice by an indorser whose liability has been fixed inures to the benefit of all subsequent parties to the instrument; and this, regardless of the fact that the prior indorser did not receive notice as soon as he would have received it, had it been sent him by the holder, for the holder has a reasonable time to give notice to his immediate indorser, and this indorser has the same time in which to give notice to his predecessor, and so on. *Big Sandy Nat. Bk. v. Chilton*, 40 W. Va. 491, 21 S. E. 774; *Brown v. Ferguson*, 4 Leigh 37.

Every party to a bill of exchange is entitled to one full day, to give notice to the party next before him, of the dishonor of the instrument. This rule is applicable even to a party who is a mere agent for collection, and who indorses the bill only for the purpose of collection. *Brown v. Ferguson*, 4 Leigh 37.

Over diligence of one party to a bill does not supply the under diligence of others; and though the drawer or indorser sought to be charged, in fact receives notice as early as he would regularly be entitled to it, yet the holder, in order to charge him, is bound to show due diligence in each and every party through whose hands the bill has passed. The onus probandi, in such case, lies on the plaintiff, to prove due diligence, and not on the defendant to prove negligence. *Brown v. Ferguson*, 4 Leigh 37.

e. Diligence in Serving Notice a Question of Law.

The question of due diligence in serving notice of dishonor of negotiable paper is a question of law, and if there be doubt or difficulty, in making proper deductions from the evidence, it must be solved by the court, as if the jury had not passed on the evidence. *Early v. Preston*, 1 Pat. & H. 228; *Peabody*

Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

E. WAIVER AND EXCUSES.

1. Waiver.

In General.—The consequences of neglect to give notice may be waived by the person entitled to take advantage of the failure, but the act which is to operate as a waiver must be the act of the indorser himself. *May v. Boisseau*, 8 Leigh 181; *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 442; *Bowman v. McChesney*, 22 Gratt. 609.

The necessity for presentment and notice of nonpayment of a check may be waived by the representations and conduct of the drawer. *Compton v. Gilman*, 19 W. Va. 312.

Subsequent Promise to Pay.—If one who is not liable on an instrument because of want of presentment, protest or notice, subsequently with full knowledge of the facts, acknowledges the debt and promises to pay it, this will constitute a waiver and render him liable thereon. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 442; *Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 175; *Walker v. Laverty*, 6 Munf. 487; *Pate v. McClure*, 4 Rand. 164; *Cardwell v. Allan*, 33 Gratt. 161.

If the drawer of a protested bill of exchange, being applied to in behalf of the holder for payment, acknowledges the debt to be just and promises to pay it, saying nothing about his having received notice, the holder in an action of debt upon the bill, against such drawer, is not bound to prove that notice was given him of the protest. *Walker v. Laverty*, 6 Munf. 487; *Pate v. McClure*, 4 Rand. 164.

Thus, in an action on a bill of exchange, the defendant required proof of notice of protest for nonpayment of the bill. The plaintiff introduced a witness, who proved, that he applied to the defendant for payment of the said bill, who acknowledged that the debt was a just one, and said he would pay it; nothing was said as to his re-

ceiving notice. The defendant moved the court to instruct the jury that unless the acknowledgment was made, with the knowledge of all the facts in the case, as to the laches of the holder of the bill, the evidence of acknowledgment was not to be received. The court refused to give such instruction, and instructed the jury that such acknowledgment was a waiver of notice. This instruction was held proper on appeal. *Pate v. McClure*, 4 Rand. 164.

Although a promise to pay by an indorser, with full knowledge of all the facts, and of the laches of the holder, may be held in point of law to amount to waiver of the right to notice, yet this rule must be taken with this qualification; the promise to be obligatory must be deliberately made in clear, explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the indorser to pay. If, therefore, the conduct or acts of the indorser be equivocal, or the language used be of a qualified or uncertain nature, the indorser will not be held responsible. A conditional promise to pay, or an offer to pay in a certain manner, is not binding, as a waiver of the rights acquired by the laches of the holder, if the terms be not accepted. *Tarley v. Boyd*, 26 Gratt. 631; *Pate v. McClure*, 4 Rand. 164.

Where an indorser of a note executed a deed of trust to secure his indorsement, but no steps were taken to fix his liability by making protest of giving notice, it was held that where he applied for a postponement of a sale of the property conveyed in trust and promised to pay the debt, he waived the steps. *Cardwell v. Allan*, 33 Gratt. 161.

"The promise to pay, in order to constitute a waiver, should be made to the party entitled to demand payment, and, if made to an entire stranger, it is not evidence of a waiver of laches; but it might be evidence that due pre-

sentment was made and notice given. But when the promise is made to the holder, it inures to the benefit of all who acquire the bill or note through him; and so will any agreement or understanding or arrangement between an indorsee and the maker inure to the benefit of an indorser in a suit against the indorser." *Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 175.

Offer to Pay in Depreciated Currency.—But an offer by an indorser to pay the debt in depreciated currency, which offer is refused, is not sufficient to excuse notice, for as soon as the offer to pay in such currency is refused the parties stand upon their former footing, the offer not constituting a waiver. *Tardy v. Boyd*, 26 Gratt. 631.

A Question of Fact.—What representations and conduct are sufficient to constitute a waiver of presentment and notice of dishonor are questions of fact to be determined under the circumstances of each case. *Compton v. Gilman*, 19 W. Va. 312.

2. Excuses.

Where Residence of Indorser Can Not Be Found by Due Diligence.

Where the holder uses due diligence to ascertain the place of residence of the indorser at the time of the maturity of the note without being able to do so, he is altogether excused for giving such notice, and the liability of the indorser then becomes fixed and absolute, and the holder is under no obligation to give such notice even though he may afterwards discover the place of the residence of the indorser. *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

Where Indorser Receives Assets of Maker.

—The assignment of property by the maker of a note to the indorser to relieve him against his contract of indorsement is not a sufficient excuse for failure to make presentment, and give the indorser notice of dishonor, unless the property so assigned is ade-

quate to indemnify the indorser against all possible loss by his contract of indorsement. *Watkins v. Crouch*, 5 Leigh 522.

Fraudulent Indorser Is Not Entitled to Notice.—An indorser, who unites with the drawer to deceive the holder, by representing a bill as one that will probably be accepted, with a knowledge that it will not, is guilty of a fraud, which deprives him of the right to insist upon notice. Therefore, an indorser who indorsed a bill of exchange for the accommodation of the drawer, for the purpose of procuring a discount at the bank, and who had no expectation that the bill would be paid by the drawee, was held not entitled to notice. *Farmers' Bank v. Vanmeter*, 4 Rand. 553; *Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 175.

If the bill be drawn without funds in the hands of the drawee, and the drawer had no reason to expect that the bill would be accepted; this is considered as a case in which it is shown that no possible prejudice can result to the drawer from want of notice; since he knew, when he drew the bill, that it would devolve on him to take it up, as well without as with notice of its dishonor; and having no reason to expect the bill to be accepted, it can not be supposed that he would make any arrangements for putting funds in the hands of the drawee to take it up. But, if the drawer, without funds in the hands of the drawee, has any just ground to believe that the bill will be accepted, he ought to have notice; for in that case, it is to be presumed that he will so arrange his funds as to place the means of paying the bill at maturity, in the hands of the drawee. Such arrangements, if unnecessary and fruitless, would be prejudicial to the party; and to enable him to avoid this mischief, immediate notice should be given. *Farmers' Bank v. Vanmeter*, 4 Rand. 557.

"If a bill were drawn upon a ficti-

tious person, and was indorsee with a full knowledge of that fact, for the purpose of enabling the drawer to raise money by getting it discounted, it could not for a moment be doubted, that the holder could recover against the indorser, without giving him notice that he applied at the place to which the bill was directed, and found no person to present it to, answering the description of the bill. This would be a gross and palpable fraud, in both drawer and indorser." *Farmers' Bank v. Vanmeter*, 4 Rand. 561.

Where Drawer Has No Reasonable Grounds to Draw.—Where the drawer of a bill of exchange has no reasonable grounds to draw he is not entitled to notice of the dishonor of the instrument. But it is not necessary that the bill should be drawn on funds in order to entitle the drawer to notice. Thus, where the drawer had no funds with the drawee, he was held entitled to notice of dishonor where the previous course of dealing between the parties furnished reasonable ground to draw. *Hornburg v. Emmons*, 23 W. Va. 325.

Conveyance in Trust by Indorser to Secure His Contract of Indorsement.

—Where an indorser of a negotiable instrument executes a deed of trust to a trustee as collateral security for his contract of indorsement, the property conveyed by the deed of trust may be subjected and sold, and it is not incumbent upon the holder of the instrument to give the indorser notice of protest of the instrument in order to subject this property. *Cardwell v. Allan*, 33 Gratt. 160.

War a Temporary Excuse.—A state of war which intercepts intercourse by the ordinary and usual course of mail between the holder and the indorser of a note, excuses the holder from giving notice of dishonor so long as such interruption continues; but due diligence on the part of the holder requires that he should forward notice to the indorser as soon as interruption

ceases. *Farmers' Bank v. Gunnell*, 26 Gratt. 131; *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785; *Tardy v. Boyd*, 26 Gratt. 631.

Presentment and demand of payment of a check made by a resident of Vicksburg upon a bank in New Orleans while commercial intercourse between Vicksburg and New Orleans was prohibited by the proclamation of the president, was illegal. *Billgerry v. Branch*, 19 Gratt. 393.

In an action against the accommodation indorser of a negotiable note, the fact that the indorser resided at the time in Alexandria, where the notes were discounted, and before the note became due he went into the confederate lines, and was there when the note was protested, and at the time of such protest he had no known agent in Alexandria to receive notice of dishonor of the note, is not of itself sufficient to render the indorser liable. *McVeigh v. Allen*, 29 Gratt. 588.

If the holder of a check is disabled, so that he can not go in person to present the check for payment, yet if he might have sent it by mail, he will not be excused for not presenting it. *Purcell v. Allemong*, 22 Gratt. 739.

Knowledge of Drawee's Insolvency or That Bill Will Not Be Paid.—Knowledge of the insolvency of a drawee of a bill, or of the fact that the bill will be dishonored, does not excuse the holder from notifying the drawer of dishonor. Until the drawer or indorser receives such notice, he has no reason to conclude that resort will be had to him. *Brown v. Ferguson*, 4 Leigh 37.

"It is perfectly settled, that the insolvency or bankruptcy of the acceptor of a bill of exchange, or the maker of a promissory note, and knowledge, on the part of the indorser, of that insolvency or bankruptcy, and that the note can not and will not be paid by the acceptor or maker, will not exempt the holder from the obligation

of due presentment, and notice of dishonor." *Watkins v. Crouch*, 5 Leigh 531.

Law Dispensing with Notice.—The ordinance of Virginia convention passed June 24, 1861, which provided that in cases specified the parties to negotiable instruments in such cities and towns (as before specified), shall remain bound after the maturity of such instruments, without demand, protest or notice as if the requirements of the law in that respect had been complied with, was as to instruments made and discounted before its passage, in violation of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of the contract." *Farmers' Bank v. Gunnell*, 26 Gratt. 131.

The rights and obligations of the parties to negotiable paper are governed by the law as it was when the contract was made, and not by the law as it was when the contract becomes payable. The ordinance of the Virginia convention on June 24, 1861, dispensed with demand, protest and notice upon all checks, bills and notes payable at a bank located in any city or town if at the time of maturity of such instruments, the town or city was occupied or invested by the public enemies. By an act of the legislature passed on May 10, 1862, this ordinance was amended so as to require notice of the dishonor of the bill or note to be given within ten days after the removal of the obstruction created by the presence of the enemies. A note was made and indorsed on December 11, 1861, payable at a bank in Fredericksburg in six months. When it fell due the town of Fredericksburg was in possession of the United States forces, but they left in a few months; but no notice of nonpayment was given at any time to the indorsers. The rights and obligations of the parties, were held to be governed by the ordinance which

was in operation when the note was made and indorsed; and notice of non-payment was not necessary to bind the indorsers. *Duerson v. Alsop*, 27 Gratt. 229.

Verdict of Jury Should Find Excuses.—Upon the question whether or not the drawer has received or is entitled to notice of the dishonor of the instrument, a special verdict of the jury in such case ought to find the causes which would excuse the delay in giving notice, if any such existed. *Brown v. Ferguson*, 4 Leigh 37.

IX. Liability of Parties.

A. MAKER OF NOTE.

1. In General.

Maker's Contract Is Absolute.—The contract of a maker of a negotiable note is an absolute one. His contract is to pay at all events and he is liable for the amount of the note without presentment, demand, protest, or notice thereof. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Hansbrough v. Gray*, 3 Gratt. 356; *Hays v. Northwestern Bank*, 9 Gratt. 127; *Watkins v. Crouch*, 5 Leigh 522. See ante, "Presentment, Protest and Notice of Dishonor," VIII.

Accommodation Maker.—The maker of a note for the accommodation of the payee is not released by the failure to protest the note and give him notice; though it is known to the holder that he is an accommodation maker of the note. *Hansbrough v. Gray*, 3 Gratt. 356.

In such a case, the maker of the note is not discharged by the omission of the holder to enforce the collection thereof, until the payee, for whose accommodation the note was made, becomes insolvent; though the holder had looked to the payee for payment. *Hansbrough v. Gray*, 3 Gratt. 356.

Recovery Back of Money Paid on Forged Note.—It is an established rule of commercial law, that the maker of a promissory note is presumed to

know his own handwriting, and if he pays a note, in the hands of a bona fide holder, although his name has been forged, he is bound by the act, and can not recover back the money so paid. *Johnston v. Commercial Bank*, 27 W. Va. 343, 55 Am. Rep. 315.

Note Made by Indorser to Take Up Indorsement.—A made a note to a bank for \$543 with B and others as indorsers. Subsequently A placed claims for collection in B's hands, upon which B collected more than enough to pay off the note. B then made a note to the bank for \$571 out of which the note for \$543 was paid, and brought a suit against A in which a judgment was rendered and which was satisfied out of a sale of A's real estate on a creditor's bill filed against his heirs of which sale C became the purchaser of the real estate. Prior to the sale C purchased the note for \$571 from the bank and brought suit thereon, and obtained a judgment, the enforcement of which was enjoined by B. It was held, that B's injunction should be dissolved and his bill dismissed; that since he had collected and received a sufficient amount of A's money to satisfy the note prior to the execution of the note for \$571, he is liable for the payment of the judgment on the note for \$571. *Thompson v. Bank*, 3 W. Va. 651.

2. Joint and Joint and Several Notes.

Note in Singular Number Signed by Two.—A promissory note in the singular number, but signed by two persons, is joint and several. *Holman v. Gilliam*, 6 Rand. 39; *Keller v. McHuffman*, 15 W. Va. 80.

And a note in such terms is still joint and several though seals are added to it. The effect of the seals is not to change the meaning of the parties, but merely to add to the solemnity and dignity of the instrument. *Holman v. Gilliam*, 6 Rand. 40.

When one signs a note or bond saying, "I promise to pay," it binds any

member who signs. *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 697.

Liability of One Joint Maker Signing as "Surety."—Where one of two or more makers of a joint and several promissory note is surety, he is liable to the payee as principal; and except in special cases provided by statute, the holder of such note has the same legal rights against such surety as he has against the principal debtor. *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Pugh v. Cameron*, 11 W. Va. 523; *Croughton v. Duval*, 3 Call 69; *Sale v. Dishman*, 3 Leigh 554.

"Where one of two or more joint and several makers of a promissory note adds to his signature the word surety, being such in fact, he becomes liable thereon, to the payee or holder, as a maker of the note. The signers are liable to the holder as principals." *Merchants' Nat. Bank v. Good*, 21 W. Va. 467.

An action of debt is brought, upon an instrument of writing in these words, viz: "On demand, I promise to pay to David Keller the just and full sum of \$200.00, for value received, as witness my hand and seal the 1st day of March, 1862. Thomas McHuffman, (Seal) Security:—David M. Riffe," by the administrator of the payee against the said McHuffman and David M. Riffe jointly on the 9th day of April, 1872, in the circuit court of Monroe county. It was held, that said instrument of writing is a joint and several promise to pay as to both defendants, and that, prima facie at least, said instrument of writing is on its face as to defendant McHuffman his single bill obligatory, and as to the defendant Riffe his promissory note, and that the deceased payee during his life, and his personal representative, after his death, had the right to an action of debt against said McHuffman and Riffe jointly thereon, and was not bound to sue them separately in separate actions upon said instrument of

writing. *Keller v. McHuffman*, 15 W. Va. 64.

Where a negotiable note ran thus: "Sixty days after date, we W. & Co., principal, and S. & L., securities, promise to pay," etc., and the note was signed by L. after the other parties had signed it, without the knowledge of S., and W. & Co. agreed with L., also without the knowledge of S., "that there should be no trouble about the note, that W. & Co. and S. would take care of it," it was held, that this was a joint promise, and that L. was bound as cosurety with S., and bound to contribute. *Stovall v. Border Grange Bank*, 78 Va. 188.

Survivor of Joint Makers Alone Liable under Statute.—The surviving obligor in a joint note, made before the act of 1786 (Rev. Va. Code, p. 31), is alone liable to an action at law; nor can the note be set up in equity against the representatives of the deceased obligor, but on the ground of a moral obligation antecedently existing on his part to pay the money. *Chandler v. Hill*, 2 Hen. & M. 124.

B. DRAWER OF BILL OF EXCHANGE.

The drawer of a bill of exchange, or order, is not directly and absolutely liable to the payee, but his implied obligation is to pay in the event the amount is not paid by the drawee, upon due presentment, protest and notice of dishonor. *Thornburg v. Emmons*, 23 W. Va. 325; *Ford v. McClung*, 5 W. Va. 165. See ante, "Presentment, Protest and Notice of Dishonor," VIII.

The payee of a draft or order, purporting to be for money lodged by the drawer in the drawee's hands, belonging to such payee, may recover of the drawer, upon the drawee's refusing payment (timely notice of such refusal being given); though such draft or order be not negotiable as a bill of exchange; being drawn on a particular fund, not in favor of the payee "or

order," nor in terms, "for value received." *Jolliffe v. Higgins*, 6 Munf. 4.

An order drawn upon sufficient consideration can not be revoked whether accepted or not; and, in the absence of an acceptance, is such an evidence of debt that an action will lie thereupon against the drawer; and, after acceptance by the drawee, an action will lie against him. *Carr v. Summerfield*, 47 W. Va. 155, 34 S. E. 812.

C. DRAWER OF CHECK.

The drawer of a check is liable to the payee or holder who has made due presentment thereof and who gives the requisite notice of dishonor just as is the drawer of a bill of exchange. His liability, however, differs from that of the drawer of a bill of exchange in that he is liable even in the absence of a proper demand or due notice of dishonor, unless he has been prejudiced by the want of such steps; and even if he is prejudiced by the delay or failure on the part of the holder he is not discharged from liability absolutely, but only pro tanto; to the extent of the prejudice. *Bell v. Alexander*, 21 Gratt. 1; *Purcell v. Allemong*, 22 Gratt. 739; *Cox v. Boone*, 8 W. Va. 510; *Compton v. Gilman*, 19 W. Va. 312. See ante, "Presentment of Checks," VIII, B, 2; "To Fix Liability of Drawer of Check," VIII, D, 1, c.

The holder of a check has no recourse upon the drawer until the check has been presented to the bank and payment refused. A check unless dishonored is payment. *Purcell v. Allemong*, 22 Gratt. 742.

"The drawer undertakes that the bank will pay to the payee or holder the sum named in the check; and the payee having received the check the drawer is not liable to pay it, if he drew it in good faith, until the holder has demanded and failed to obtain payment from the bank upon which it was drawn. If the bank refuses to pay, the holder, as a general rule, has no right of action against it, but must look to

the drawer for payment. But the drawer may have his action against the bank, for refusing to honor his check; but not until the same has been presented and payment refused." *Purcell v. Allemong*, 22 Gratt. 742.

B. purchased cattle of M. in 1861. M. informed B. that he wanted the money to pay a debt he owed A., due in 1858 by bond; whereupon B. agreed with M. that he would pay the debt to A., and accordingly drew a check in favor of A. upon the exchange bank at Salem. The check bore date April 17, 1862, and was for \$1,435, the amount of the debt due from M. to A., and A. accepted the check in payment of M.'s debt, and M.'s bond was surrendered to him. A. held the check until April, 1863, when he presented it at bank for payment, which was refused; the cashier stating that all the funds of B. had been drawn out a few days before. There was nothing said at the time the check was given as to the kind of currency in which it was to be paid, and at that time Virginia bank notes, Virginia treasury notes and confederate treasury notes were circulated as of equal value. In April, 1863, when payment was demanded, only confederate notes were paid out by the bank. On August 25, 1862, B. drew all his funds out of the bank, and made no further deposit until April 6, 1863, when he deposited \$1,914; but he drew this out on the 27th of same month. It was held, that B. is not relieved from the payment of the check by the delay of A. to present it; and in any case he would only be relieved to the extent that he was injured by the delay. *Bell v. Alexander*, 21 Gratt. 1.

Effect of Failure of Bank on Which Check Is Drawn.—If the holder of a check has failed to take the proper steps to fix the liability of the drawer by presenting the check for payment, the drawer will be discharged to the extent of his prejudice, where the bank upon which the check is drawn fails

before the check is presented. *Bell v. Alexander*, 21 Gratt. 1; *Purcell v. Allemon*, 22 Gratt. 739; *Compton v. Gilman*, 19 W. Va. 312; *Cox v. Boone*, 8 W. Va. 510.

D. DRAWEE OF BILL OF EXCHANGE.

Duty to Know Drawer's Signature.

—It is an established rule of commercial law, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and if he accepts or pays the bill although the drawer's name has been forged, he is bound by the act and can not recover the money so paid. *Johnston v. Commercial Bank*, 27 W. Va. 343, 55 Am. Rep. 315.

Payment without Seeing or Examining Bill.—"If the drawee is allowed to recover on payment of a forged draft, because he has not seen it, he would probably never care to see a draft before payment, but even when presented at his counter and he present, would direct his clerk to pay it, and afterwards take advantage of his own laches to enforce a recovery. To admit this would be to overthrow the long-settled principles of law and require the holder instead of the drawee to guarantee the signature of the drawer, which manifestly would be most unjust and inequitable and destructive of commercial business." *Johnston v. Bank*, 27 W. Va. 343, 55 Am. Rep. 315.

E. DRAWEE OF CHECK.

As to liability of a bank, upon which a check is drawn, to the depositor, see the title **BANKS AND BANKING**, ante, p. 254. As to whether a check operates as an assignment of the fund upon which it is drawn, so as to render the bank liable to the holder, see the title "Assignments," vol. 1, p. 745.

F. INDORSER.

1. General Nature of Indorser's Contract.

Indorser's Contract Is Conditional.

—The contract of an indorser of a

negotiable note is conditional. His undertaking is that if, upon due diligence having been used against the maker, the money is not paid, he will become liable for it. The due diligence is a condition precedent to a right of recovery against him. Being only collaterally and conditionally responsible, the indorser must be dealt with with the utmost strictness. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515; *Shields v. Reynolds*, 9 W. Va. 487.

With respect to an indorser a negotiable note is not a writing for the payment of money, although so as to the drawer, because the undertaking of the indorser is not for the payment of money absolutely but is a collateral contract to pay it under certain circumstances and therefore it was not within the meaning of the act of 1804. *Hatcher v. Lewis*, 4 Rand. 152; *Metcalf v. Battaille*, Gilm. 191; *Commercial, etc., Co. v. Everhart*, 88 Va. 956, 14 S. E. 836.

An indorser of negotiable paper is not a surety in the strict and legal meaning of that term. The contract of a surety is absolute and unconditional; he usually signs the instrument which binds him absolutely with the principal to pay so much money or other thing, or to do some other act. The indorser's undertaking is conditional and his liability is also conditional and contingent. His liability is not fixed and absolute until due presentment, demand and notice of dishonor. *Shields v. Reynolds*, 9 W. Va. 487.

The word "indorser," applied to negotiable paper, has a legal meaning. The allegation in this bill that they indorsed the note does not import that they became sureties, as between themselves, nor liable as sureties, but that their only liability was as indorsers. *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 516.

Indorser Considered as Drawing a New Bill.—The indorser of the note is

not only considered as warranting the note, but as drawing a new bill; and thereby rendering himself immediately liable to every indorsee to whom it may, for a valuable consideration, be assigned. Every subsequent indorser is considered in the same light; and the bona fide owner of the note, if he does not receive payment of the maker, may, at his election, bring suit against him, or against any indorser, however remote. If he recovers against a remote indorser, such indorser has the same remedy against the maker of the note, or any prior indorser, as the owner of the note had against him. The currency and credit of such notes is aided by such a construction; for then, the more indorsers, the more security. *Dunlop v. Harris*, 5 Call 16.

The indorser stands in the attitude of the drawer on a new bill and is not primarily liable to make the payment but only in case of the default of the maker and proof of due presentment, protest and notice of dishonor. *Shields v. Reynolds*, 9 W. Va. 487; *McVeigh v. Bank*, 26 Gratt. 785.

2. Implied Warranties Made by Indorser.

In General.—An indorser contracts with every subsequent holder to whom the note is transferred that the instrument and antecedent signatures are genuine, that he has a good title to the instrument, that he is competent to bind himself by indorsement, that the maker is competent to bind himself to the payment and that he will, upon due presentment of the note, pay it at maturity, and that if when duly presented it is not paid by the maker he will upon due and reasonable notice of the dishonor pay it to the indorsee or holder. *Shields v. Reynolds*, 9 W. Va. 487.

The indorser warrants that the instrument is not void. *Nichols v. Porter*, 2 W. Va. 13.

Warranty That Consideration Is Not Illegal.—The indorser impliedly under-

takes by the contract of indorsement, if the indorsee be a bona fide indorsee without notice, that the note is a valid and subsisting obligation, free from usury or any other stain that would avoid it. *Moffett v. Bickle*, 21 Gratt. 283.

In an action of debt by the holder of a negotiable note, against the maker and four indorsers, upon the plea of usury by the indorsers, the jury found that the note was indorsed by the first three indorsers, for the accommodation of the maker, and was sold by him to the fourth indorser, at a usurious rate of interest; who afterwards and before it became due, indorsed it to the holder for value. Upon this verdict the court should render a judgment in favor of the maker and the first three indorsers, and against the fourth indorser, under ch. 177, § 19 of the Va. Case of 1860. *Moffett v. Bickle*, 21 Gratt. 280.

Warranty That Instrument Is Not a Forgery.—It is well settled that an indorser of negotiable paper, makes a new contract, and would be held thereto, although the note itself, as to the maker, was a forgery. *Pugh v. Cameron*, 11 W. Va. 534; *Nichols v. Porter*, 2 W. Va. 13.

Warranty That Instrument Has Not Been Paid.—One who transfers an instrument by assignment without recourse warrants the instrument has not been paid. *Mays v. Callison*, 6 Leigh 230.

Warranty of Payment at Maturity.—An indorser impliedly warrants that the instrument will be paid at its maturity. *Moffett v. Bickle*, 21 Gratt. 281; *Shields v. Reynolds*, 9 W. Va. 487.

Where a party assigns a nonnegotiable instrument calling for the payment of money by writing his name across the back and delivering it, he warrants by implication, unless otherwise agreed, its validity, and his right to assign, that it is a subsisting unpaid debt, and the solvency of the debtor. *Merchants'*

Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681; Merchants' Nat. Bank *v.* Williams, 41 W. Va. 37, 23 S. E. 685.

If such instrument is illegal, and therefore invalid, there is an immediate breach of such implied warranty, and the right accrues at once to the assignee to recover back the consideration paid in an action for money had and received to his use. Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681; Merchants' Nat. Bank *v.* Williams, 41 W. Va. 37, 23 S. E. 685. See the title ASSIGNMENTS, vol. 1, p. 745.

8. Order of Liability.

When several persons indorse a bill or note in succession, the legal effect is to subject them as to each other in the order in which they indorse. The indorsement imports a several and successive, and not a joint obligation unless there be an agreement different from that evidenced by the indorsement. Shields *v.* Reynolds, 9 W. Va. 483; Shenandoah Valley Nat. Bank *v.* Bates, 20 W. Va. 211; Hoge *v.* Vintroux, 21 W. Va. 1; Quarrier *v.* Quarrier, 36 W. Va. 310, 15 S. E. 154; Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 515; Young *v.* Sehon, 53 W. Va. 134, 44 S. E. 136; Chalmers *v.* McMurdo, 5 Munf. 252; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; Bank *v.* Beirne, 1 Gratt. 265; Hogue *v.* Davis, 8 Gratt. 4.

As an indorser is liable only to a subsequent, and not to a prior, indorser if equity had jurisdiction, the bill must show that the parties indorsed in a certain order, else it shows no ground of recovery, no legal demand by plaintiff against defendant. Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 516.

Upon a bill by a judgment creditor to subject the lands of his debtors to satisfy a judgment obtained against them as the maker and indorsers of a note, whose liabilities inter sese are successive, it is error to decree a sale

of the lands of the last indorser before resorting to the lands of the maker and prior indorsers of such note, unless to require the plaintiff to exhaust the estates of those debtors, whose liability is prior to the last indorser, will in the opinion of the court unduly delay the plaintiff in the collection of his debt. Shenandoah Valley Nat. Bank *v.* Bates, 20 W. Va. 211.

Liability as between Immediate Parties Prima Facie Merely.—But as between the immediate parties, or as to any party having notice, the liability of one whose name is indorsed on negotiable paper is prima facie merely, and he may show any facts and circumstances, as against his immediate indorsee, which would constitute a good defense to any other written contract. Hence, he may prove that the party whose name is indorsed below him, really indorsed before him, in point of time. Quarrier *v.* Quarrier, 36 W. Va. 310, 15 S. E. 154; Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915.

Change of Position of Indorsers upon Renewal.—The third indorser indorsed a note on the faith of the solvency of a prior indorser, and on the renewal of the note, the order of the indorsements were changed, without the consent of this third indorser, who for the convenience of renewing the note, had left his blank indorsement with the makers; it was held, that a court of equity would grant him relief as against the indorser who should have preceded him. Slagle *v.* Rust, 4 Gratt. 274.

But a note made by a corporation to A bore upon its back indorsed first the name of A, next the name of B, and was in the hands of an assignee. It was held, that the paper and indorsements imported that A was bound as first and B as second assignor, and money realized by an assignee and applied on the note from a collateral security assigned by A would constitute no demand against B, A being

first liable before B. *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154.

Accommodation Indorsers.—Accommodation indorsers are no exception to the rule that indorsers are liable in the order in which they indorse. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases therefore in which no such agreement is proved the indorsers are not bound to contribution between themselves, but each and all are liable to those who succeed them. *Hogue v. Davis*, 8 Gratt. 4; *Bank v. Beirne*, 1 Gratt. 265; *Bank v. Vanmeter*, 4 Rand. 553; *Chalmers v. McMurdo*, 5 Munf. 252; *Shields v. Reynolds*, 9 W. Va. 483; *Hoge v. Vintroux*, 21 W. Va. 1; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515; *Young v. Sehon*, 53 W. Va. 134, 44 S. E. 136; *Robertson v. Williams*, 5 Munf. 381; *Rhea v. Preston*, 75 Va. 757.

But in *Stovall v. Border Grange Bank*, 78 Va. 188, it was said that when successive indorsers all indorse for accommodation of the maker, though at different times and without mutual agreement, they are cosureties and in equity liable to contribution but this was obiter merely, as it clearly appears from that case that the instrument under consideration was a joint obligation and that the question of the liability of accommodation indorsers did not arise. *Young v. Sehon*, 53 W. Va. 135, 44 S. E. 136.

"It can not be said that § 11, ch. 99, W. Va. Code, changes this; that was not meant to enlarge the liability of parties to negotiable papers. It was not designed to make liable parties not liable under the law merchant. It only declares that parties that are liable may be sued jointly, as indorsers and makers, whereas before they would have to be sued separately. It relates only to the remedy when liability exists.

When, under the law, other parties are liable, it allows them to be sued jointly, and judgment taken against all or any." *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515.

The first indorser of a note in point of time, is not, of course, first responsible. If the payee of a note writes his name over that of a person who indorsed the same in blank before delivery, but did so only on the ground of the payee's responsibility as first indorser, the payee will be liable as such in point of contract, though second in point of time. *Chalmers v. McMurdo*, 5 Munf. 252, 7 Am. Dec. 684.

4. Liability of Agent on Indorsement Made for Principal.

An agent indorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person, to whom the note is indorsed, with notice of such equity; but the decree should be against the principal. And, it seems, if the indorsee had no such notice, yet, if the principal be solvent, the decree ought still to be against him in the first place. *Chalmers v. McMurdo*, 5 Munf. 252.

G. IRREGULAR INDORSER.

In Absence of Agreement as to Liability.—When a negotiable promissory note made payable to a particular person or order, is first indorsed by a third person, and then delivered to the payee, such indorser is prima facie an original promisor or guarantor, as the payee may elect, or the payee may by indorsing his name above that of such third person, and transferring the note, make him a second indorser in the commercial sense. *Burton v. Hansford*, 10 W. Va. 470; *Kearnes v. Montgomery*, 4 W. Va. 29; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512; *Roanoke Grocery, etc., Co.*

v. Watkins, 41 W. Va. 787, 24 S. E. 612; *Orrick v. Colston*, 7 Gratt. 189; *Frank v. Lilienfeld*, 33 Gratt. 390. See ante, "Notice of Dishonor," VIII, D.

"If a third person indorses at the time it is made, a negotiable note not drawn payable to him, he thereby indicates that he intends to bind himself for the payment of the note in some form, and if he has failed to indicate in what form it is fair to presume that he intended to be bound in any manner that the payee might elect." *Burton v. Hansford*, 10 W. Va. 471.

One makes a negotiable note to a payee and others put their names on its back, the payee not indorsing it, and it is then delivered to payee. He may treat them all as joint makers, or he may treat the two putting their names on its back as indorsers or guarantors, as he chooses, unless he agrees, before or on delivery of the note, to treat them in a particular one of those characters. Unless he agrees to treat them as indorsers, no protest or notice of nonpayment is necessary to hold them as joint makers or guarantors. *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512.

Parties make a nonnegotiable note, and other parties put their names on its back. It is blank as to the payee's name, and is to be filled with the name of the person who should furnish the money upon it. The parties intend it to be used to raise money upon it. It is delivered to one of the makers to be so used. The name of the party agreeing to furnish money upon it is inserted in it as payee, and it is delivered to him, he furnishing the money upon it. He has right to treat all as original promisors or makers, or some as makers and others as guarantors, as he chooses, and sue them as such. *Long v. Campbell*, 27 W. Va. 665, 17 S. E. 197.

A paper signed in blank and indorsed in blank, may be filled up either as a common promissory note or a

negotiable note; and the person who indorsed it in blank will be liable on his indorsement to a holder for value. In such a case, if the paper is filled up as a common promissory note to a third person, who advances the money for it to the makers, he may treat the indorser as an original security, or as a guarantor of the note. *Orrick v. Colston*, 7 Gratt. 189.

In *Powell v. Com.*, 11 Gratt. 828, it was held, that if the indorsement was at the time of the making of the note, he may be treated by the payee as an original promisor or joint maker of the note. If the indorsement were after the date of the note, however long, the payee may treat him as a guarantor, and may write over the signature a guaranty consistent with the nature of the case.

Agreement as to Liability.—But the true nature of the transaction, and the understanding of the parties to it at the time, may be shown by parol proof, and such proof may destroy this right of election by the payee, and the third person backing such note may be held liable only as an original promisor, or as a guarantor, or as an indorser, according to the nature of the transaction, and the original understanding of the parties to it. If it is shown by evidence that such third person signed his name on the back of such a note at the time it was made as security for the maker and for his accommodation, to give him credit with the payee, such proof does not alter the right of the payee to hold him bound as original promisor, or as guarantor, or as indorser, as he may elect, but strengthens his prima facie right to elect; such option may be exercised at any time by the payee, and so long as he holds the note, may be changed at his pleasure, even after the institution of a suit by him against such third person. If it be shown that the understanding between such third person and the payee at the time of the transaction, was that

such third person should be bound only collaterally, such understanding will destroy the right which the payee would have otherwise had, of electing to hold him bound as original promisor. *Burton v. Hansford*, 10 W. Va. 470; *Kearnes v. Montgomery*, 4 W. Va. 29; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Roanoke, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612; *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512; *Orrick v. Colston*, 7 Gratt. 189; *Watson v. Hurt*, 6 Gratt. 633.

Whether an irregular indorser is a guarantor or maker, depends on the understanding of the parties. If the payee or assignee of paper, not negotiable, indorse his name in blank on the back of it he is prima facie assignor, but if a stranger indorse his name in blank on the back of paper not negotiable, he is prima facie guarantor, but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred. *Kearnes v. Montgomery*, 4 W. Va. 40.

If it be shown that the understanding between such third person and the payee at the time of the transaction was that such third person should be bound only collaterally, in such case the payee will not have the right to hold him bound as an original promisor. *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

So where it appears that it was the intention of a party to be bound as an ordinary indorser when he placed his name upon the instrument, his liability is not affected because of the peculiar position of his name upon the paper, but he will be held to the liability which he intended to assume. *Frank v. Lilienfeld*, 33 Gratt. 377.

No understanding between parties making and so indorsing the note, that these so indorsing it shall be liable only as guarantors, will avail against

the payee, unless before delivery of the note he knows of such understanding. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

Extrinsic Evidence Inadmissible to Change the Contract.—A blank indorsement by a person who is not the payee of a note, and who is not a regular indorsee, imports a guarantee, and this guarantee can not be altered by proof of a parol agreement, at the time of the execution of the note, that the note was not to be paid until the happening of a contingent future event. *Watson v. Hurt*, 6 Gratt. 633.

Right of Holder to Change Election after It Is Made.—If, after the note is filled up and delivered to the payee, the holder fills up the blank indorsement with a guaranty, he may afterwards erase it and proceed against the indorser as an original security. *Orrick v. Colston*, 7 Gratt. 189.

In this case the indorsement was filled up after suit brought thereon; and the declaration charged the indorser both as original surety and as guarantor. On the trial the parties agreed a case, on which the court below gave a judgment for the defendant. On appeal, this court, without deciding whether the filling up of the indorsement constituted a guaranty or an original security, reversed the judgment, and entered a judgment against the defendant as an original surety, without sending the case back to have the filling up of the indorsement erased, and to have it filled up as an original promise. *Orrick v. Colston*, 7 Gratt. 189.

Instruction to Jury.—Defendant Jones was sued only as a joint promisor, and pleaded the general issue *nil debet*. The court was asked on his behalf to give the following instruction: "Defendant's Instruction No. 6. The court instructs the jury that if they believe from the evidence, in this case that H. C. Jones indorsed his name on the back of the note sued on in this case

as indorser, and not as joint maker thereof, and that at the time the said note was delivered to the plaintiff it knew the said Jones indorsed the said note as an indorser thereon, and not as a joint promisor, and that the said plaintiff had said note regularly protested, and had notice sent to the said Jones, as indorser, of such protest, then the jury may consider said facts along with the other evidence in the case, and if therefrom they believe from the evidence that the said Jones was an indorser on the note sued on, and not a joint maker or promisor, they should find for the defendant;" which, being objected to by plaintiff, was refused by the court. It was held, that this was error to defendant's prejudice, as the evidence tended to prove the facts upon which it was based. *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

Irregular Indorsers of Nonnegotiable Paper.—The same rules apply to irregular indorsers of nonnegotiable paper, as to irregular indorsers of negotiable paper. *Watson v. Hurt*, 6 Gratt. 633; *Orrick v. Colston*, 7 Gratt. 189; *Powell v. Com.*, 11 Gratt. 828; *Kearnes v. Montgomery*, 4 W. Va. 29.

H. TRANSFERRER BY DELIVERY.

One who, for value transfers a negotiable note without an indorsement, thereby guarantees the genuineness of the instrument, but not the solvency of the parties thereto. In such case, it is immaterial whether the person making the transfer received the consideration for his own use, or for the use of another, unless he is acting as agent, and discloses not only his agency, but the name of the principal for whom he is acting. *Lyons v. Miller*, 6 Gratt. 427, 52 Am. Dec. 129.

"By declining to indorse, the defendant avoided the responsibility of an indorser; but he could not, without an agreement or understanding to that effect, avoid the responsibility of war-

ranting the genuineness of the instrument. That is a guarantee which the law imposes upon the transfer, for a valuable consideration, of bills, bank or promissory notes, and other assurances for money, though without indorsement. The person so transferring impliedly undertakes that the instrument is genuine; in other words, that it is what it purports to be; and if it turns out to be a forgery, there is a failure of the consideration, which subjects him to the repayment of the money he has received. Nor is it material whether the person making the transfer, receives the consideration for his own use, or for the use of another; unless he is acting as an agent, and discloses not only his agency, but the name of the principal for whom he is acting; in which case he is not a party to the contract, the contract being made with his principal through his agency." *Lyons v. Miller*, 6 Gratt. 440.

I. GUARANTORS AND SURETIES.

See the titles GUARANTY; SURETYSHIP.

J. ASSIGNORS.

See the title ASSIGNMENTS, vol. 1, p. 745.

K. ACCOMMODATION PARTIES.

As to liability of accommodation maker, see ante, "Maker of Note," IX, A. As to order of liability of accommodation indorsers, see ante, "Order of Liability," IX, F, 3. As to necessity of presentment and notice to fix liability of accommodation indorser, see ante, "Presentment, Protest and Notice of Dishonor," VIII.

What Constitutes Accommodation Paper.—In a contract for building a house it was agreed between the contractor and the employer, that the house should be paid for in notes of the employer, to be delivered to the contractor as the work progressed, and at times when a third party should say that the contractor had completed

enough work to entitle him to the notes. The first note was properly issued. Before the contractor was entitled to the second note, it was delivered to him by the employer at the request of the contractor. This note though given to the contractor to accommodate him is not an accommodation note in the legal sense, but is a note founded upon a valuable consideration and is enforceable. *Ould v. Myers*, 23 Gratt. 383.

Necessity for Negotiation.—Although a negotiable note on its face imports a debt due from the maker to the payee, and the indorsement imports a debt from the first indorser to the second, yet an accommodation note is not available as a security for money, until it is issued or negotiated to some real holder for valuable consideration. Until such note is so negotiated, it is a mere blank piece of paper, in no manner binding on the makers or indorsers. *Whitworth v. Adams*, 5 Rand. 342; *May v. Boisseau*, 8 Leigh 193.

A bill of exchange, or accommodation note, drawn and indorsed for the purpose of being sent into the market and sold, is not a complete and subsisting contract or security until negotiated for valuable consideration. It then for the first time assumes the character of an agreement, and until then it has been looked upon, in some regards, as nothing more than a blank piece of paper. *Nelson v. Fotterall*, 7 Leigh 216.

As the acceptance of a bill for the accommodation of the drawer, creates no liability on the acceptor until the bill has passed into the hands of an indorsee for value, so the signing of a note as surety, while the same remains in the hands of the principal, creates no liability on the surety until the note is delivered. It is the negotiation of the bill in the one case, and the delivery of the note in the other which is the consummation of the contract.

Hefflebower v. Detrick, 27 W. Va. 27; *Abell v. Penn Ins. Co.*, 18 W. Va. 400.

Retraction of Indorsement Before Negotiation.—An indorser on an accommodation note has a right to retract his indorsement at any time before the negotiation of the note to a bona fide holder for value. And his right to retract such indorsement is not affected by a conveyance of property to him by the maker of the note to indemnify him against his indorsement. *May v. Boisseau*, 8 Leigh 192; *Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842.

And although the paper has been pledged for a certain sum, an accommodation indorser, while of course remaining liable for the amount advanced, may revoke his indorsement and prevent the further discount of the instrument. *Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842.

Right to Recover from Principal and Prior Parties.—A party who places his name upon a bill of exchange as an irregular indorser may recover the amount of the bill from the drawer, upon proving that he only indorsed the note as security. *Call v. Scott*, 4 Call 402.

An accommodation indorser of a negotiable note who pays the note after protest, has only the right of a surety, to be fully indemnified for his payment on account of his principal. This indemnity is fully secured by the payment to him by the principal of the value paid by the surety. *Burton v. Slaughter*, 26 Gratt. 914.

A promissory note negotiable at a bank was made and indorsed for the sole purpose of obtaining accommodation for the maker. This note was left with a second indorser to be lodged in bank for discount. This second indorser fraudulently put the note into circulation to raise money thereon for his own use. It was held, that the third indorser, knowing nothing of such fraud, might cause the note to be

protested as to the maker and prior indorser, pay it himself, and thereupon maintain his action against the maker and first indorser; notwithstanding the fact that no valuable consideration passed or was contracted for, between him and the second indorser, but he made the indorsement merely for the motive of enabling such second indorser to get the note discounted at the bank. *Robertson v. Williams*, 5 Munf. 381.

Indorser for Accommodation Is a Surety.—An indorser of a negotiable note who indorses for the accommodation of the maker, is a surety of the maker, and if time of payment is extended by the holder to the maker by a binding agreement without the consent of such indorser, the indorser is thereby released. *State Sav. Bank v. Baker*, 93 Va. 510, 25 S. E. 550; *Dey v. Martin*, 78 Va. 1.

L. AGREEMENTS CHANGING ORDINARY LIABILITY.

1. In General.

It is not a fraud in the holder of a bill of exchange, to make an arrangement with one of the indorsers, by which it is agreed that the whole burden shall be thrown upon the other indorsers, and that the indorser first mentioned is to be liable only in case they should be unable to pay. *Farmers' Bank v. Vanmeter*, 4 Rand. 553.

An agreement is entered into in 1855 between T. a commission merchant in r. and Y., an inspector of tobacco at a warehouse in that city, by which T. was to send all his tobacco to that warehouse, and r. was to indorse his notes to an amount not exceeding ten thousand dollars. At the same time three of the owners of the warehouse agree with Y. that they will each bear a certain proportion of any loss he may sustain by his indorsements for T. This agreement with T. is acted on until October, 1847, when Y. is removed from his place as inspector; and soon thereafter, T., with the consent

of Y., ceases to send his tobacco to that warehouse. At this time Y. is first indorser on a note of T., and two of the owners of the warehouse are also indorsers upon the note. It is afterwards renewed with Y. still the first indorser; and with two other indorsers, they being inspectors at another warehouse, where T. was about to send his tobacco. In May, 1848, T. fails, and Y. is compelled to pay the note. Y. is entitled to recover from each of the owners to the warehouse the proportion of the note which he had agreed to pay. *Young v. Thweatt*, 12 Gratt. 1.

Where an accommodation indorser or security of a note, on which judgment has been obtained, purchases real estate from the principal debtor who retained the lien for the purchase price, and it is a matter of contract between them, at the time of the sale, that the indorser or surety shall assume the payment of the judgment, the relation of the parties inter se is changed. The indorser or surety becomes the real debtor, and the principal debtor the surety; and the latter has the right to require that the lien of the judgment shall be enforced against the real debtor for his exoneration. *Rhea v. Preston*, 75 Va. 757.

2. Parol Evidence to Show Agreement.

a. Maker of Note.

It has been held in West Virginia that a note after payment thereof, does not preclude the makers and indorsers from proving by parol evidence a contemporaneous oral agreement as an inducement thereto; fixing their ultimate liabilities among themselves in accord with the true consideration and purpose of entering into such obligation. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915. See the title PAROL EVIDENCE.

But the fact that the joint maker of a note pays the same at maturity, and does not for a long time require an

indorser to come in and contribute his moiety thereof under a verbal arrangement between the parties, but awaits until the death of such indorser, and presents the same against his estate, is strong circumstantial evidence in rebuttal of such agreement; but it is not conclusive, and may be explained and overcome by sufficient competent parol evidence. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 916.

Evidence to Show Note to Be Payable upon Contingency.—J. executes to W. a note, payable on demand, which is indorsed in blank by B., who thereby intends to guaranty the payment of the note. This blank indorsement imports a guarantee according to the terms of the note; and the guarantee can not be altered by proof of a parol agreement at the time of the execution of the note, between J., B. and W., that the note was not to be paid until the happening of a contingent future event. * *Watson v. Hurt*, 6 Gratt. 633.

To Show Delivery on Unfulfilled Condition.—See ante, "Delivery," II, E.
b. Drawer of Bill of Exchange.

Parol evidence is inadmissible to prove that at the time a bill was drawn it was expressly agreed between one of the members of the payee firm, who acted for the firm, and the agent of the drawer of the bill, that if it was accepted by the drawee, who was also a member of the payee firm, it was to be taken in full of the debt of the drawer and he was not to be liable further for it or his debt, and without this agreement the agent of the drawer would not have drawn the bill. *Martin v. Lewis*, 30 Gratt. 672.

It not being claimed that there was any fraud or misrepresentation in the transaction, it is not a case in which a court of equity will correct the paper so as to conform it to the alleged agreement between the parties. *Martin v. Lewis*, 30 Gratt. 672.

c. Indorser.

Negotiable Paper.—In an action by

an indorsee against his immediate indorser, upon a protested bill of exchange, parol evidence of an agreement made between them, at the time of the indorsement, which would vary the legal liability of the indorser under his indorsement, is inadmissible. *Woodward v. Foster*, 18 Gratt. 200; *Martin v. Lewis*, 30 Gratt. 672; *Riverview Land Co. v. Dance*, 98 Va. 245, 35 S. E. 720; *Citizens Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890.

Nonnegotiable Paper.—Where a non-negotiable note bears on its back the signatures of the promisee and another person, in such manner as would make them first and second indorsers, respectively, if the note were negotiable, the parties so signing are not deemed to have thereby made a complete and specific contract, analogous to the contract of commercial indorsement, making them liable as guarantors in the order of their signatures; and parol evidence is admissible to show the relation which they bear to one who asserts a liability against them on such note. *Young v. Schon*, 53 W. Va. 127, 44 S. E. 136.

When such paper does not represent an existing debt, but is made for the purpose of obtaining on it a loan of money for one, or all, of the parties to it, a person who makes such loan on the faith of it and takes it, may, in the absence of an agreement to the contrary of which he has notice, treat those whose names are on the back of it as copromisors with him who signed on its face, or as guarantors, at his election. *Young v. Schon*, 53 W. Va. 127, 44 S. E. 136.

X. Payment and Discharge.

A. PAYMENT.

See the title PAYMENT.

1. Amount Payable.

M. was indorser for the firm of S., B. & Co., of which firm L. was a member. Said firm, as well as L. individually become insolvent; and M.

being required, as such indorser, to pay near \$2,000, and not being able to raise all the money for the purpose himself, L. loaned him \$805, for which M. executed to L. the following writing: "\$805. Due W. H. Lipscomb eight hundred and five dollars, borrowed money, to be re-paid when collected off of Stone, Bowman & Co., out of drafts which I have had to pay for them. This March 9th, 1888. Witness my hand and seal. W. B. Maxwell. (Seal.)" M. recovered a decree against S., B. & Co., August 2, 1890, for \$956.06, interest and costs. It was held that, M. could only be liable to L. or his assignee upon said note to the extent of his actual collection from said S., B. & Co. *Allen v. Maxwell* (W. Va.), 49 S. E. 242.

2. To Whom Payment May Be Made.

Note Deposited in Bank for Collection May Be Paid to Bank.—If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested is permitted by the holder to remain in the bank, however long or for whatever motive he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor, provided he has not notice that the bank in fact has no authority to receive the money. *Alley v. Rogers*, 19 Gratt. 366.

Payment at Branch Bank.—The provision in the Code of Virginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them

off against it. *Farmers' Bank v. Willis*, 7 W. Va. 31.

Where notes were discounted at the Bank of the Old Dominion in Alexandria, payment of these notes made to a branch of that bank, in another town, in confederate money, under an act of assembly authorizing it, the branch not having the notes at the time, was held not to constitute a payment of the notes; though after the war the bank took possession of all the assets of said branch, including the funds so paid. *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785. See the title **BANKS AND BANKING**, ante, p. 254.

Payment to Mother Bank.—The mother bank has a right to receive the payment of any debt due the branch, even though contracted with a branch bank, as a negotiable note discounted by a branch bank; and the mother bank may authorize one of its own officers to receive payment of such a note or confirm the receipt of payment of such a note, if it had previously been done by such officer without express authority. *Smith v. Lawson*, 18 W. Va. 212.

Payment to Assignor of an Instrument Transferable by Delivery Invalid.—By the indorsement, or transfer by delivery when payable to bearer, of a negotiable note, though after maturity the legal title passes without notice to the maker, and therefore a payment to the assignor or transferrer, who no longer holds the legal title, is not a good payment, though the party making the payment had no notice of the assignment or transfer. *Smith v. Lawson*, 18 W. Va. 212.

Payment of an Overdue Note to Party Who Held It at Maturity.—Payment of an overdue note to one who held it at maturity, but who had transferred it after maturity, and before such payment, of which transfer the one making the payment had no notice, was held not to discharge the maker; and it made no difference that a written as-

signment was made separate from the note, it having been previously indorsed by the payee, and being, therefore, transferable by delivery. *Smith v. Lawson*, 18 W. Va. 212.

3. Necessity of Taking Up Paper.

The person liable on commercial paper is not bound to pay it unless it is produced and surrendered to him; he has a right to it as his voucher of payment and as his security against any further claim or demand thereof, and where payment is made without taking up the paper, such payment is not a good defense to an action brought on the instrument by a subsequent transferee or holder. *Davis v. Miller*, 14 Gratt. 1.

And payment by the maker and indorser of a negotiable note, after it has been protested for nonpayment, taken up by the payee and transferred by him to his creditor as collateral security for a larger debt, such payment being made without knowledge of the transfer, is not a good defense to an action brought on the note by the transferee and holder against the maker. *Davis v. Miller*, 14 Gratt. 1.

4. Medium of Payment.

Meaning of Word "Dollars" Contained in Bill or Note.—At common law where an instrument was payable in "dollars" the word dollars was taken to mean gold dollars if the instrument was payable in this country; if made in a foreign country it would mean the dollar of the country wherein it was made, and for the purpose of showing where the contract was made, and the value of the dollar of that country, compared with our gold dollar, parol evidence was admissible. *Bierne v. Brown*, 10 W. Va. 748.

If the instrument was made in the confederate states the word dollar unexplained would mean a confederate note of one dollar, and the measure of recovery would be the value of a confederate dollar in gold currency, which might be shown by parol evi-

dence. *Bierne v. Brown*, 10 W. Va. 748.

Confederate Money.—During the late war, a firm being indebted to a bank by note, accepted the offer of a third party to take up their note at the bank. This party took up the note paying confederate money, which was the only money having any circulation in Virginia at the time. The firm executed their note to this party without mentioning the currency in which such note was to be paid. It was held that the note was payable in confederate money, as in the absence of stipulation to the contrary, it would be presumed that the parties contracted with reference to it. *Ashby v. Porter*, 26 Gratt. 455.

Upon a sale of land at public auction during the late war, nothing was said at the time of the sale as to the kind of money which should be paid for the land. The land was sold for its value estimated in confederate money as of that date, and the purchaser made a cash payment in that money, and gave his negotiable notes payable in one and two years, with a deed of trust to secure them. The vendor received payment of the first note when it became due, in the same money and sold the second note to a third party, who paid for it in the same currency. When this second note became due the maker tendered payment in confederate notes, which was refused. The sale was held to have been made with reference to confederate notes as a standard of value, and the purchaser of the note though a holder for value took it as it was held by the payee. *Lohman v. Crouch*, 19 Gratt. 331.

As to notes deposited in bank for collection during the war, when confederate money was the only currency, they might have been properly paid in such money, at least without notice that other money was demanded. But in the case of a nonresident owner, the bank had no authority to receive pay-

ment of the note in depreciated currency, and such payment was void and the notes still remained due. *Alley v. Rogers*, 19 Gratt. 366.

A perfectly valid debt evidenced by a negotiable note, and payable in sound currency, can not be discharged by a mere promise without consideration on either side to pay in confederate currency; especially is this true, where the promise has not been performed and no attempt has been made to perform it. In such case an action may be brought on the note though it is in possession of the maker, it not having been surrendered with an intention to discharge it. *Lewis v. Davisson*, 29 Gratt. 216.

Upon a sale of land the purchaser paid one-fourth cash and gave his notes for the balance, payable in one, two and three years. Nothing was said at the time as to the currency in which the notes were to be paid; but the vendor accepted payment of the first two notes in confederate currency. The vendor was held not bound to take confederate currency for the last note; but was entitled to be paid in the legal money of the country. *Omohundro v. Crump*, 18 Gratt. 703.

Scaling Ordinances.—It was provided by the act of March 3, 1866, that in any actions for the enforcement of any contract made between January 1, 1862, and April 10, 1865, either party might show by parol or other relevant evidence what was the true understanding and agreement of the parties, with respect to the kind of currency in which the same was to be paid or in respect to the kind of currency in reference to which as a standard of value it was made and entered into. *Hilb v. Peyton*, 22 Gratt. 550; *Ashby v. Porter*, 26 Gratt. 465; *Sexton v. Windell*, 23 Gratt. 534; *Barnett v. Cecil*, 21 Gratt. 93; *Bowman v. McChesney*, 22 Gratt. 609; *Stearns v. Mason*, 24 Gratt. 484.

The West Virginia act of 1873 was in substance the same as that of Virginia.

Bierne v. Brown, 10 W. Va. 748; *Gilkeson v. Smith*, 15 W. Va. 44.

These statutes were construed or applied in the following cases relating to commercial paper. *Omohundro v. Crump*, 18 Gratt. 703; *Alley v. Rogers*, 19 Gratt. 366; *Lohman v. Crouch*, 19 Gratt. 331; *Kraker v. Shields*, 20 Gratt. 377; *Barnett v. Cecil*, 21 Gratt. 93; *Hilb v. Peyton*, 22 Gratt. 550; *Bowman v. McChesney*, 22 Gratt. 609; *Sexton v. Windell*, 23 Gratt. 534; *Ashby v. Porter*, 26 Gratt. 455; *Bierne v. Brown*, 10 W. Va. 748; *Gilkeson v. Smith*, 15 W. Va. 44.

Generally, as to the effect of scaling ordinances, see the title PAYMENT.

5. Tendor of Payment.

Where an offer of payment of a note is made on condition that the holder will surrender collateral security and other liabilities, the offer is not a proper tender where the party making it has no right to make such a demand for the collateral, and, therefore, the tender does not stop interest on the note. *Fidelity, etc., Co. v. Engleby*, 99 Va. 168, 37 S. E. 957. See the title TENDER.

6. Application of Payments.

B. indebted to S. on a protested bill of exchange and also on a bond, assigned to him some securities, which were accepted as if they had been payments in money of the principal and interest due by said securities. B. claimed credit therefor against the bill of exchange; S. claimed the right to apply them first to the bond, which the trial court allowed him to do, B. not having directed otherwise. The court of appeals, "without contravening the rule giving creditors the right of application of payments to either of different debts due at the time," held, that the said securities should "from the combined circumstances of the case be applied to the protested bill; since it is evident the payer so intended it; and that if the receiver did not assent thereto, yet he did not make such recent and proper application of them

otherwise as ought to control the choice of the payer." *Hill v. Gregory*, Wythe 73. See the title PAYMENT.

7. What Constitutes Payment.

Giving Other Paper as Payment.—See the title PAYMENT.

Part Payment.—See the title PAYMENT.

Deposit in Bank Holding Note for Collection.—Defendant offered to pay his note to the plaintiff, but at the plaintiff's request the note was renewed, upon the understanding that it should be deposited in bank for collection. Subsequently the defendant deposited in his own name the amount of the note in the bank, which was burned, with its contents, before the note had matured or been deposited. It was held, that the defendant was liable for the amount of the note. *Moses v. Trice*, 21 Gratt. 556.

8. Presumptions in Regard to Payment.

Decedent had held two notes one made by all the defendants the other by one of them, A. The former note was in suit, and the latter was in the hands of A. There was proof of a payment to decedent by A., partly in money, and partly by his individual check, but no such payment was credited on note in suit, and the other note was not produced. It was held, that payment was presumably on A.'s note. *Wells v. Ayers*, 84 Va. 341, 5 S. E. 21, wherein it was held, that the evidence did not support A.'s contention that the payment was made on the joint note and that his individual note was delivered up to him as a gift by payee during his lifetime.

Where a check is given by the plaintiff to the defendant, and many years afterwards, the defendant executes a note to the plaintiff, for the accommodation of the former, it will be presumed that the check has been settled or accounted for. *McRae v. Boast*, 3 Rand. 481. See the title PRESUMPTIONS AND BURDEN OF PROOF.

Presumption of Payment from Lapse of Time.—See the title PAYMENT.

9. Effect of Payment by Particular Parties.

Payment by Parties Primarily Bound.—When one who is primarily bound for the payment of a note takes it up, it is a payment and extinguishment of the note, no matter what his intention may have been. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791.

Payment by Indorser.—Payment of a dishonored note by an indorser, does not extinguish its negotiability as to him and all parties liable thereon to him. But it discharges the liability of subsequent indorsers, whose liability will not be revived by his putting the note in circulation again. *Davis v. Miller*, 14 Gratt. 1; *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Smith v. Lawson*, 18 W. Va. 212.

Payment by Stranger.—But if a note be taken up by a stranger who is neither a party to the paper, nor in any way bound for its payment, it becomes a question of fact, to be determined upon the evidence in the case, whether the transaction constitutes a payment or a purchase. *Cussen v. Brandt*, 97 Va. 1, 32 S. E. 791.

Payment of a note at a bank is either a sale or a discharge thereof. It can not be a sale without the bank's consent. Where the note is paid by a stranger bound for its payment at maturity, the note is thereby actually discharged, and can not be reissued by him, so as to bind the parties thereto or to keep alive a trust deed executed to secure it, except with the knowledge and consent of those parties. *Citizens' Bank v. Lay*, 80 Va. 436.

F. was indebted to J. and J. wanting money in the absence of F. borrowed of Y. one hundred and fifty dollars, for which he gave his note with the understanding that on the return of F. he would pay it; and accordingly upon the return of F. he paid the amount to Y. and took in the

note. Some two years afterwards F. and J. had a settlement of their accounts, when F. was found to be the debtor of J., and gave his note for the balance. Some years subsequent to this settlement F. found the note among his papers, and believing it had been omitted in the settlement between himself and J. assigned it for value, and an action was brought upon it in the name of Y. for the benefit of P., the then holder of the note. Upon the evidence the court was of the opinion that the note was embraced in the settlement. But if not, by the payment F. became a creditor of J. for so much money paid for his use; and the note was discharged and extinguished by such payment, and was not revived by the omission of it in the settlement. *Young v. Johnston*, 10 Gratt. 269.

10. Rights of Sureties upon Making Payment.

See the titles CONTRIBUTION AND EXONERATION; SUBROGATION; SURETYSHIP.

B. DISCHARGE OF PARTIES SECONDARILY LIABLE.

See the title SURETYSHIP.

1. Change or Alteration of Contract.

See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 307.

A joint note, signed by several parties, for \$6,000 was presented to a bank for discount by the principal in the note. The bank discounted it for \$4,000 only, and the cashier indorsed it "discounted for \$4,000 only, and should be so read." This was done without the knowledge of the sureties in the note. It was held, that they were notwithstanding bound, the transaction being equivalent to a discounting of the note for \$6,000 and a repayment by the principal of \$2,000 thereon. *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

2. Extension of Time to Principal.

In General.—Where the holder of a note extends time to the principal by a

binding agreement without the consent of the indorser, however immaterial the extension may be, and even if it is to the advantage of the indorser, he is nevertheless discharged from liability on his indorsement unless he has waived his rights, because by the extension, the holder impairs the remedy which the indorser would have over against the principal to save himself from loss. *Winfree v. First Nat. Bank*, 97 Va. 83, 33 S. E. 375; *Wright v. Independence Nat. Bank*, 96 Va. 723, 32 S. E. 459; *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576; *State Savings Bank v. Baker*, 93 Va. 510, 25 S. E. 550; *Exchange Bldg., etc., Co. v. Bayless*, 91 Va. 134, 21 S. E. 279; *Stuart v. Lancaster*, 84 Va. 772, 6 S. E. 139; *Dey v. Martin*, 78 Va. 1; *Callaway v. Price*, 32 Gratt. 1; *Sitlington v. Kinney*, 29 Gratt. 91; *Merchants', etc., Bank v. Evans*, 9 W. Va. 373; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002; *Shields v. Reynolds*, 9 W. Va. 483. But see *Bennett v. Maule*, *Gilmer* 305.

Any change of the contract by the principal, however slight, without the consent of the surety, releases the latter from all further liability. And where extension of time of payment is given to the principal, without the consent of the surety, in pursuance of a binding legal contract, the surety is at once released from his obligations. But if, in the contract for extension, all the rights and remedies after the contract as before, the surety is not discharged. *Exchange Building, etc., Co. v. Bayless*, 91 Va. 134, 21 S. E. 279.

It is well settled that an agreement between creditor and principal debtor to extend time of payment for a definite period discharges the surety if made without his consent, even though the change be for his benefit. *Stuart v. Lancaster*, 84 Va. 772, 6 S. E. 139; *Dey v. Martin*, 78 Va. 1.

Suspension Must Be Binding and for a Definite Time.—But in order to discharge a surety by indulging the prin-

cipal, it must be shown amongst other things, that there was an agreement or promise, upon valid consideration, to indulge the principal for some definite time, or at least for a time not altogether indefinite. The partial payment by the principal without an agreement to extend as to the balance is not sufficient to discharge the surety, though the principal expected that in consequence of the payment he would not be immediately pressed for the balance, and in fact, he was no so pressed. *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576; *Merchants', etc., Bank v. Evans*, 9 W. Va. 373; *Dey v. Martin*, 78 Va. 1.

Payment of Interest as Consideration for Extension.—Actual payment of usurious or legal interest in advance is a sufficient consideration to make valid a contract to extend payment of a debt, so as to discharge a surety, but a mere naked unexecuted agreement to pay such interest will not discharge a surety. *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

Payment of interest in advance, though at a usurious rate, is sufficient consideration for an agreement to extend the time of payment. *Glenn v. Morgan*, 23 W. Va. 467.

Necessity for Holder to Know of Suretyship.—To release a surety by indulgence of the principal or by surrender of a security for the debt, the creditor must know, when he agrees to indulge or surrenders the security, that the party is a surety. When two persons make a note, the prima facie presumption is that they are both principals, and the payee may so treat them, unless the note, or the parties, or the circumstances, plainly inform the payee that one is a surety. The surety may so notify the payee, and then the payee must have regard to his rights as such. *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

Consent or Acquiescence of Surety.—If indulgence be granted a principal debtor, with consent of the surety, or

if, with knowledge of past agreement to indulge, the surety promises payment, such indulgence will not release him. *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002; *Callaway v. Price*, 32 Gratt. 1.

Taking Another Security.—The effect of taking new notes or bills for a pre-existing one, is a suspension, and a consequent discharge of the surety. It is not for the surety to prove an agreement to stay the action, but for the creditor to show that by agreement the negotiable security does not entitle the debtor to forbearance. *Callaway v. Price*, 32 Gratt. 1.

It is well settled that if holder of promissory note take a new note of principal debtor without surety's consent, the latter is discharged, unless the evidence clearly shows that the parties otherwise intended, and the burden of showing such intention rests on creditor. *Stuart v. Lancaster*, 84 Va. 772, 6 S. E. 139; *Callaway v. Price*, 32 Gratt. 1.

Whilst the mere taking a negotiable security, payable at a future day, does not, unless so agreed, operate as a payment of an antecedent debt, it does operate to suspend the right of action on the original demand until the maturity of the bill or note. It is a conditional satisfaction with respect to the principal; and with respect to the surety it is absolute, unless it plainly appears the parties intended otherwise. *Callaway v. Price*, 32 Gratt. 1.

Dismissal of Action against Maker.—After a holder of a note had delivered it to a bank as collateral security for a debt, he gave a plaintiff an order entitling him to the note when the debt was paid. Pending an action by the bank on the note the debt was paid, and the action was dismissed, and subsequently the note was delivered to the plaintiff pursuant to the said order. It was held, that the dismissal was not a retraxit precluding the plaintiff, who was not a party,

from subsequently recovering from an indorser who was a party, and acquiesced in the dismissal; nor did the dismissal discharge the indorser because it extended time to the maker. *Tate v. Bank*, 96 Va. 765, 32 S. E. 476. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

Extension of Time to Second Indorser Does Not Affect First.—An indorser of a note is not released from liability by an agreement of the holder with a subsequent indorser to extend the time of payment. *Wright v. Independence Nat. Bank*, 96 Va. 728, 32 S. E. 459.

Agreement to Extend upon Condition That the Indorser Consents.—Where the holder of a note agrees to an extension of the time of the payment on condition that the indorser consents to the extension, the indorser is not thereby released. *Winfree v. Bank*, 97 Va. 83, 33 S. E. 375.

Extension of Time to Maker of Notes Delivered as Collateral.—Where the negotiable note of two or more makers upon which there is an accommodation indorser, is delivered as collateral for the note of one of the makers, and both notes are given to secure the same debt, delivered at the same time, and as parts of the same transaction, all payments made on either note should go to the credit of both, and the extension of the time to the principal of the collateral note, by a binding agreement with the creditor, without the consent of the indorser, releases the indorser. *State Sav. Bank v. Baker*, 93 Va. 510, 25 S. E. 550; *Dey v. Martin*, 78 Va. 1.

In What Court Defense Available.—The defense by a surety that he has been discharged by indulgence to the principal, or by a surrender of a security for the debt, may be made in a court of law, where the debt is not under seal, but where it is under seal such defense can be made only in equity. *Parsons v. Harrold*, 46 W. Va.

122, 32 S. E. 1002. See also, *Shields v. Reynolds*, 9 W. Va. 485.

XI. Actions.

A. JURISDICTION.

Fraud in Obtaining Instrument.—A bill alleging that L. and A. had obtained the possession of certain bonds or promissory notes executed by themselves to the plaintiff, and which were left in the hands of the plaintiff's agent, through false or fraudulent representations, with the design to cheat and defraud the plaintiff, and had destroyed them, shows sufficient ground on its face for the jurisdiction of a court of chancery. *Campbell v. Lynch*, 6 W. Va. 17. See the titles EQUITY; JURISDICTION; RESCISSION, CANCELLATION AND REFORMATION.

To Subject Wife's Separate Estate.—Equity is the appropriate tribunal for changing a wife's separate estate, and an indorser on her note may be joined as a party. And if from cause developed in the suit, the plaintiff fails in his remedy against that estate, he may have relief in the same suit against the indorser. *Walters v. Farmers' Bank*, 76 Va. 12. See the titles EQUITY; SEPARATE ESTATE OF MARRIED WOMEN.

Va. Code, 1873, ch. 141, § 19, providing that equity shall not have jurisdiction of suits on bonds, notes, etc., by assignee or holder thereof, was not intended to affect the principle that when the court has once rightly obtained cognizance of the controversy and of the parties, its power is effectual for complete relief. *Walters v. Farmers' Bank*, 76 Va. 12.

Where Collateral Contract Affording Defense Is Lost.—Where a written agreement between the maker and the payee of a note, in relation to the contract in pursuance of which the note was made, having been lost at the time a judgment was recovered on the note, and without which the maker had no

defense at law, it was held, that equity had jurisdiction of the case. *Vathir v. Zane*, 6 Gratt. 246. See the titles **EQUITY; LOST INSTRUMENTS AND RECORDS.**

B. FORM OF ACTION.

Debt.—See the title **DEBT, THE ACTION OF.**

At common law an action of debt will not lie for the indorsee against the acceptor of a bill of exchange. *Smith v. Segar*, 3 Hen. & M. 394; *Wilson v. Crowdhill*, 2 Munf. 302. But under the statute (Va. Code, 1860, ch. 144, § 10), which provides, that an action of debt may be maintained on a note or writing by which there is a promise to pay money, if the same be signed by the party who is charged thereby, or his agent, an action of debt will lie in the name of the indorsee on a bill of exchange against the acceptor. *Hollingsworth v. Milton*, 8 Leigh 50; *Regnault v. Hunter*, 4 W. Va. 257.

An action of debt will lie for the drawer of a bill of exchange, who is also the payee, against the acceptor at common law. *Regnault v. Hunter*, 4 W. Va. 257.

Debt can not be maintained on a writing obligatory by which the obligors promise, on or before a specified day, to pay the obligee 813 dollars, 79 cents, in notes of the United States bank or either of the Virginia banks. *Beirne v. Dunlap*, 8 Leigh 514.

A joint action of debt lies against the persons who have bound themselves by the same writing to pay a sum of money, the one with and the other without a seal. *Keller v. McHuffman*, 15 W. Va. 76; *Rankin v. Roller*, 8 Gratt. 63.

Assumpsit.—See the title **ASSUMPSIT**, ante, p. 1.

Though, in general, indebitatus assumpsit for money lent, or money paid and expended, or money had and received, lies for the holders of a promissory note against an indorser, and the

indorsement is prima facie evidence to support those money counts; yet if it be found by special verdict, that the defendant indorsed the note, and the holders discounted it, for accommodation of the maker, and that the defendant received no part of the proceeds of the note so discounted, in such case the holders can not recover against the defendant on the money counts. *Bank of the U. S. v. Jackson*, 9 Leigh 221.

Where one purchases a foreign bill of exchange, which is afterwards lost before it is presented, and the seller refuses to give a second bill; the buyer may bring indebitatus assumpsit for the purchase money. *Murray v. Carret*, 3 Call 373.

Covenant.—Demurrer lies to a declaration in covenant on a trust deed executed merely as a collateral security for the payment of a promissory note. Such trust deed does not raise such note to the dignity of a specialty, and the note is barred by a lapse of five years before suit brought. *Wolf v. Violet*, 78 Va. 57. See the title **COVENANT, ACTION OF.**

Detinue.—A treasury note is, by the act of congress, transferable by delivery and assignment only and where a treasury note indorsed in blank was stolen from the mail, and subsequently passed into the hands of a bona fide purchaser for value, it was held, that the note could be recovered in an action of detinue, brought by the real owner against such bona fide purchaser. *Myers v. Friend*, 1 Rand. 12. See the title **DETINUE AND REPLEVIN.**

C. PARTIES.

1. Parties Plaintiff.

Instrument Indorsed Specially.—If a negotiable instrument, not payable to bearer, be indorsed specially to a particular person, while such person remains the holder and legal owner, the right of action is in him alone, and none but him or his personal repre-

sentative can sue. *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004. See the title PARTIES.

Beneficial Owner of Instrument Transferable by Delivery.—The beneficial owner of a negotiable instrument, which is payable to bearer or indorsed in blank, may institute a suit thereon in any court of law, in the name of any one who will allow his name to be used for that purpose; and where the defendant has no legal or equitable defense to the instrument as against the real owner thereof, he can not be permitted to show that the nominal plaintiff, in whose name the suit is brought, is not the real party in interest. *Bank v. Simmons*, 43 W. Va. 79, 27 S. E. 299.

Where a negotiable note is made payable, at a particular bank and such bank is also made payee, and said note is indorsed in blank by a third party, and a fourth party, on the day of the execution of said note, becomes the owner thereof, by paying the maker the cash therefor, and before maturity said note is indorsed to said bank for collection, and is subsequently duly protested for nonpayment, said fourth party may sue in the name of the bank for his use and benefit, and recover judgment against said maker and indorser. *Bank v. Simmons*, 43 W. Va. 79, 27 S. E. 299.

And an action on a negotiable note indorsed in blank may be maintained in the name of the holder, who is not the owner, by the owner's consent. *Smith v. Lawson*, 18 W. Va. 212.

The payee of a note, made for the benefit of a company for which he was treasurer, transferred it to another. An action was brought in the name of the former for the benefit of the latter, and on the trial the payee testified that he did not authorize the suit to be brought in his name. This was not sufficient to prevent a recovery by the assignee in his action. *Kimmins v. Wilson*, 8 W. Va. 584.

Joint Instrument Must Be Sued on Jointly.—Two persons, to whom or for whose benefit a third person has promised to pay a single amount, can not maintain separate suits for their alleged shares of such amount, or the whole thereof must sue jointly. *Phoenix Assurance Co. v. Fristoe*, 53 W. Va. 361, 44 S. E. 253.

Thus where A promised to pay the sum of \$867.15 for the benefit of the Phoenix and Peabody Assurance Companies, one of whom subsequently instituted suit against A for the sum of \$495.15, its alleged share of such joint note, it was held, that the suit was not maintainable. *Phoenix Assurance Co. v. Fristoe*, 53 W. Va. 361, 44 S. E. 253.

Payee of an Order Drawn on a Fund.—An order drawn on a particular fund or debt, and for the whole thereof, though not accepted by the drawer, is a good equitable assignment of the fund or debt, and it will be recognized by a court of law to the extent of permitting the payee of such an order to institute a suit at law in the name of the drawer against the drawee. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555. See the title ASSIGNMENTS, vol. 1, p. 745.

Administrator of an Accommodation Indorser.—And the administrator of an accommodation indorser of a negotiable note protested for nonpayment, who takes up the note after the death of his intestate, may maintain either assumpsit on debt in his own name against the maker of the note, for the amount in value which he has paid for the note. *Burton v. Slaughter*, 26 Gratt. 914. See the title EXECUTORS AND ADMINISTRATORS.

Guardians.—A guardian may bring assumpsit in his own name, upon a draft or order payable to himself as guardian, for money due to his ward. *Jolliffe v. Higgins*, 6 Munf. 4. See the title GUARDIAN AND WARD.

2. Parties Defendant.

Action against One of Two Partners.—Where a promissory note was executed by one of two partners in the firm name, one of the partners being an infant at the time of the execution of the note, it was held, that an action brought against the adult partner only was badly brought, as the act of the infant was voidable only, and was valid until disaffirmed. *Wamsley v. Lindenberger*, 2 Rand. 478. See the title **PARTNERSHIP**.

Joint Action against Maker and Indorser.—It has been held, that in order to hold an indorser of a negotiable note liable in an action of debt, with the maker, it must appear that the note was duly and formally protested for nonpayment and that the indorser was notified of the dishonor. *Shields v. Farmers' Nat. Bank*, 5 W. Va. 254.

A note for a sum certain, payable to order, and negotiable and payable at a bank out of the state of Virginia, is a note negotiable at a bank in Virginia, and therefore is placed on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against the maker and indorsers jointly, and with the like effect, except as to damages. *Hays v. Northwestern Bank*, 9 Gratt. 127.

Where the payee in a negotiable note made the following indorsement on the back of the note: "For value received, we hereby guaranty the payment of the within note at maturity, waiving demand, notice of nonpayment, and protest. (Signed) A. G. Lee & Co.;" it was held, that this operated as a transfer of the note, and as an indorsement thereof with enlarged liability, and that an action of *assumpsit* might be maintained on such note, together with other negotiable notes by the same makers, and with the simple indorsement of the same payees, jointly against the makers and indorsers. *National Exchange Bank v. McElfresh Mfg. Co.*, 48 W. Va. 406, 37 W. E. 541.

Joint Action against Drawer and Indorsers of a Specialty.—A single bill, under seal, is not a note, but a specialty; and therefore the drawer and indorsers of such a bill, made "negotiable and payable" at a certain place, can not be sued jointly thereon. *Mann v. Sutton*, 4 Rand. 253.

Joint Instrument Sealed as to One Party.—An action of debt was brought by the administrator of the payee upon an instrument in these words: "On demand I promise to pay to David Keller, the just and full sum of \$200, for value received, as witness my hand and seal. Thomas McHuffman. [Seal.] Security:—David M. Riffe." This instrument was held to be a joint and several promise as to both defendants, and *prima facie* the instrument was on its face as to the defendant McHuffman a single bill obligatory, and as to the defendant Riffe his promissory note, and a joint action was proper in such case. *Keller v. McHuffman*, 15 W. Va. 64.

Action to Subject Indorser's Land.—The maker of a note is a necessary party to a suit in chancery to subject the lands of the indorser. *Fidelity Loan, etc., Co. v. Engleby*, 99 Va. 168, 37 S. E. 957.

In a suit in equity to subject the estate of an indorser, persons primarily bound on the paper are necessary parties, as they may have defenses unknown to the indorser, and, being first liable, equity will not, except under special circumstances subject the estate of the indorser until that of his principal has been exhausted. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318; *Horton v. Bond*, 28 Gratt. 816.

Necessity to Join Attaching Creditor of Payee in Action against Maker.—H. filed his bill against C. to subject land to the payment of a negotiable note past due, which he alleges was indorsed by the payee to him before maturity, and which note was a vend-

or's lien on this land. The defendant denies that the plaintiff is the bona fide holder of this note, and alleges that he had, before the note became due, been served with an attachment in a suit in the same court, brought by a creditor of the payee, which attachment was still pending; and he files with his answer a copy of the record in the attachment case. A blank indorsement of the payee's name is found on the back of the note. It was held, that the court could not properly render a decree in favor of the plaintiff, till this attaching creditor was made a party to the suit; but the plaintiff had a right to prosecute such a suit on making the necessary parties defendants, and was not required in lieu thereof to file his petition in the attachment cause. *Hatch v. Calvert*, 15 W. Va. 90. See the title ATTACHMENT AND GARNISHMENT, ante, p. 70.

D. DECLARATION.

1. Necessity for and Sufficiency of Averments.

a. Title or Ownership.

In an action of debt on a negotiable note the plaintiff must allege in his declaration, that he is the payee or indorsee or holder of the note. If he fails to make such allegation, though he alleges the drawing of the note and its indorsement by the payee in blank, the declaration is fatally defective on general demurrer. *Bank v. Hysell*, 22 W. Va. 142.

b. Consideration.

In Action on Bill of Exchange.—The declaration in an action on a negotiable bill of exchange need not aver that a consideration was received for it. Such an instrument is presumed to be founded upon a valuable consideration. *Ford v. McClung*, 5 W. Va. 164; *Averett v. Booker*, 15 Gratt. 163; *Power v. Finnie*, 4 Call 413.

In Action on Note.—Under the Virginia statute, an action of debt may

be brought upon a note in writing; and in such action it need not be averred or proved that there was any consideration for the note. The note itself imports consideration, as does a bond; the only difference being that in case of a bond the consideration can not be inquired into, but in the case of a note it may. *Peasley v. Boatwright*, 2 Leigh 195; *Snead v. Coleman*, 7 Gratt. 300; *Crawford v. Daigh*, 2 Va. Cas. 521; *Jackson v. Jackson*, 10 Leigh 452; *Hollingsworth v. Milton*, 8 Leigh 52; *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751; *State v. Harmon*, 15 W. Va. 121.

In Action on Check.—A check also is presumed to be founded on a valuable consideration, and in an action thereon, consideration need not be averred in the declaration. *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003; *Terry v. Ragsdale*, 33 Gratt. 342.

c. Promise to Pay.

In an action on the case upon a note of hand, there must be an express assumpsit laid in the declaration; merely reciting the note of hand in *hæc verba* is not sufficient. *Cooke v. Simms*, 2 Call 39.

It is sufficient to set forth the promise or obligation according to its legal effect. *Second Nat. Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206.

d. Amount Payable.

In an action against the makers and indorsers of a protested negotiable note, the accidental omission of the sum for which the note was given, in describing it in the declaration, was held no ground of demurrer, where the sum sufficiently appeared from other parts of the declaration. *Archer v. Ward*, 9 Gratt. 622.

e. Medium of Payment.

A sterling debt may be sued for without laying the value in current money; if it is laid, it is merely surplusage, and will not vitiate; but in

such case, the damages should be laid in sterling money, the verdict and judgment should be in sterling money, and the court is to fix the rate of exchange. *Skipwith v. Baird*, 2 Wash. 165.

In an action of debt upon a protested bill of exchange, drawn for sterling money, the declaration was for the current money value of the sum for which the bill was drawn. The declaration should have been for the sterling money, and judgment being for the sum so demanded, was reversed on a writ of error. *Scott v. Call*, 1 Wash. 115.

Where a declaration stated that a bill was drawn for current money, without naming the sum of current money, it was held, that the plaintiff could only recover current money. *Proudfit v. Murray*, 1 Call 394.

f. Nonpayment.

And in an action of debt or assumpsit upon a promissory note it is indispensable to aver nonpayment, and that to every party connected with the note entitled to receive payment, whether payee, assignee, decedent, or representative, or survivors of decedent, and each one of the parties jointly entitled to receive payment. *Smoot v. McGraw*, 48 W. Va. 144, 35 S. E. 914.

In an action by an indorsee of a note against the maker, the declaration, failing to negative payment to the maker, as well as to the indorsee, is insufficient. *Norvell v. Hudgins*, 4 Munf. 496.

A defective allegation of a breach in a count on a single bill in a declaration in debt, containing also counts for money lent, paid, and received, is cured by a sufficient allegation of a breach at the end of the declaration. *Somerville v. Grim*, 17 W. Va. 803.

g. Presentment, Protest and Notice of Dishonor.

In General.—In an action on a ne-

gotiable note against the indorser, the declaration must allege, that the note was duly presented for payment at the place where it was payable, at the time when it became due and payable, and that it was not paid, and that thereupon the said note was duly protested for nonpayment, of all of which the indorser had prompt notice. *Bank v. Hysell*, 22 W. Va. 142; *National Exchange Bank v. McElfresh Mfg. Co.*, 48 W. Va. 409, 37 S. E. 541; *Early v. Preston*, 1 Pat. & H. 228; *Fidelity, etc., Trust Co. v. Engleby*, 99 Va. 168, 37 S. E. 957.

In a bill to subject a decedent's estate upon his liability as an indorser of a negotiable paper, notice of the dishonor of the paper is a necessary allegation in the bill. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318.

Note Discounted for Indorser's Accommodation.—It seems that the declaration in an action against an indorser upon a note which was discounted for the accommodation of the indorser and the proceeds of which were received by him, need not aver presentment, protest and notice. *McVeigh v. Bank*, 26 Gratt. 785.

Necessity for Averment in Each Count.—A count in the declaration on a protested bill of exchange which did not aver presentment and demand of payment, was held bad on demurrer, and the overruling of such demurrer was held error. But it was held, that the appellate court would not reverse the judgment for such error, as the presentation and demand of payment was sufficiently alleged in other counts, and no injury could have resulted to the defendant therefrom. *Early v. Preston*, 1 Pat. & H. 228.

Time and Place of Presentment.—A declaration, which simply states, "that the note was presented at the close of banking hours to the cashier of the bank, where it was payable, for payment, which was refused, and there-

upon it was duly protested for nonpayment, notice whereof was given said indorser," is fatally defective on general demurrer, as it does not state when the note was presented for payment or where it was presented. *Bank v. Hysell*, 22 W. Va. 142; *National Exchange Bank v. McElfresh Mfg. Co.*, 48 W. Va. 409, 37 S. E. 541.

A declaration in an action of assumpsit on a bill of exchange, by the holder against an indorser, alleged that "when the bill became due and payable according to the tenor and effect thereof, to wit, on the 27th of December, 1816, on the bank of Marietta in Ohio" it was presented for payment, and dishonored. December 27 was not the third, but the fourth day after the time appointed for the payment of the bill. As it was averred that the bill was presented when it became due according to its tenor and effect, and the date of the presentment was stated under a videlicet, the date so stated was held not material, and the plaintiff might prove presentment on the third day of grace. *Jackson v. Henderson*, 3 Leigh 196.

A declaration against the maker on a promissory note, payable at a particular place, need not aver presentation for payment at the time or place specified. *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

Sufficiency of Averment.—A charge in a bill in equity that a defendant indorsed certain notes and that "said notes are filed" as exhibits with the bill, does not make the certificates of protest annexed to the notes parts of the bill, and is not a sufficient allegation of dishonor to charge the indorser. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318.

Waiver or Excuses.—If presentment, protest, or notice is waived, that must be likewise alleged, if not, the declaration is bad on demurrer. A declaration which fails to show on its face any cause of action against the indorser,

either by protest or waiver thereof, in any of the special counts, is bad. *National Exchange Bank v. McElfresh Mfg. Co.*, 48 W. Va. 409, 37 S. E. 541.

h. Interest.

If a declaration upon a promissory note does not demand interest and the defendant waives his plea, the count can not give judgment for interest. *Brooke v. Gordon*, 2 Call 213. See the title INTEREST.

Where an action of debt is brought upon a note for a certain sum of money, with interest from the date, and the declaration does not claim interest, judgment upon non sum informatus, must be entered for the principal only. *Hubbard v. Blow*, 1 Wash. 71.

But under the act of January 29, 1805, "to reform the practice of the district, county, and corporation courts in certain cases," judgment may be entered, as well as execution issued, for interest, though not mentioned in the writing, and not demanded by the declaration. *Baird v. Peter*, 4 Munf. 76.

In an action of a negotiable note it was held, no error to demand interest in the declaration which was not claimed in the writ. *Hatcher v. Lewis*, 4 Rand. 152.

In *Harper v. Smith*, 6 Munf. 389, it was held, that a judgment entered upon nil dicit in action of debt on a penal bill, ought not to be reversed on the ground that the declaration though describing the bill correctly as to the principal, penalty, and date, omitted to mention that the debt was payable "with interest from a day prior to the date," and that the judgment, in conformity with the penal bill, was entered for the penalty, to be discharged by the principal, with such interest, and costs.

i. Place of Payment.

A negotiable note payable at a particular office or bank, is a very different instrument from a mere promissory note payable generally,

even when between the same parties and for the same amount. The place of payment regulates the rate of interest and sometimes determines the character of the instrument as to its negotiability. These are matters of importance and make the place of payment a material part of the description of the note. It is therefore essential that the place of payment fixed by the note should be set out in the declaration on the note; and if this be not done, and the admission of the note in evidence is objected to, the court should exclude it on account of the variance between such note and the one described in the declaration. *Damarin v. Young*, 27 W. Va. 436; *Bank v. Showacre*, 26 W. Va. 48.

And where a note on its face is dated at a specified place, and is drawn in such form as to make it a negotiable instrument at such place, the maker, when sued on such note by an innocent holder for value, will not be allowed to aver or prove that such note was not in fact made at the place at which it purports to have been made. *Bank v. Showacre*, 26 W. Va. 48.

j. Cost of Protest.

A declaration in debt, under the law of Virginia, upon a protested bill of exchange for the principal, interest, damages and costs of protest, must aver the amount of those costs of protest. *Wilson v. Lenox*, 1 Cranch (U. S.) 194 (1803).

It was held, error to claim in the declaration costs of protest when those costs were not demanded in the writ. *Hatcher v. Lewis*, 4 Rand. 152.

k. Action to Subject Separate Estate of Married Women.

A bill to subject a married woman's separate estate to the payment of a promissory note made by her must allege that she intended to charge her separate estate with its payment, otherwise it is demurrable. *McDonald v. Hurst*, 86 Va. 885, 11 S. E. 536. See

the title **SEPARATE ESTATE OF MARRIED WOMEN**.

2. Conclusion of Counts.

Where an action of debt is based upon a single bill and simple contract for money lent, money received, or money paid, and the aggregate of all the counts is demanded, the usual conclusion need not be adopted to each count, and if the general conclusion of the declaration is in proper form it will be considered as applying to each count, as well as to all collectively. *Somerville v. Grim*, 17 W. Va. 803.

3. Profert.

In an action of debt on a bill of exchange, it is not necessary for the plaintiff to make profert of the bill in the declaration. *Terrell v. Atkinson*, 2 Wash. 143. See the title **PROFERT AND OYER**.

E. PLEA.

1. General Issue.

As to denial of execution under oath, see post, "Denial of Execution," XI, E, 2; "Denial of Partnership," XI, E, 3.

Nil Debet.—And in an action of debt, upon a negotiable note, the defense that the plaintiffs are not holders for value of the note, may be made under the plea of nil debet. *Fant v. Miller*, 17 Gratt. 47.

Non Est Factum.—In an action on nonnegotiable notes given for land purchased by defendant, non est factum is not a proper plea. *Richmond, etc., Improvement Co. v. West Point*, 94 Va. 668, 27 S. E. 460.

But it is harmless error to overrule a demurrer to and a motion to strike the plea of non est factum, when every defense relied on by defendant could be made under the plea of nil debet, pleaded. *Richmond, etc., Improvement Co. v. West Point*, 94 Va. 668, 27 S. E. 460.

It has been held, that the plea of non est factum is a plea to the merits, and ought to be received after an is-

sue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for. *Franklin v. Cox*, 4 Rand. 448.

Necessity of Joining Issue.—In an action on a negotiable note, where the plea of nonassumpsit and payment properly conclude to the country, the plaintiff may, without the formal addition of the similiter, proceed to trial as though the issue had been formally joined. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

2. Denial of Execution.

Necessity of Sworn Plea.—In an action of debt at common law upon negotiable paper the plea nil debet put in issue the execution of the instrument and all the transfers thereof. But in Virginia, by statute (Va. Code, 1887, § 3279), where the declaration avers the execution and transfer of the paper no proof thereof is required unless such plea is supported by an affidavit. *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471.

Object of Statute Requiring Sworn Plea.—The object of this statute is to dispense with the proof of handwriting in certain cases, and it does not apply to a transfer of paper by mere delivery. Upon an averment of such transfer by a wife, proof of transfer by the husband without proof of his agency is insufficient, even on demurrer to evidence to maintain the issue on the part of the plaintiff tendered by the plea of nil debet. *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471.

Genuineness Can Not Be Questioned unless Denied under Oath.—Where the declaration avers that the indorser indorsed a note by subscribing his name on the back thereof, and he not having filed an affidavit with his plea according to the statute, he will not be permitted to question the genuineness of the note, or to show that it was altered after it was indorsed by him. *Archer v. Ward*, 9 Gratt. 622.

Thus, in an action against the indorsers of a negotiable note, they pleaded nil debet, and filed an affidavit that at the time the note was indorsed and when it was protested it was not stamped, as required by an act of congress, and that it had been since altered by the collector of the United States revenue putting a stamp on it. As this affidavit did not deny their signatures, it was held, not necessary for the plaintiff to offer proof of the signature before introducing the note. *Crews v. Farmers' Bank*, 31 Gratt. 348.

The Affidavit Required.—In Virginia the affidavit which the defendant is required to make is that the said instrument was not made by him as charged in the declaration, and it is not sufficient to make oath that the name subscribed is not in his handwriting, for, if so, a party who had caused the instrument to be signed by his name and in his presence by a third person might raise an entirely immaterial question. *Archer v. Ward*, 9 Gratt. 622.

Burden of Proof Shifts after Filing of Sworn Plea.—Where the answer of the maker of a note denied that the payee indorsed it to the complainant as alleged in the latter's bill, and such denial was supported by affidavit as required by § 3279 of the Va. Code of 1887, the burden of proof was held, to be upon the complainant to show such indorsement, and in default thereof his bill was dismissed. *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505.

Statute Applies to Suits in Equity as Well as Actions of Law.—The statutes providing that the execution of the instruments shall stand admitted unless it is put in issue by a plea or an answer under oath, apply to suits in equity based upon negotiable instruments. *Simmons v. Simmons*, 33 Gratt. 451; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53.

3. Denial of Partnership.

Necessity for Sworn Plea Denying Partnership.—In Virginia it is provided by statute (Code, 1887, § 3280): "That in all actions which may be hereafter commenced in the names of any persons composing a partnership, and the names of the several persons constituting such partnership shall be set forth in the declaration, the plaintiffs shall not be required to prove the existence of the said partnership, as described in said declaration, unless the defendant or some other person shall, by plea verified by affidavit, deny the existence of such partnership." This statute applies to negotiable instruments signed in the name of the partnership. *Shepherd v. Frys*, 3 Gratt. 442. See the title PARTNER-SHIP.

Thus, in an action of debt brought upon a negotiable note, signed with a partnership name, the declaration charged that the defendants subscribed the note by their partnership name. There was no affidavit by the defendants or any of them putting the execution of the note in issue. They were held estopped from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the other partners. *Phaup v. Stratton*, 9 Gratt. 615.

A defendant, against whom office judgment was confirmed at rules, not having appeared and filed his affidavit denying his partnership relieves the plaintiff from the necessity of proving the partnership as to him. *Carlton v. Ruffner*, 12 W. Va. 298.

By the withdrawal of their pleas, the defendants by virtue of ch. 125, § 41, W. Va. Code, 1899, relieve the plaintiff from the necessity of proving the fact of the partnership, there being no affidavit denying the partnership; and their defense in that respect is cut off. After the withdrawal of the pleas, the only question for the court then to

determine, is the amount of the debt due on the note; and it is its duty to render judgment, upon the proof of the amount of said debt, against all the defendants who have been duly served with process, and as to whom the case has not been dismissed or abated. *Carlton v. Ruffner*, 12 W. Va. 298.

4. Incapacity of Parties.

To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action. *Hamtranck v. Selden*, 12 Gratt. 28.

So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action. *Hamtranck v. Selden*, 12 Gratt. 28. See the title BANKS AND BANKING, ante, p. 254.

5. Fraud in Procurement.

A plea that a negotiable note signed by a party was procured by deception and fraud in representing it to be a paper of different character is not good against a holder for value acquired in due course of business before maturity, unless the plea aver notice to the holder of such fraud and deception before he acquired the note. *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179. See the title FRAUD AND DECEIT.

Special Plea under § 3299, Va. Code.

—In an action on notes given for a patent right, if the defendant claims that he has been damaged by fraud or misrepresentation in the procurement of the notes, he may file a special plea

under § 3299 of the Code of Virginia, 1887, and have set off against the plaintiff's demand the amount of damages sustained by him in consequence of such fraud and misrepresentation. This does not require a rescission of the contract in suit and a reinvestment of the vendor with the title. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

6. Illegality or Failure of Consideration.

Illegality.—A special plea reciting that the consideration of a bond is confederate treasury notes issued by an illegal association to overthrow the government of the United States, and for no other consideration whatever, presents an immaterial issue, and is rightly rejected. *Huffman v. Callison*, 6 W. Va. 301.

Failure of Consideration.—In *Keckley v. Union Bank*, 79 Va. 458, it was held, that a failure in consideration of a promissory note could not be shown under the general issue but must be specially pleaded under § 3299, Va. Code, 1887. But this case has been overruled, and it is now held that failure in consideration may be shown under the general issue. *Columbia, etc., Association v. Rockey*, 93 Va. 678, 25 S. E. 1009.

7. Tender.

Where in an action upon a bill of exchange dated in 1775 the defendant pleaded that he tendered the interest in paper money without confessing the action as to the principal or saying anything in bar of it, it was held, that the plea was bad. *Skipwith v. Morton*, 2 Call 277.

Where the defendant in an action on a bill of exchange pleaded that he tendered the interest in paper money without confessing the action as to the principle or saying anything in bar of it, it was held, that he might give the tender in evidence to ex-

tinguish the interest on the plea of payment, but by withdrawing the plea of payment he relinquished the evidence and that therefore if there was a demurrer to the plea of tender final judgment would be against the plaintiff. *Skipwith v. Morton*, 2 Call 277.

A party, who in a court of equity or law relies on a tender of money in satisfaction of a debt, must bring into court, when he files his pleading setting up such tender, the amount of money so tendered, unless this production of the money is waived by the other side; and if he fails to do so, this defense to the payment of the debt and any proof in relation thereto will be disregarded by the court. *Gilkeson v. Smith*, 15 W. Va. 44. See the title TENDER.

8. Payment.

Where a plea of payment was entered to an action on a bill of exchange, it was held, error to require the plaintiff to answer interrogatories which tended to show that the bill was not made for a debt due from the defendant in his individual capacity, but as president of an incorporated company, as the interrogatories were immaterial to the issue, the plea of payment having admitted the execution of the instrument. *Rand v. Hale*, 3 W. Va. 495.

A plea that a judgment note was executed in satisfaction of a note given for the same debt is defective in not alleging that it was accepted in satisfaction of such note. *Witz v. Fite*, 91 Va. 446, 22 S. E. 171. See the title PAYMENT.

F. REPLICATION.

Time of Filing.—By § 4, ch. 171, W. Va. Code, 1860, parties to a suit are respectively entitled to a month to declare, plead, reply, rejoin, etc., and the plaintiff is entitled to a rule to reply to the defendant's plea to the amended declaration. *Manufactures', etc., Bank v. Mathews*, 3 W. Va. 26. See the title PLEADING.

G. EVIDENCE.

See generally, the titles DOCUMENTARY EVIDENCE; EVIDENCE; PAROL EVIDENCE; WITNESSES.

1. Presumptions and Burden of Proof.

See ante, "Consideration," II, B; "Presumptions in Holder's Favor," VII, C; "Presumptions in Regard to Payment," X, A, 8.

It lies upon the party seeking to enforce a bill or note, to account for any alteration that appears on the face of the instrument. *Piercy v. Piercy*, 5 W. Va. 199.

2. Necessity of Producing Instrument in Evidence.

In an action on a negotiable note, the note is a necessary part of the plaintiff's evidence, and there can be no judgment for the plaintiff without the production of the note. If judgment be rendered for the plaintiff, and a writ of error awarded to that judgment, the record certified to the appellate court can alone be looked to to ascertain what evidence was introduced in the trial court. In an action on a note where the record failed to disclose the fact that the note was offered in evidence in the trial court the judgment was reversed. The appellate court will never presume what the record fails to disclose. *Davis v. Poland*, 92 Va. 225, 23 S. E. 292.

In a proceeding by an assignee of a note against a remote assignor to recover on the implied contract of assignment, the note is a necessary piece of evidence for the plaintiff in order to prove the assignments, and also to show the measure of the plaintiff's recovery. In the absence of proof to the contrary the law presumes that the assignor received for the note a sum equal to that specified in it. The fact that the note was seen and inspected by the court need not appear in the entry of the judgment, but the appearance of it does not vitiate the judgment, nor show that the judgment was rendered on the note, and not on the

contract implied from the assignment. *Long v. Pence*, 93 Va. 584, 25 S. E. 593. See the title ASSIGNMENTS, vol. 1, p. 745.

Recovery of Lost Instruments.—See the title LOST INSTRUMENTS AND RECORDS.

3. Competency of Witnesses.

See the title WITNESSES.

Husband and Wife as Witnesses.

Where a husband and wife are joint makers of a negotiable note, neither party is a competent witness in an action on the note although no relief is prayed for in the bill as against the husband. In such case the payee is also incompetent. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799. See the title HUSBAND AND WIFE.

In Action against Survivor of Two Joint Makers.—And under § 3, ch. 130, W. Va. Code, as amended by acts of 1882, neither the plaintiff, nor a person for whose benefit a suit is brought, is a competent witness against a defendant, who is the survivor of himself and a deceased party who with him, was a joint maker of the promissory note on which the action was brought, in regard to any personal transactions or communication, between either of them, and such deceased party. *Heffebower v. Detrick*, 27 W. Va. 16.

Where one whose name appears on the back of a nonnegotiable note as second indorser is dead, the payee and first indorser can not give evidence against his estate of a personal transaction with him to show that he in fact became bound as joint promisor with, or guarantor for, the maker, because of his incompetency under § 23, ch. 130, W. Va. Code, 1899. *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154.

Indorser as Witness in Action against Maker.—But an indorser of a note, whether negotiable or not, is a competent witness in a suit between the holder and maker, to prove that the note was given for a usurious con-

sideration. And where a joint action of debt was brought against the drawers and indorsers, under the act of the assembly allowing a joint action in such case, it was held, that one of the indorsers could not render himself a competent witness, by a confession of judgment. *Taylor v. Beck*, 3 Rand. 316.

Maker as Witness Where Payee Is Dead.—Payee being dead, maker is not competent to testify in his own favor in action on the note, no person having an interest adverse to maker's having previously testified to some fact occurring before payee's death. Acts 1876-77, ch. 256, p. 265. *Wells v. Ayers*, 84 Va. 341, 5 S. E. 21.

Drawer of Bill Accepted for Accommodation.—A drawer of a bill for whose accommodation it has been accepted, is not a competent witness for the acceptors, in an action thereon by the holder against them. *Ford v. Nichols*, 3 Gratt. 88.

Agent.—If one, as agent for another, purchase a bill of exchange, and indorse it to his principal, the latter may call the agent as a witness, if he first prove that he was an agent merely, or give him a release. *Murray v. Carret*, 3 Call 373.

Parties Interested.—A negotiable note was indorsed by several parties for the accommodation of the drawer, and at the maturity the last indorser had to take it up. He, thereupon, brought an action against his immediate indorser. At the trial the defendant offered as a witness, the indorser immediately preceding him on the note, to prove that all of the indorsers had agreed at the time of the execution of the note, to share equally the liability of loss on the note, should any occur, and that, as between themselves, they would be bound as joint securities only, and not be liable the one to the other as successive indorsers of negotiable paper. The trial court held that whether the plaintiff

recovered or not, the witness' interest would be the same except as to the costs, which the plaintiff might recover of the defendant, and that the witness might therefore testify, if the defendant would release him from all liability for costs. While the release was being prepared, it was discovered that the plaintiff had paid the money on the note more than five years before the trial, and hence, that if he failed to recover of the defendant in this suit, his recourse against the witness would be barred by the statute of limitations, and the witness was not permitted to testify. Upon a writ of error it was held, that, the right of the witness to plead the statute in such an event, disturbs his equality of interest (if such equality existed before) in the subject matter of this suit, and rendered him incompetent to testify, but his competency might be restored by an entire release to him, by the defendant, of all claim against him on account of his indorsers. *Chapman v. Hiden*, 2 Pat. & H. 91.

In an action of debt against the maker and prior indorsers of a negotiable note, they pleaded jointly nil debet and usury. Before the trial the maker confessed a judgment, and there was a final judgment entered against him; and the two prior indorsers released him from all liability to them. As the maker was liable to the two last indorsers under the statute (Va. Code, 1887, ch. 146, § 6, p. 587), for five per cent. damages for any amount of the debt they might have to pay, he was held not a competent witness for the defendants to prove usury. *Mills v. Central Savings Bank*, 16 Gratt. 94.

Maker an Incompetent Witness to Prove Usury.—In an action for debt against the maker and four indorsers of a negotiable note, they pleaded jointly nil debet and usury. Before the trial the maker confessed a judgment, and there was a final judgment entered against him, and the three in-

dorsers released him from all liability to them. The maker was held still liable to the fourth indorser, and was not a competent witness for the defendants to prove usury. An agreement by the plaintiff not to take a judgment against the last indorser unless he recovered against all, did not release him so as to render the maker a competent witness when released by the prior indorsers. *Hogshead v. Baylor*, 16 Gratt. 99.

4. Admissibility.

See the titles DOCUMENTARY EVIDENCE; EVIDENCE; PAROL EVIDENCE.

Admissibility of Bill of Exchange.—

In *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526, it was held, that bills of exchange drawn by the defendant on its agent, in favor of the plaintiff and described with particularity in the bill of particulars filed with the declaration containing the common counts, ought to be received in evidence on the trial of the issue of nonassumpsit.

Admissibility of Unstamped Instruments.—A bill or note not stamped as required by act of congress, may nevertheless be admitted in evidence in a United States court, if the omission to stamp it was not due to a fraudulent intent. *Hale v. Wilkinson*, 21 Gratt. 75.

And it is always admissible in an action brought in a state court, the act of congress not applying to proceedings in state courts. *Hale v. Wilkinson*, 21 Gratt. 75.

Under the act of 1812, requiring negotiable notes to be stamped, a note, negotiable at a bank, might be given in evidence if duly stamped, before it became payable, though not so stamped when it was executed. *Hannon v. Batte*, 5 Munf. 490.

A revenue law of a state, which requires a stamp upon the indorsement of an overdue bill or note before such indorsement can be given in evidence, is a local law and has no extraterritorial

effect. Such note may be given in evidence in the courts of another state although unstamped, as the laws of one state can furnish no rule of evidence for the courts of another. *Lambert v. Jones*, 2 Pat. & H. 144.

In *Crews v. Farmers' Bank*, 31 Gratt. 348, revenue stamps were placed upon a note by a collector of revenue more than a year after it was made. This could only be done upon the payment of a penalty of \$50. It was held, that the payment of a penalty did not tend to show that the failure to affix the stamp when the note was made was with an intent to evade, the law, and the note was admissible in evidence.

Evidence of Failure to Stamp May Be Shown under General Issue.—Evidence that a note sued on was not stamped as required by law may be given under the general issue in debt, *Crews v. Farmers' Bank*, 31 Gratt. 348.

5. Weight and Sufficiency.

Weight of Check as Evidence.—In an action of assumpsit a check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiff to recover on those counts. But it is only prima facie evidence of money lent, paid and advanced, or had and received; and when it is proved that no money had come into the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts. *Blair v. Wilson*, 28 Gratt. 165.

Check Presumed to Be Given in Payment of Debt.—And a check upon a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of the check. Though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by

the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the implication and to establish the contrary fact. *Terry v. Ragsdale*, 33 Gratt. 342; *Blair v. Wilson*, 28 Gratt. 165.

Weight of Evidence a Question for the Jury.—The weight of evidence is in all cases a question for the jury, and it is improper for the court to pass upon the weight of evidence, as this would be usurping the functions of the jury. Thus in an action on a promissory note, the court if requested, should instruct the jury, that twenty years having elapsed between the time when the note became due and the institution of the action, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, in the twenty years. The court can not be justified in refusing to give such instruction on the ground that the defendant has not stated the evidence given in the cause in his application; or that in the court's opinion the said principle of law does not apply to the case, under the circumstances appearing in evidence; for this would be undertaking to judge of the weight of evidence. *Wells v. Washington*, 6 Munf. 532.

H. VARIANCE.

See the title VARIANCE.

Variance as to Amount.—A count in a declaration on a promissory note which alleged that the maker, by his promissory note, promised to pay the plaintiff \$6,000 (meaning, and intending thereby \$4,000), by reason whereof he became liable to pay \$4,000, was held bad on general demurrer. *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

But it has been held, that if the demand in the declaration in an action of debt be for less than the right of

recovery shown by the note described in it, it would be disregarded on demurrer by reason of § 29, ch. 125, W. Va. Code; 1899, and as the variance does not aggrieve the defendant, but is to his benefit; and also, in the absence of a demurrer, it is cured after judgment by § 3, ch. 134 of the Code of West Virginia of 1899. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197 (1893).

Where the defendant in an action of debt on a note files the plea of nil debet, the note produced in evidence must correspond with that described in the declaration. A note was described in the declaration as a note for three hundred and forty-two dollars payable two months after the date thereof, and the note offered in evidence was for three hundred and forty-two dollars and twenty-five cents, payable sixty days after date. This was held, to be a fatal variance and the note was not admissible in evidence. *Scott v. Baker*, 3 W. Va. 285.

Variance as to Seals.—An action of debt was brought upon an instrument, which was in form a promissory note for money, and which concluded "witness the hands" of the parties, but no actual seal was attached to the instrument, scrolls being placed opposite to the signatures and used by way of seals. This instrument was held rightly described in the declaration as a promissory note. *Peasley v. Boatwright*, 2 Leigh 195. See the title SEALS AND SEALED INSTRUMENTS.

Variance as to Time of Delivery.—A declaration on a negotiable note, stated the indorsement and delivery as at the time of the making; and the proof was that the delivery was after the note fell due. This was held, no variance; and if it was, could only be taken advantage of at the trial by a motion to exclude the evidence, or to instruct the jury to disregard it. *Davis v. Miller*, 14 Gratt. 1.

Variance in Describing Joint and Several Note as Several.—If a declaration describe a note of several parties as several, while the note is joint and several, and no objection is made on account of the variance before judgment, though it be rendered on demurrer to evidence, it is unavailing to reverse the judgment, by reason of § 3, ch. 134, of the Code of West Virginia of 1899. *Long v. Campbell*, 27 W. Va. 665, 17 S. E. 197 (1893).

Variance as to Names.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

A middle name is generally no part of the name of a person and if there be a variance as to the middle name of the payee of a note, between the description of the note in the declaration and the note itself, and such variance would even be deemed material, and it is not taken advantage of in some way before judgment, it will not be ground for reversal of the judgment. This is so, though the judgment was rendered upon defendant's demurrer to the plaintiff's evidence. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

It is no cause for demurrer, in an action of debt on a negotiable note, that a party defendant is described in the declaration as "H. D. McClintic." If there be any misnomer it should be pleaded in abatement, or the defendant on his own motion and affidavit should have the declaration amended by inserting the proper name. *Handley v. Ludington*, 4 W. Va. 53.

Variance as to Demand and Notice.—An allegation in a declaration against the indorser of a note of a demand and notice is sustained by a proof of a promise to pay after maturity by the indorser. *Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 174.

But where a declaration upon a note is special, and avers demand and notice to the indorser, the plaintiff may prove at the trial that the note was made

and discounted for the accommodation of the indorser, and that he received the proceeds. The plaintiff may recover in the action, though no notice, or an insufficient notice, was given to the indorser. *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

Recovery on Implied Promise.—In an action against a firm on the express promise evidenced by their notes and the indorsement thereof, there can be no recovery upon the implied promise arising from the use of the proceeds of the notes by the firm. The allegation and proof must correspond. *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203.

I. QUESTIONS OF LAW AND FACT.

In an action on notes, an instruction which submits to the jury the legal effect of the notes is bad, as it is for the court and not for the jury to determine the legal effect of written instruments. *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203. See ante, "Diligence in Serving Notice a Question of Law," VIII, D, 3, e.

J. JUDGMENT.

See the titles JUDGMENTS AND DECREES; FORMER ADJUDICATION OR RES ADJUDICATA.

When Final Judgment May Be Entered and When Writ of Inquiry Necessary.—A final judgment, when no plea is filed, may be rendered in the office at rules, for principal and interest, when the action is founded upon any instrument in writing for the payment of an ascertained sum of money. But where the plaintiff showed by a paper filed by himself, that the defendant was entitled to a credit, the judgment ought to have been entered subject to such credit, or if the plaintiff refused to take judgment in that way, a writ of inquiry should have been awarded; and where a judgment in such case was entered without the allowance of such credit, and without awarding a

writ of inquiry, this was held reversible error. *Rees v. Conococheague Bank*, 5 Rand. 326.

Where a joint action is brought against the drawer and indorsers of a negotiable note, an office judgment can not be confirmed against all, or either of the defendants, without a writ of inquiry. In a suit against the drawer alone, a judgment might be rendered against him without the writ of inquiry, but when he is sued with the indorser, no judgment can properly be given finally against him, until a final judgment is also given against all of the defendants. *Hatcher v. Lewis*, 4 Rand. 152; *Metcalf v. Battaile*, Gilmer 191.

A negotiable note is not considered to be a writing for the payment of money as to the indorser, but it is only a collateral contract to pay it under certain circumstances, and judgment against the indorser without the intervention of a jury is improper. *Metcalf v. Battaile*, Gilmer 191. See the titles DEFAULTS; INQUESTS AND INQUIRIES; JUDGMENTS AND DECREES.

Judgment against Some and in Favor of Others.—In an action of debt by the holder of a negotiable note, against the maker and the four indorsers, upon the plea of usury by the indorsers, the jury found that the note was indorsed by the first three indorsers, for the accommodation of the maker, and was sold by him to the fourth indorser, at a usurious rate of interest; who afterwards and before it became due, indorsed it to the holder, for value. It was held, that upon this verdict, the court should render a judgment in favor of the maker and the first three indorsers, and against the fourth indorser, under Va. Code, 1887, ch. 177, § 9, p. 733. *Moffett v. Bickle*, 21 Gratt. 280.

An action of debt was brought under the statute, against the drawer and indorser of a protested negotiable note.

Upon a demurrer by both defendants to the evidence offered by the plaintiff, in which demurrer the plaintiff joined, the court gave judgment against one defendant and in favor of the other. *Raine v. Rice*, 2 Pat. & H. 529.

Judgment against Parties Served with Process.—In a joint action against two makers and an indorser of a negotiable note, process was served upon one of the makers and the indorser, but was returned again and again as to the other maker, "not found" or "no inhabitant." Upon a discontinuance of the action as to this maker, he was not thereby released from his liability on the note, and therefore the indorser was not released; and the plaintiff was held entitled to judgment against the indorser and the maker who had been duly summoned. *McVeigh v. Bank of Old Dom.*, 26 Gratt. 785.

Discontinuance as to One Defendant Does Not Affect Judgment against Others.—A joint action was brought against two partners as makers of a negotiable note, and two other parties as indorsers. One of the partners filed a plea of nil debet, which plea was sworn to. On the motion of the plaintiff's counsel the cause was discontinued as to the party so pleading. The other parties not appearing, judgment was given against them by default. This judgment was held to be a valid judgment against the other parties, as the discontinuance of the action as to one of the parties did not amount to retraxit. A retraxit can only be entered by the plaintiff in person, and in open court. *Muse v. Farmers' Bank*, 27 Gratt. 252. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

Confession of Judgment.—Where two persons were indorsers at a bank for third parties who are insolvent, and, for the purpose of gaining an extension, one of the indorsers confessed judgment for the whole amount for which he was liable, the third parties

agreeing to give certain other collateral security; and to procure the other indorser to likewise confess judgment, neither of which was done, it was held that the first indorser was liable on his confession of judgment, even though the bank had promised to obtain judgment against his coindorser, such promise being void. *Kelly v. Taliaferro*, 82 Va. 801, 5 S. E. 85. See the title CONFESSION OF JUDGMENTS.

Conclusiveness of Judgment against One Indorser as to Others.—A judgment obtained against a subsequent indorser is not conclusive against a prior indorser; but in order to make him responsible, where the subsequent indorser has paid the debt, his liability must be fixed as though no judgment had ever been obtained. When such liability is fixed, a security of the subsequent indorser in a forthcoming bond, is entitled to be subrogated into the shoes of his principal to the extent of that liability. *Conaway v. Odbert*, 2 W. Va. 25.

In a suit upon a note against the maker and indorser, a decree was rendered in favor of the first indorser; but it not appearing upon the face of the record, nor by extrinsic evidence, that the adjudication was upon the merits and that it decided the re-

spective rights of the indorsers as between themselves, it was held, that the surety of the second indorser, who had been compelled to pay the note, was not estopped by that adjudication from recourse against the first indorser. *Chrisman v. Harman*, 29 Gratt. 494. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

Judgment Including Interest.—The interest being included in the note, if there is a decree for the payment of the note, it is proper to decree interest on the whole amount. *Kraker v. Shields*, 20 Gratt. 377. See the title INTEREST.

Where in action of debt on a check, declaration demands a sum certain and interest, there is a verdict for "the amount of the debt in the declaration mentioned;" it was held, that the judgment may be for "the principal and charges of protest with interest thereon from the date of such protest." Va. Code, 1887, § 2853. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

Where Void Judgment Is Rendered Note Is Still Good.—Though the judgment upon a note rendered by the court not having jurisdiction of the case is void, the note is still a valid security. *Linn v. Carson*, 32 Gratt. 170. See the titles JUDGMENTS AND DECREES; JURISDICTION.

Bill to Enforce or Impeach Decrees.

See the title JUDGMENTS AND DECREES.

Bill to Perpetuate Testimony.

See the title DEPOSITIONS.

Bill to Quiet Title.

See the title QUIETING TITLE.

Bill to Remove Clouds.

See the title QUIETING TITLE.

Binding Out.

See the title APPRENTICES, vol. 1, p. 684.

Binding over to Keep the Peace.

See the titles BAIL AND RECOGNIZANCE, ante, p. 196; BREACH OF THE PEACE.

Birth.

See the title CONCEALMENT OF BIRTH OR DEATH.

Birth During Coverture.

See the title CURTESY.

Births and Deaths.

See the titles CONCEALMENT OF BIRTH OR DEATH; DOCUMENTARY EVIDENCE; PEDIGREE.

Blacklisting.

See the titles BOYCOTT; CONSPIRACY; MASTER AND SERVANT.

Blackmailing.

See the title EXTORTION.

Blacksmith Shop.

See the title NUISANCES.

Blank Endorsements.

See the title BILLS, NOTES AND CHECKS, ante, p. 401.

Blanks.

As to whether filling blanks in written instruments constitutes an alteration, see the title ALTERATION OF INSTRUMENTS, vol. 1, p. 312.

As to effect of blank endorsements, see the title BILLS, NOTES AND CHECKS, ante, p. 401.

Blasphemy.

See Va. Code, 1904, § 3798; W. Va. Code, 1899, ch. 149, § 15.

Blasting.

See the titles EXPLOSIVES; NUISANCES.

Blind Persons.

See the titles HOSPITALS AND ASYLUMS; NEGLIGENCE; RAILROADS.

BLOCKADE.—In *Grinnan v. Edwards*, 21 W. Va. 356, it is said: "A blockade, is the exercise of a belligerent right; before a blockade can be declared, a war must exist; and a blockade lawfully declared, is conclusive evidence that a state of war exists between the nation declaring such blockade, and the nation whose ports are blockaded."

BLOOD STAINS.

I. Blood Stains an Indicia of Homicide, 501.

II. Admissibility of Evidence Respecting Blood Stains, 501.

- A. General Rule, 501.
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As to admission in evidence of blood stained clothing obtained from the accused by the sheriff, see the title CRIMINAL LAW.

I. Blood Stains an Indicia of Homicide.

"Stains of blood found upon the person or clothing of the party accused have always been recognized among the ordinary indicia of homicide." *State v. Henry*, 51 W. Va. 283, 41 S. E. 444.

II. Admissibility of Evidence Respecting Blood Stains.

A. GENERAL RULE.

"It is the constant practice upon trials for murder to admit evidence of the presence of blood spots upon clothing of the prisoner, or the deceased, or at the scene of the tragedy." *State v. Henry*, 51 W. Va. 283, 41 S. E. 439; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639. See also, *Barbour v. Com.*, 80 Va. 290; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

B. MICROSCOPIC EXAMINATION OR CHEMICAL ANALYSIS UNNECESSARY.

It is not essential to the competency

of evidence respecting spots supposed to be blood stains that it be established by microscopic examination or chemical analysis that the marks are blood stains. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439; *Barbour v. Com.*, 80 Va. 290. See also, *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

The evidence may be sufficient to show that, stains or spots are blood stains or that a substance supposed by the witness to be blood, was blood when no analysis of the substance, no chemical test or no microscopic examination has been made. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

C. TESTIMONY OF WITNESSES.

1. General Rule.

The practice of identifying blood stains by the inspection of witnesses has the sanction of immemorial usage in all criminal tribunals. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

"Any witness, expert or nonexpert

may testify that the stains resembled blood." *State v. Henry*, 51 W. Va. 283, 41 S. E. 439; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639. See also, *Barbour v. Com.*, 80 Va. 290; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. See post, "Testimony of Experts," II, C, 3; "Testimony of Nonexpert Witnesses," II, C, 4.

That Stains Are of Human Blood.—Testimony tending to show that blood spots on the clothing of an accused person or of the deceased or at the scene of the crime are the stains of human blood and the blood of the deceased is admissible. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. See post, "Province of Court and Jury," III; "Instructions," IV.

2. Primary Evidence.

"Proof of the character and appearance of the stains by those who saw them has always been regarded by the court as primary and legitimate evidence." *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. See the title BEST AND SECONDARY EVIDENCE, ante, p. 355.

3. Testimony of Experts.

See the title EXPERT AND OPINION EVIDENCE.

The testimony of experts as to the character of marks supposed to be blood stains or on a question of blood stains may be admissible in evidence. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639. See also, *Barbour v. Com.*, 80 Va. 290; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. See ante, "General Rule," II, C, 1.

Evidence that spots supposed to be blood stains, "when treated by chemicals under the microscope, give precisely the same appearance and changes as were observed by treating known blood stains in the same way," is competent. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

In *State v. Baker*, 33 W. Va. 319, 10 S. E. 639, a microscopist, who had examined certain stains found on the trousers of the accused, testified as follows: "There were strong indications of the presence of blood, but not conclusive enough to justify me in swearing there was blood. I examined the scrapings from suspected spots under the action of chemicals. I wanted to get undoubted blood corpuscles detached, to obtain the hæmin crystals of Teichman. * * * The spots, when treated by chemicals, under the microscope, give precisely the same appearance and changes as were obtained by treating known blood stains in the same way. These are indications, not actual proof. My best judgment is that there was blood on the pants, but would not swear there was, without the additional confirmatory proof I was searching for."

"Ewell, in his *Medical Jurisprudence* (p. 260), says: 'Of all the tests for blood given in this connection, the discovery of red blood corpuscles by the microscope, and the microspectroscopic examination above described, alone seems to be without fallacy.'" *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

"As to this test, Ewell, *Med. Juris.* 248, says: 'Teichmann's test has been shown to be liable to considerable uncertainty, for the reason that spots of human blood, or even the fluid itself, in appreciable quantity, may fail to yield any hæmin crystals whatever, or only such as are of so indefinite a character as to be utterly worthless for diagnosis.'" *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

Direction of Flow of Blood.—It seems that it is competent for witnesses to testify as to the direction of the flow of blood as indicated by the wounds, the position of the body and the appearance of blood or of the blood stains themselves; in short, by the whole appearance. Thus in a trial for

murder where the deceased person was killed by blows on the head the following question was asked of a physician, who testified for the state, to wit: "From the character of the wounds that you observed, having noted the fact that there was coagulated blood, indicating that the person was warm when the blows were struck, could it have been possible for her to have stood up or have been held in an upright position, without blood having flowed down, under her garments, on her person?" He answered, "No." The admission of this testimony was held not to be error. The court says: "This witness was a physician who examined the wounds, and was competent from his profession to judge from their character whether the escape of blood would be large or small in quantity, so as likely to be apparent on the person of the deceased below the neck. I am not prepared to say that one not a physician would not be competent to express this opinion. The wounds, the blood over the head, and on the bed, the floors, and wherever it appeared, to one present and seeing the whole appearance would enable him to be better able to form an opinion as to the probability of blood appearing below the neck of the deceased than a jury could form from description of the appearances at the scene of the murder, because of the inability of witnesses, by mere words, to present fully and accurately that appearance." *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. See post, "Testimony of Nonexpert Witnesses," II, C, 4.

4. Testimony of Nonexpert Witnesses.

See the title EXPERT AND OPINION EVIDENCE.

Opinion That Spots Were Blood Spots.—"Witnesses not medical men may give their opinion as to whether certain spots were blood spots. The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it,

belong to the same legal grade of evidence; and, though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal." *State v. Henry*, 51 W. Va. 283, 41 S. E. 444; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. See also, *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *Barbour v. Com.*, 80 Va. 290; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. See ante, "General Rule," II, C, 1.

"It is not necessary to the competency of such evidence that the spots be first shown by expert testimony and chemical analysis to be blood spots." *State v. Henry*, 51 W. Va. 283, 41 S. E. 455. See also, *Barbour v. Com.*, 80 Va. 290.

A witness may give his opinion that stains seen by him are blood stains, and that a certain large stain seen by him upon bedclothing was the stain of a pool of blood. *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

When the evidence shows that the coat worn by the accused, when with the deceased just before the killing, was found hidden in the prisoner's room between the mattress and the slats of his bed, and there are spots on it which might have been made by the blood of the deceased, and on other clothing of his worn at the same time similar spots are found, and the mode of the killing was such as makes it probable that the blood of the victim did splatter upon the clothing of the murderer, a witness who saw the spots soon after the murder may testify that he supposed the spots were blood stains, as the statement is nothing more than his opinion, and that is all he could state with certainty. *State v. Henry*, 51 W. Va. 283, 41 S. E. 455.

In *State v. Henry*, 51 W. Va. 283, 41 S. E. 455, a witness was permitted to point out certain marks or stains on the coat and say "that there were very small splotches; that is I suppose they was blood, they looked to be blood,

here is some of the small marks here now."

When Spots Are Obviously Blood.—

"The hand of the accused appearing immediately after the homicide to be stained on the inside and the outside, and daubed between the fingers with blood, and the knife in his pocket, with which the killing was done, being smeared with blood, so that it came off on the hands of all who touched it; the evidence of these facts was properly admitted, without any chemical analysis to ascertain the obvious and indubitable fact that it was blood, and not simply something else that looked red, and looked like blood without really being blood." *Barbour v. Com.*, 80 Va. 290. See ante, "Microscopic Examination or Chemical Analysis Unnecessary," II, B.

That Spots Are in Fact Blood Stains.

—"In *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636, it was held, that a nonexpert may testify that spots which he had seen were blood spots. The witness testified that a short time after the commission of the crime he had seen spatters or spots under stones, and, after saying he could testify as a matter of fact what the spots were, he was asked so to state. The court informed him that his opinion was not requested, and he would only be allowed to answer as a fact what the substance was. He then answered that it was blood. In the court of appeals, *Miller, J.*, said of the competency of this evidence: 'In regard to the second ground, we think that the witnesses were competent to testify upon the subject whether the spots described were blood, without deciding the question whether an opinion of the witnesses would have been competent.'" *State v. Henry*, 51 W. Va. 283, 41 S. E. 444.

Change of Appearance of Spots.—

"As the time would naturally change the appearance of those spots, it was proper to introduce a witness to show what their appearance had been eight

months before." *State v. Henry*, 51 W. Va. 283, 41 S. E. 445.

"Without assuming that time would naturally change the appearance, it would be competent to show by the testimony of witnesses that the appearance had changed, and what it was at the time of the first examination." *State v. Henry*, 51 W. Va. 283, 41 S. E. 445.

D. CIRCUMSTANTIAL EVIDENCE.

The practice of identifying blood stains by circumstantial evidence has the sanction of immemorial usage in all criminal tribunals. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. See the title CIRCUMSTANTIAL EVIDENCE.

E. INSPECTION OF BLOOD STAINS BY THE JURY.

See post, "Province of Court and Jury," III.

The practice of identifying blood stains by the inspection of the jurors has the sanction of immemorial usage in all criminal tribunals. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

It is not error to allow the jury to inspect instruments used in the commission of the crime and the clothes of the prisoner, bearing marks which the evidence shows may be blood stains, without it having been established, by microscopic examination or otherwise, that the marks are blood stains. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. See ante, "Microscopic Examination or Chemical Analysis Unnecessary," II, B.

Production of Blood Stained Coat.—

When the evidence shows that the coat worn by the accused, when with the deceased just before the killing, was found hidden in the prisoner's room between the mattress and slats of his bed, and there are spots on it which might have been made by the blood of the deceased, and on other clothing of his worn at the same time similar spots are found, and the mode of the killing was such as makes it probable that the

blood of the victim did splatter upon the clothing of the murderer, such clothing may be produced at the trial for the inspection of the jury. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

If there had been no testimony at all from any witness to the effect that the spots upon it appeared to be blood stains, but, as a matter of fact, there were spots upon it which might have been made by the blood of the deceased, it was proper for the jury to examine this coat in connection with the circumstances shown by the evidence. *State v. Henry*, 51 W. Va. 283, 41 S. E. 445.

Blood Stained Hammer.—The wounds on the head of a deceased person were such as might have been inflicted with a hammer. A day or two after the commission of the crime a hammer which had some hairs and what appeared to be blood stains on it, was found in a field adjoining that in which the body was found. The blood stains and hair found on it and the nature of the wounds tended to show that it was the instrument with which the killing had been done. It was proper, therefore, to introduce in evidence the hammer. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

III. Province of Court and Jury.

Competency a Question of Law.—The competency of testimony as to the presence of blood stains, as to the character of marks supposed to be blood spots, or of evidence on a question of blood stains is a question for the court. *State v. Henry*, 51 W. Va. 283, 41 S. E. 445; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

The competency of evidence in respect to blood stains is the only thing the court has to do with it. *State v. Henry*, 51 W. Va. 283, 41 S. E. 445.

Questions for the Jury.—Whether certain spots or stains seen by the witnesses and testified to as resembling blood are in fact blood stains is a ques-

tion of fact for the jury. It is for the jury to say whether the testimony satisfies them beyond a reasonable doubt that the spots seen by the witnesses were blood. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. See the title REASONABLE DOUBT.

The degree of force to which evidence in respect to blood stains is entitled may depend upon a variety of circumstances, to be considered and weighed by the jury in each particular case. *State v. Henry*, 51 W. Va. 283, 41 S. E. 444.

When as a matter of facts there are spots upon the clothing of the accused which may have been made by the blood of the deceased it is for the jury to give the fact of the existence of such spots such weight as, in their judgment, it is entitled to under all the circumstances shown by the evidence. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

Whether Blood Be Human Blood.—It is for the jury to say whether blood found on the clothes of the accused is human blood and they may so find in the absence of the establishment of that fact by a microscopic examination. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439; *Barbour v. Com.*, 80 Va. 290. See also, *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. See ante, "General Rule," II, C, 1.

IV. Instructions.

It is not error to refuse to instruct the jury that they are not permitted to say blood found on the clothes of the accused, is human blood, in the absence of the establishment of that fact by a microscopic examination. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. See also, *Barbour v. Com.*, 80 Va. 290; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. See ante, "General Rule," II, A.

Board of Aldermen.

See the title MUNICIPAL CORPORATIONS.

Board of Ballot Commissioners.

See the title ELECTIONS.

BOARD OF CANVASSERS.—In *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165, it is said: "The **board of canvassers** is merely a body to canvass the returns of elections for public officers, acting simply on the certificates sent from voting precincts by certain officers holding the election, and re-counting ballots when demand is made. They may send for those precinct officers to ascertain the true result; but they hear no contests judicially, no evidence of fraud in the election." See also, the title ELECTIONS.

Board of County Commissioners.

See the title COUNTIES, and references given.

Board of Directors.

See the title CORPORATIONS, and references given.

Board of Education.

See the title SCHOOLS.

Board of Health.

See the title HEALTH.

Board of Pardons.

See the title PARDON.

Board of Public Works.

See the titles COUNTIES; MUNICIPAL CORPORATIONS; STATE.

Board of Supervisors.

See the titles APPEAL AND ERROR, vol. 1, p. 663; COUNTIES; ELECTIONS.

Board of the School Fund.

See the title SCHOOLS.

Board of Visitors.

See the title COLLEGES AND UNIVERSITIES.

Boats.

See the title SHIPS AND SHIPPING.

BODILY INJURY.—In *State v. Porter*, 25 W. Va. 689, it is said: "The words, 'inflict any punishment,' **bodily injury**, 'destroy,' and 'injure,' all contemplate acts of trespass."

Body Execution.

See the titles EXECUTIONS AGAINST THE BODY; IMPRISONMENT FOR DEBT.

BONA FIDE PURCHASER.—See the titles ADVERSE POSSESSION, vol. 1, p. 199; BILLS, NOTES AND CHECKS, ante, p. 401; IMPROVEMENTS; JUDICIAL SALES; SALES; SHERIFFS' SALES; TAXATION; VENDOR AND PURCHASER.

In *Morehead v. Horner*, 30 W. Va. 548, 4 S. E. 450, it is said: "The law is well settled that the purchaser of an equitable title can never claim the rights of a **bona fide purchaser**. The simple fact that his vendor has no legal title is of itself sufficient to give him notice that he is purchasing an imperfect title and to deprive him of the character of a **bona fide purchaser** and the protection which the law accords to such purchaser. *Poe v. Paxton*, 26 W. Va. 607; *Richards v. Fisher*, 8 W. Va. 55; *Coles v. Withers*, 33 Gratt. 186; *Vattier v. Hinde*, 7 Pet. 252, 271."

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I. Scope of Title.

The scope of this title will extend only to such instruments under seal as, by the common law, are technically designated bonds, whereby a person obligates himself, absolutely or conditionally, to pay a sum of money; their nature, requisites, validity, construction, operation and effect; the negotiability and transfer of such instruments; the rights of parties and third persons in respect to such instruments, and actions on the same. Statutory, official and government bonds, bonds of special classes of persons, corpora-

tions or institutions, bonds incident to particular transactions, the rights of principal and surety, promissory notes under seal, questions relating to the assignment of bonds, and rights thereunder, will be found fully treated under other specific titles in this work, corresponding to the particular class of bonds in question or the nature of the question arising.

II. Definition and Nature.**A. DEFINITIONS AND DISTINCTIONS.**

General Definitions.—A "bond" is

defined to be an obligation under seal, and is either single or conditional. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

"A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. 2 Black. Com. 346." *Preston v. Hull*, 23 Gratt. 600.

Common Law and Statutory Bonds Defined and Distinguished.—A common-law bond, whether single or conditional, is one voluntarily executed in the absence of any statutory authority requiring the same to be executed, prescribing the penalty or condition thereof. Such bonds, unless executed for a consideration *malum in se* or *malum prohibitum*, or the same be in violation of public policy, or be in special cases declared void, are valid, and bind the obligors to the extent and according to the terms and conditions of the bond. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

A statutory bond is one required by statutory authority by state, county, district, or municipal officers, by fiduciaries appointed, created, or recognized by law, or by parties in judicial proceedings, or by officers and agents of private corporations, taken in pursuance of authority conferred on them by their charters or general law. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

The chief distinction between statutory and common-law bonds is that the obligee in the former is entitled to all the special privileges, remedies, and processes which are granted by the statute while the common-law or voluntary bonds stand upon the ground of any other contract introduced in a bond upon a condition between man and man. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

An instrument which stated that "after my death, for value received, I bind my heirs, executors, etc., to pay to my daughter, Frances E. Hood, the just and full sum of five thousand dol-

lars of my Virginia registered state bonds. As witness my hand and seal this 16th day of September, 1871. E. C. Haden, [Seal]," is not a testamentary act but a common-law obligation. *Hood v. Haden*, 82 Va. 588.

Bonds Distinguished from Deeds of Trust.—"There is a plain and important distinction between deeds of trust, executed as collateral security for the payment of simple contract debts, and bonds and deeds and other promises to pay under seal. The acknowledgment of the debt or obligation, in the deed, or bond, or other promise to pay, can have but one possible object or intention, to wit; the express or implied promise to pay; but the execution of a deed of trust, to convey specific property as security for a debt, or obligation, already subsisting, and the necessary recital of the debt, and words of reference to, and description of it, do not import a specific promise to pay, or create a debt or obligation of any higher dignity than the character of the debt intended to be secured." *Wolf v. Violet*, 78 Va. 57. See the title DEEDS OF TRUST.

B. NATURE.

Bonds are either single or conditional. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

A bond is single when the obligor obliges himself, his heirs, administrators, or executors, to pay a certain sum of money on a certain day. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

A bond is conditional when the obligor obliges himself, his heirs, etc., to pay a certain sum of money, upon condition that if he does some particular act the obligation shall be void. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

A bond with collateral condition is a bond to pay money with a condition annexed to be void, if a collateral stipulation to do or omit something be complied with. *Reynolds v. Hurst*, 18 W. Va. 648.

III. Form, Requisites and Validity.

A. PARTIES.

An obligor and obligee are essential to the existence and constitution of a bond. *Preston v. Hull*, 23 Gratt. 600.

A writing, though executed with all the solemnities of a deed, without an obligee, is a mere nullity. It imposes no liability upon the party issuing it. It confers no rights upon him who receives or holds it. It is not simply an imperfect deed; it is no deed at all. It only becomes a deed when the name of an obligee is inserted, and delivery made by the obligee or by some one legally authorized by him. *Preston v. Hull*, 23 Gratt. 600.

As to designation of parties in bonds, see post, "Designation of Parties," III, D, 3.

As to liability of obligors in bonds, see post, "As to Liability of Obligors," V, B.

B. SHOWING AS TO INTENTION OF OBLIGOR.

Necessity for.—To constitute a valid bond of a party, the intention to bind himself must appear on the face of the instrument. *Beery v. Homan*, 8 Gratt. 48.

Intention Inferred from Face of Paper.—The declaration counts on a bond by which defendant bound himself to pay. The bond offered in evidence is dated 2d September, 1837, and says for value received, 1st of March next, I bind my heirs, etc., to pay. Held, that from the face of the paper, it is to be inferred, the obligor intended to bind himself. There was, therefore, no variance in that respect. *Henderson v. Stringer*, 6 Gratt. 130.

C. CONSIDERATION.

1. Imported by Bond.

In the case of bonds the seal imports a consideration. *Harris v. Harris*, 23 Gratt. 737.

A seal, properly speaking, renders

a consideration superfluous and binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause. *Harris v. Harris*, 23 Gratt. 737.

As to the question of consideration in contracts generally, see the title CONTRACTS.

2. Want of Consideration.

In General.—Although the W. Va. Code, § 5, ch. 126, changes the common-law rule by allowing failure of consideration to be pleaded at law, it does not mention want of consideration, but leaves that as at common law; so neither at common law nor under the above section of the Code, can want of consideration be pleaded or shown at law. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 921.

In *Harris v. Harris*, 23 Gratt. 737, which was an action of debt upon a bond, the allegations of the plea showed that the bonds sued upon were originally without consideration. The court in holding that this was not a good plea said: "Such a defense can not be made to a specialty either at common law or under the statute. The seal imports a consideration, and a party can not avoid his solemn obligation under seal upon the ground of a want of consideration. That inquiry is precluded by the very nature of the instrument." See also, *Preston v. Hull*, 23 Gratt. 600.

In *Strother v. Strother*, 1 Va. Dec. 367, the court held, that supposing the bond in question to be considered, as was contended for the appellants, as made without valuable consideration, to be a mere voluntary obligation, yet such obligation was good and valid between the parties, and constituted a debt due by the obligor to the obligee.

Section 7, ch. 172, of the Virginia statutes, declares that "nothing in this chapter shall impair or affect the obligation of a bond or other deed deemed obligatory in law, upon any party

thereto or his representatives." *Harris v. Harris*, 23 Gratt. 737.

The words "failure in the consideration," as used in the Virginia and West Virginia statutes, refer to contracts where originally there was consideration subsequently failing, not to contracts wholly wanting consideration at their execution. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Harris v. Harris*, 23 Gratt. 737. See also, *Cunningham v. Smith*, 10 Gratt. 255; *Watkins v. Hopkins*, 13 Gratt. 743.

If a bond be given, without any consideration, but to be used as an article of traffic to raise money, the bona fide purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount. *Hansborough v. Baylor*, 2 Munf. 36.

A bond executed without consideration, for the purpose of being sold by the obligee for the benefit of the obligor, is of no obligatory force until it passes into the hands of a holder for value. *Harnsberger v. Geiger*, 3 Gratt. 144.

Effect as Invalidating Bond of Married Woman.—The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction, out of which a debt would have arisen, if she were a feme sole, except that her separate estate is not bound by a bond or covenant based on no consideration, such bond or covenant being void at law, and she not being estopped in a court of equity from showing that it was based on no consideration. *Hughes v. Hamilton*, 19 W. Va. 366.

3. Failure of Consideration.

At common law failure of consideration in a bond or other sealed document could not be shown at law. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

By statute, both in Virginia and West Virginia (Va. Code, 1904, §

3299; W. Va. Code, 1899, ch. 126, § 5), failure of consideration may be pleaded at law in an action on a bond. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Harris v. Harris*, 23 Gratt. 737.

Bonds for Price of Slaves Not Void for Failure of Consideration.—In *Henderlite v. Thurman*, 22 Gratt. 466, a bond was given in October, 1863 (subsequent to the emancipation proclamation), for the price of slaves purchased at a judicial sale. In an action on such bond it was insisted that the slaves were free by force of the emancipation proclamation; that the consideration had wholly failed, and that the contract was contrary to public policy. The court, however, held, that such bond was valid and binding, and might be enforced after the war and after the adoption of the thirteenth amendment to the constitution. This case was approved and affirmed on a similar state of facts in *Rives v. Farish*, 24 Gratt. 125.

The sale and delivery of slaves prior to 1861 passed the property in them to the purchaser, and was a valid consideration for a bond given for the price. The subsequent action of the government which liberated the slaves could not affect the validity of such bond nor bar a suit for the debt evidenced thereby on the ground of failure of consideration. *Matthews v. Dunbar*, 3 W. Va. 138.

Partial Failure of Consideration.—Where property is sold, a bond taken, suit brought, and the defendant pleads that the property was of less value than it was represented to be, such defense, sounding altogether in damages, is bad; and the proper remedy would be an action of deceit. *Tomlinson v. Mason*, 6 Rand. 169.

4. Illegality of Consideration.

In General.—Illegality of consideration in a bond or other sealed document may be shown at law. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

Confederate Treasury Notes as Consideration.—A special plea reciting that the consideration of a bond is confederate treasury notes, issued by an illegal association to overthrow the government of the United States, and for no other consideration whatever, presents an immaterial issue, and is rightly rejected. *Huffman v. Callison*, 6 W. Va. 301.

A plea is held to be bad, which sets up for defense, that a bond given in settlement or compromise of another bond, that was to be paid in confederate money, for a less sum, and in the settlement of the original debt, is illegal and void. *Jarrett v. Nickell*, 4 W. Va. 276; *Renick v. Correll*, 4 W. Va. 627. See also, *Beard v. Livesay*, 4 W. Va. 637.

J. sued N. on a bond; N. pleaded specially that the bond sued on was given in 1866, in lieu of one given in 1863, which latter was executed in pursuance of a debt payable in so-called confederate currency, and the consideration of which was wholly and entirely such currency, and the bond was, therefore, void; to which J. replied specially that the bond sued on was executed in consideration of the compromise of certain "disputes and difficulties" between them. To this replication the defendant demurred, and the demurrer was sustained, and judgment entered for N. Held, that the plea and replication were both bad, and the demurrer to the replication should have been sustained, the plea held bad, and judgment entered for J. *Jarrett v. Nickell*, 4 W. Va. 276.

In *Payne v. Bowlin*, 6 W. Va. 273, it was held, that in an action of debt on a bond a plea that the obligors of the bond and the obligee, being all parties to the paper, were officers in the service of the so-called confederate states of America, engaged in unlawful war against the United States of America, and that the sole consideration of said writing obligatory was

certain notes which were issued to maintain said unlawful war, constitutes no valid defense to the action.

"It has been heretofore held by this court, in the case of *Mathew W. Harrison, Ex'r, etc., v. Farmers' Bank of Virginia*, that this consideration unaccompanied by any unlawful purpose between the parties themselves, it being simply an ordinary business transaction, does not vitiate the paper, or present a bar to a recovery thereon. Such unlawful purpose is not here alleged, nor is it competent to infer it, as a conclusion of law from the averment merely that the parties to this paper, were all officers in the service of the Confederate States." *Payne v. Bowlin*, 6 W. Va. 273.

"But the plea still further avers that the said confederate notes were, on the first day of March, 1862, the day on which said bond was executed, of no value, and were utterly worthless outside of the military lines of said confederacy. Assuming this to be in itself a valuable averment, it is essential to give it effect, that the plea should still further aver that the confederate money was of no value anywhere, even if it were competent to aver a want of consideration to a bond. This not being averred in the plea, we must infer that the obligation to pay exists wherever the bond is found, according to its tenor and effect. With these views it is not seen how this plea can be sustained." *Payne v. Bowlin*, 6 W. Va. 273.

See, however, *Calfee v. Burgess*, 3 W. Va. 274, in which case the consideration of a bond was stated to be "money loaned," to which the defense set up was that the consideration was confederate treasury notes and therefore illegal and void, to which the plaintiff replied that the defendant was estopped by the bond from alleging any other consideration than that mentioned in it, and on demurrer to this replication the court below held the

law to be for the plaintiff. It was held, that a court ought not to lend itself to enforce a contract made in violation of law, nor allow a guilty party to effectuate his ends by pleading an estoppel to the truth of the case when the policy of the law forbids the transaction.

A conveyance of a pretended title to land is not void; and the bonds given for the purchase money for the same are valid. *Middleton v. Arnolds*, 13 Gratt. 489. See the title CHAMPERTY AND MAINTENANCE.

A bond for the sale of an office is void. *Noel v. Fisher*, 3 Call 215. See the title PUBLIC OFFICERS.

Bond in Violation of Law against Trading with Enemy.—W., a married woman, holding property to her own use under a marriage settlement, through a trustee, and residing in Illinois when the war broke out, went to Richmond in September, 1861, and to avoid the confiscation of her property by the Confederate government, executed her bond for \$1,600 to her kinswoman, G., who resided in Richmond, which on its face purported to be for the maintenance and education of the daughter of W., prior to January 1, 1861. G. brings suit on the bond and seeks to make the property of W., in the hands of her trustee, liable therefor. Held, that the bond is void by reason of being a transaction in violation of public policy and the law against trading with an enemy. *Wright v. Graham*, 4 W. Va. 430.

Usurious Consideration.—Generally, as to the invalidity of bonds, etc., given for a usurious consideration, see the title USURY.

Usury Purged by Change of Parties.—A., B. and G. execute a bond for one thousand dollars to P. for a loan of money at usurious interest. Subsequently O., J. and W., with B., who signs himself security, execute their bond to P. for the amount, principal and interest, of the first bond, and an-

other small bond of A., in lieu of these bonds. The usury is purged by the change of the parties, and the last bond executed is valid. *Drake v. Chandler*, 18 Gratt. 909.

Illegality or Failure as Ground for Equitable Defense.—Generally, as to equitable defenses on the ground of want of consideration, illegality of consideration, and failure of consideration, see the title ACTIONS, vol. 1, p. 144 et seq.

D. EXECUTION.

1. Capacity to Execute.

Capacity of Married Woman to Execute.—The bond of a married woman is void at law, and it is void in equity also, except as to her separate estate. *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

A bond executed by a married woman as surety for a debt of her husband is valid to bind her separate estate. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

M., the wife of P., was entitled to real estate by descent from her father and by devise from W., but her husband had not reduced any part of it into possession when he made a deed, by which he conveyed to C. and L. all his interest and right in said estate in trust for the sole and separate use of his wife M., free from all claim by him, with full power in her to control and dispose of the same as if she was not a married woman. The real estate was afterwards divided, and M. came into actual possession of it, and she sold a part of it to McD., retaining the title, who improved it and sold it again to her; and she executed her bond to S., by direction of McD., for a part of the purchase money. She also executed to B. a bond as security for G. Upon a creditor's bill by S. to subject the land of M. to pay his debt, it was held, that the bonds, though void at law, are valid in equity, as evidence of debt against the separate estate of M.; and the debts are not barred by the

statute of limitations as simple contract debts. *Garland v. Pamplin*, 32 Gratt. 305.

Capacity as Affected by Partial Insanity.—Monomania, or partial insanity, in no way connected with the subject of a bond, will not invalidate it. *Boyce v. Smith*, 9 Gratt. 704.

Execution by Parent to Child—Presumption of Undue Influence.—There is no presumption of invalidity as to a bond executed by a mother to her son for services rendered by him as her agent eight years prior to the date of the bond. If fraud or undue influence is relied upon as a defense, it must be proved as a fact as in other cases, and the burden is on the party alleging it. Even a gift from a parent to a child is not presumed to be invalid, though it may be shown that actual undue influence was exercised. *Burwell v. Burwell*, 103 Va. 314, 49 S. E. 68.

2. Authority to Execute.

Necessity for Agent's Authority to Be by Deed.—The authority of an agent must be commensurate with the act or performance, and if the act of the agent is the execution and delivery of a bond his authority must be by deed. *Preston v. Hull*, 23 Gratt. 600; *Penn v. Hamlett*, 27 Gratt. 337.

Generally, as to the authority of agents to execute deeds, bonds, etc., see the title AGENCY, vol. 1, p. 246. As to the effect of the subsequent filling in of blanks in bonds without authority, or under parol authority, see post, "Filling in Blanks," III, F, 2.

Execution under Power of Attorney.—Under a power of attorney, authorizing a person to execute an administration bond for the person giving the power, the attorney may be allowed to execute the bond accordingly. *M'Candlish v. Hopkins*, 6 Call 208.

3. Designation of Parties.

Obligor.—While an obligor and obligee are essential to a valid bond, it is not essential to the validity of such bond that the name of the party sign-

ing and sealing it be inserted in the penalty, or recited in the condition. *Beery v. Homan*, 8 Gratt. 48; *Luster v. Middlecoff*, 8 Gratt. 54; *Cox v. Thomas*, 9 Gratt. 312; *Bell v. Allen*, 3 Munf. 118; *Beale v. Wilson*, 4 Munf. 380; *Raynolds v. Gore*, 4 Leigh 275; *Crawford v. Jarrett*, 2 Leigh 630; *Bartley v. Yates*, 2 Hen. & M. 398.

In *Bartley v. Yates*, 2 Hen. & M. 398, it was held that though there be a total blank for the name of the surety in the obligatory part of a bond, yet, his name being mentioned in the recital of the condition, and he having signed and sealed it, it was sufficient to charge him.

The official bond of an executor contains in the penal part the names of the executor and several sureties, and there is no blank for the name of another; but it is signed and sealed by all those whose names are in the penal part, and also by another person. Held, it is the bond of the person who executed it, though his name is not in the penal part. *Luster v. Middlecoff*, 8 Gratt. 54.

R., the committee of a lunatic, was summoned to give counter security, as appeared by the order of the county court. The order then proceeds: "Whereupon the said R. appeared in court and acknowledged notice of the motion, and with K. and B. gave the security as required by the above order, condition as the law directs, which bond was duly acknowledged by the parties thereto, and ordered to be certified." In fact the bond produced was not a bond for counter security, but was a new bond, and though B. signed it, his name does not appear in either the penal part or the condition, but there is a blank in the penal part after the name of K. Held, that the bond acknowledged and certified as this was, became a part of the record, and is to be taken and construed with the order, as showing what was required by the court, and therefore it must be

taken that the court required the committee to execute a new bond; that it is the bond of B. though his name is not in the penal part of the condition. *Beery v. Homan*, 8 Gratt. 48.

Obligee.—While it is not indispensable that the party to whom the promise is made by the obligor of the bond should be mentioned *eo nomine*, that his name of baptism and surname shall be given, yet it must be in some unmistakable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such obligee, is a mere nullity, imposing no liability upon the party issuing, and conferring no rights upon him who receives or holds it. It is not simply an imperfect deed, it is no deed at all. It only becomes a deed when the name of an obligee is inserted. *Preston v. Hull*, 23 Gratt. 600.

4. Signature.

As Evidence of Party's Intention to Bind Himself.—The signature and seal of a bond form a part thereof, and furnish *prima facie* evidence that the person so signing and sealing the bond intended to make himself a party thereto, and to be bound by the stipulations thereof. *Beery v. Homan*, 8 Gratt. 48.

When one signs a note or bond saying "I promise to pay," it binds any number who sign. *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 697, citing *Homan v. Gilliam*, 6 Rand. 39.

Signer Bound though Name Not in Penalty.—A party signing a bond whose name is not in the penalty, does not vitiate the bond, and he is bound as an obligor. *Cox v. Thomas*, 9 Gratt. 312. See ante, "Designation of Parties," III, D, 3.

There being nothing on the face of the bond to indicate that all named in the penalty were not appointed as deputies, and the obligors having sealed and delivered the bond in its present shape, they are estopped from

denying the fact. *Cox v. Thomas*, 9 Gratt. 312.

Sufficiency of Seal without Subscription.—"It is laid down in *Goddard's* case [2 Coke, 5a.] that only three things are necessary to making a good obligation, to wit, writing on paper or parchment, sealing, and delivery; and it has since been adjudged not to be necessary that the obligor should sign or subscribe his name; and, therefore, if the obligor be named *Erlin*, and he sign his name *Erlevin*, this variation is not material, because subscribing is no essential part of the deed, sealing being sufficient." *Bartley v. Yates*, 2 Hen. & M. 398.

Effect of Subsequent Acknowledgment of Signature.—Though a party may not have originally put his name to the bond, yet if he afterwards acknowledge the signature to be his hand and seal, he is bound at law; or, if he is not so bound at law, it is a legal defense of which he should avail himself upon the motion for judgment on the bond, and not resort for relief, on that ground, to a court of equity. *Maupin v. Whiting*, 1 Call 224.

Effect of Misplacing Obligor's Name.—In *Argenbright v. Campbell*, 3 Hen. & M. 144, under the circumstances, a written instrument was declared to be a good bond, with collateral condition, though the obligor's name was not signed opposite to the seal, but between the penal part and the condition, and the name of the obligee was signed at the foot of the condition, with the seal annexed, both signatures being attested by the same witnesses.

The addition of "security" or "surety" to the name of the signer of a bond is *prima facie* evidence of his suretyship; but it may be rebutted by parol evidence to the contrary. *Boulware v. Hartsook*, 83 Va. 679, 3 S. E. 289.

"This court, in the recent case of *Harper v. McVeigh*, 82 Va. 751, decided that the addition of the word 'security,' or 'surety,' to the signa-

ture of a bond is prima facie evidence of the suretyship; but that it may be rebutted by proof to the contrary, and especially by proof that the party claiming to be surety got the benefit of the money individually, or as partner in a firm into whose business it went." *Boulware v. Hartsook*, 83 Va. 679, 3 S. E. 289.

5. Seal.

a. Necessity for.

According to the definition of a bond, an obligation to constitute such an instrument must be under seal. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

It is the sealing, together with the delivery that gives effect to the instrument. *Board of Supervisors v. Dunn*, 27 Gratt. 608.

Generally, as to the necessity and sufficiency of seals, see the title SEALS AND SEALED INSTRUMENTS.

b. Validity of Scroll or Stamps as Seal.

A scroll is of equal validity to constitute a bond as an impression made by a seal on wax. *Jones v. Logwood*, 1 Wash. 42. See the title SEALS AND SEALED INSTRUMENTS.

To a printed form of a bond, there are put printed stamps or scrolls by way of seals, the blanks are filled up, and the instrument executed by the obligors, by signing their names to the printed stamps or scrolls, which are recognized as their seals in the body of the instrument. This is a sealed instrument within the statute. 1 Rev. Code, ch. 128, § 94. *Buckner v. Mackay*, 2 Leigh 489.

Necessity for Recognition in Body of Instrument.—A writing for the payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof with the word "seal" written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument. Evidence aliunde is not

admissible to prove that a scroll at the foot of writing was intended as a seal. *Clegg v. Lemessurier*, 15 Gratt. 108.

A contract in writing has a scroll annexed, opposite the signature, and the word seal is written in the scroll, but in the body of the instrument there is no recognition of the scroll as a seal. Held, the instrument is no deed, but a simple contract only. *Cromwell v. Tate*, 7 Leigh 301.

An instrument concluding "Witness our hands," with a scroll annexed to the signature, and the word "seal" written therein, is only a simple contract. If such instrument is in the form of a penal bill, the plaintiff should declare for the principal sum, and not the penalty. *Jenkins v. Hurt*, 2 Rand. 446.

c. Effect of Sealing by Part of Obligors Only.

A writing which recites that "On demand I promise to pay to David Keller the just and full sum of two hundred dollars for value received of him, as witness my hand and seal, the 1st day of March, 1862. Thomas McHuffman, [Seal]. Security—David M. Riffe," is a promissory note as to the said Riffe and a single bill obligatory as to the said McHuffman; and in such case an action of debt will lie upon the instrument against them jointly. *Keller v. McHuffman*, 15 W. Va. 64.

An instrument binding the parties thereto to pay a sum of money, purports to be under their hand and seals; but it is signed by one of the parties without a seal, and by the other parties with seals, to their names. Held, upon demurrer, that one action of debt may be brought against all the parties. *Rankin v. Roller*, 8 Gratt. 63.

"The fact that there is no seal or scroll annexed to the signature of Roler & Crawford, and that there are scrolls annexed to the signatures of Benjamin Weller and John W. Roler, while it makes the instrument a promissory note as to the former, and a single

bill obligatory as to the latter, does not change the joint nature of the contract. Without intending to decide in this case that several actions might not be maintained upon the instrument, regarding it in one action as the simple contract of Roler & Crawford, and in another as the specialty of Benjamin Weller and John W. Roler, the court is yet of opinion that one action of debt may be maintained upon it against all of the joint contractors; each of whom will in such an action be entitled to make any defense which he might make in a separate action. In this way the intention of the parties is effectuated, multiplicity of actions is avoided, and no injury or inconvenience is occasioned to any person. Therefore it is considered, that the said judgment be reversed and annulled, and that the plaintiff recover against the defendants his costs by him expended in the prosecution of his writ aforesaid here." *Rankin v. Roller*, 8 Gratt. 63.

6. Stamp.

Necessity for.—The act of congress, entitled "An act laying duties upon stamped vellum, parchment and paper," being enacted in pursuance of the constitutional power to levy and collect taxes, duties, imposts and excises, and being therefore constitutional, although changing the rules of evidence in state courts; it was held, in an action of debt, upon a bond, that the bond not being duly stamped, could not go in evidence to the jury. *Woodson v. Randolph*, 1 Va. Cas. 128.

Presumption That Bond Was Properly Stamped.—A bond is offered in evidence, to which is affixed a United States internal revenue stamp. The defendant offers to prove that the bond was not stamped at the time of its execution, but since then a stamp had been affixed to it without his knowledge, consent or authority. The plaintiff objected to this offer of proof by the defendant, and the court below

sustained the objection; which is held to be a proper ruling. *Myers v. McGraw*, 5 W. Va. 30.

"There is nothing in the record that indicates that the revenue stamp was placed upon the bond contrary to the acts of congress. The stamp was on the bond at the time it was put in evidence. When or how it was placed there does not appear. The objection defendant made to it was not that it was placed there contrary to the provisions of the revenue laws in such cases made and provided, but because it was done without the knowledge, consent or authority of defendant. It may be true that the stamp was placed on the bond without the knowledge, consent or authority of defendant, and yet done under authority of the revenue act; and without proof to the contrary, the court will presume it was properly and legally placed on the bond. No proof of that kind was offered." *Myers v. McGraw*, 5 W. Va. 30.

7. Acknowledgment.

The person who signs, seals and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed, in proof of its execution. This principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgement, or proof in court, essential to the validity of the instrument. *Board of Supervisors v. Dunn*, 27 Gratt. 608; *State v. Proudfoot*, 38 W. Va. 745, 18 S. E. 952.

E. DELIVERY.

1. Necessity for.

In the case of an ordinary bond delivery is absolutely essential to give it effect either in a court of law or equity. Without such delivery a bond is an absolute nullity. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

It is the sealing and delivery of a bond that gives it efficacy, and not proof of its execution. *Board of Supervisors v. Dunn*, 27 Gratt. 608. See also, *Preston v. Hull*, 23 Gratt. 600.

"An ordinary note or bond, not delivered, if lost, or stolen, is not the deed or note of the party, and can avail no one." *Whitworth v. Adams*, 5 Rand. 333.

2. Possession as Evidence of Delivery.

Possession of a bond, by the obligee, is prima facie evidence of delivery; and where the defendants admit the signing and sealing, the rule of evidence is sufficiently complied with by the plaintiff when he produces before the jury the instrument, and it is then incumbent on defendants to show some special matter in avoidance. *Newlin v. Beard*, 6 W. Va. 110.

3. Validity of Delivery after Death of Grantor.

It is essential to the validity of a bond that delivery shall be made by the obligor in his lifetime, but if he parts with all dominion over it, and makes an absolute and unconditional delivery thereof to a third person, with direction to the latter to deliver it to the obligee on the death of the obligor, the delivery is good. In the case in judgment there was no condition imposed upon complete delivery except that the bond was to be delivered to the obligees after the obligor's death. *Frank v. Frank*, 100 Va. 627, 42 S. E. 666.

4. Conditional Delivery.

a. Delivery to Stranger as Escrow.

If a bond is delivered to a third person, not a party to it, to take effect as a bond only upon the happening of some event, or the performance of some condition, and that person delivers it to the obligee before the event happens or the condition is performed on which he was to deliver it, it will not take effect. And it matters not that the obligee had no knowledge of the condition which the party at-

tached to the delivery of the escrow. The condition is valid, whether known to the obligee or not. *Newlin v. Beard*, 6 W. Va. 110; *Ward v. Churn*, 18 Gratt. 810. See generally, the title ESCROW.

b. Delivery to Obligee or Agent.

(1) Where Instrument Perfect on Its Face.

General Rule.—In the case of bonds the rule of law as to deeds generally applies; namely, that an instrument which is upon its face a complete contract, requiring nothing but delivery to make the same perfect according to the intention of the parties, can not be delivered to the party to whom it is made, as an escrow, to be the deed of the obligor only on condition. In such case a delivery is absolute and the condition nugatory. *Wendlinger v. Smith*, 75 Va. 309; *Nash v. Fugate*, 32 Gratt. 595; *Newlin v. Beard*, 6 W. Va. 110; *Ward v. Churn*, 18 Gratt. 801. *Miller v. Fletcher*, 27 Gratt. 403. See the title ESCROW.

"If the instrument is on its face complete and perfect according to the intention of the parties, and delivery is made to the obligee or his previously constituted agent, without notice that it is conditional, the obligee is not required to make inquiry whether it is a deed or bond of all of the signers, or any of them, because it is presumed that all the obligors authorized its delivery, and he has the right to treat it as absolute and unconditional." *Newlin v. Beard*, 6 W. Va. 110.

Effect of Delivery by Principal Obligor.

—A bond which is a complete and perfect instrument on its face at the time of its delivery to the obligee, was executed by persons as sureties, upon the condition that it should not be delivered until executed by other persons, and it was placed in the hands of the principal obligor, and without being so executed it was delivered by the obligor to the obligee, who was not

informed of the condition. The bond is the valid bond of the sureties, and they can not set up the condition against the obligee. *Nash v. Fugate*, 24 Gratt. 202. See *Lyttle v. Cozad*, 21 W. Va. 199; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

"The point to be considered then is, whether there is any substantial distinction between a delivery to a stranger and a delivery to the principal obligor by one who signs the instrument as surety. That such a distinction does exist, and that it is founded upon the soundest principles, I think is easily established." *Nash v. Fugate*, 24 Gratt. 202.

"It is true the principal obligor has no greater power than the stranger to whose custody the bond is committed; but in such a case the question is not what is the power conferred, but what is the power the obligee has the right to suppose is conferred. The principal obligor has certainly an apparent authority to deliver the instrument in its then existing form and condition; that is such an authority as may be fairly inferred from his connection with and possession of the paper. The reasonable presumption is, that he is to dispose of the bond according to the natural course of proceeding in such cases; that is, by a delivery to the obligee. It is true the agency is a special one; but the agent being clothed with the evidence of agency for the general purpose of delivery, no secret limitations or restrictions ought to control the exercise of the power, so far as parties are concerned dealing with the agent, upon the faith of the apparent power. The instrument being complete in form (precisely such as would have been adopted if the parties signing it alone were to be bound), being found in the possession of the very person who would have held it if the purpose had been to make an unconditional delivery, under such circumstances an obligee accept-

ing it has the right to infer that the transaction is precisely what it purports to be, and that the real power is in fact coextensive with the apparent power." *Nash v. Fugate*, 24 Gratt. 202.

Delivery by Obligor of Bond Containing Scrolls without Names Attached.—A bond is signed by the principal obligor and a number of sureties,

and there are several scrolls below the names of the sureties who sign it. In other respects the bond is complete and perfect on its face; but the sureties sign it and deliver it to the principal obligor, on condition that he shall obtain additional sureties to execute it, before he delivers it to the obligor; but he violates the condition, and delivers it to the obligee, without obtaining additional sureties. Held, the bond is binding on the sureties, unless the obligee has notice of the condition on which they executed it; and the fact that there were other scrolls to the instrument, to which no name was signed, was not sufficient to put the obligee upon inquiry as to the authority of the obligor to deliver the bond to him. *Nash v. Fugate*, 32 Gratt. 595.

"This precise question has never been decided by this court; at least, there is no reported case. In *Hicks v. Goode*, 12 Leigh 479, 492, Judge Cabell, in delivering the opinion of the court, did not place the decision on the ground that the instrument contained a scroll to which no name was attached. He does not even advert to the fact as material. It was to the language of the instrument and to the fact that the name of one of the parties who did not sign was inserted in the body of the bond, he looked exclusively. From this he came to the conclusion that the instrument was incomplete, and plainly indicated on its face that some other person was to sign it before it could take effect as a valid obligation. The decision in

Ward v. Churn, 18 Gratt. 801, proceeded substantially on the same ground. The incompleteness of the instrument there was inferred from its language, from the whole tenor of the writing, and not from the fact that there was a scroll without a name attached." *Nash v. Fugate*, 32 Gratt. 595.

(2) Where Instrument Incomplete.

(a) In General.

The rule laid down as to the effect of delivery to the obligee is applicable only to the case of instruments which are upon their face complete contracts and is not applicable to these which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties. If the instrument upon its face indicates that it is not complete according to the intention of the parties, it puts the obligee on guard, and if he does not heed the warning, and make the necessary inquiries to satisfy himself that the original intention of the parties had been relinquished, he accepts it at his risk and must abide the consequences. *Newlin v. Beard*, 6 W. Va. 110. See also, *Nash v. Fugate*, 32 Gratt. 595; *Ward v. Churn*, 18 Gratt. 801; *Hicks v. Goode*, 12 Leigh 479; *Wendlinger v. Smith*, 75 Va. 309.

A bond is drawn with the names of the principal and four persons as sureties inserted therein. The principal and three of these sureties sign it. Two of these sureties sign and deliver it upon the condition that a certain one of the other two named shall execute it, but he does not, and it is delivered to the obligee without his signature. Held, that whether the bond was delivered to a third person, not a party to the bond, or to the principal or any other co-obligor, the parties so delivering it on condition are not bound by the said bond; and it is not necessary to give effect to said condition, that the same should

have been known by the obligee when the bond was delivered to him. *Ward v. Churn*, 18 Gratt. 801.

The bond being void as to the two who delivered it on condition, it is void as to the third surety, who executed it without any condition. *Ward v. Churn*, 18 Gratt. 801.

(b) Presumption from Unconditional Delivery.

In the absence of evidence to the contrary, the presumption from an unconditional delivery of an instrument incomplete on its face, as where it shows an original intention that others should execute it, is that the intention which appears from the unfinished condition of the instrument is waived. *Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288; *Ward v. Churn*, 18 Gratt. 801; *Kyger v. Sipe*, 89 Va. 510, 16 S. E. 627; *Miller v. Fletcher*, 27 Gratt. 403; *Cox v. Thomas*, 9 Gratt. 312.

The obligee, however, having full notice from the face of the instrument of the original intention of those who signed it, can not complain if they are allowed to prove that this original intention was not relinquished on the delivery. He should either refuse to accept the paper in its existing shape, or be prepared to repel the defense of a conditional delivery. *Ward v. Churn*, 18 Gratt. 801.

(3) Delivery on Conditions Known to Obligee.

In General.—A bond, signed, sealed and delivered to the obligee, or his previously appointed agent, upon condition, is not the deed of the party signing, until the condition is complied with. *Newlin v. Beard*, 6 W. Va. 110.

"If the delivery is upon a condition made known to the obligee, his assent to it will be presumed from the acceptance of the instrument, and he will not be allowed to repudiate the condition thus assented to, and to treat the

delivery as absolute and unconditional." *Ward v. Churn*, 18 Gratt. 801, quoted in *Newlin v. Beard*, 6 W. Va. 110.

Admissibility of Evidence Showing Conditional Delivery.—A party who has made a conditional delivery to the agent of the obligor has the right to defend by pleading non est factum, and proving by the agent himself the agency and the conditional delivery. *Newlin v. Beard*, 6 W. Va. 110.

A bond prepared, intended and purporting on its face, to be the joint bond of G. and J. to four commissioners under decree in chancery for sale of land, is signed and sealed by G. and by him delivered to one of the obligees, upon condition that J. also shall execute it, otherwise it shall not be binding on G. but be null and void; J. never executes it; in debt on the bond against G. he pleads that the bond was delivered to the obligees as an escrow, to be his deed only upon the condition that J. also should execute it, which J. never did, et sic non est factum; held, the plea is a good bar. *Hicks v. Goode*, 12 Leigh 479.

In an action of debt on a bond purporting to be the bond of three obligors, two of the obligors under a plea of non est factum offer evidence of an understanding between themselves and the other obligor that the bond should not be binding on them until signed by two other designated parties, of which understanding the obligee in the bond had notice at the time of its delivery. Held, the evidence was admissible under the general plea of non est factum, and the court erred in excluding it. *Stuart v. Livesay*, 4 W. Va. 45.

"Had the agent then, in this case, delivered the bond absolutely, notwithstanding his particular instructions and special authority, but without notice thereof to the obligee, it might become a question upon which there seems to be much contrariety of decision; but, inasmuch as the obligee

was at the time of taking the bond fully advised by the agent of the facts, and took on the terms specified, of procuring the signature required to make it obligatory, nothing can be clearer than that there was not in such case any such delivery of the bond, as the bond of the parties to be bound thereby; and being no such delivery, there was no such bond. The evidence was admissible under the general plea of non est factum, and the court erred in excluding it." *Stuart v. Livesay*, 4 W. Va. 45.

A bond signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory. *Nash v. Fugate*, 32 Gratt. 595; *Solenberger v. Gilbert*, 86 Va. 789, 11 S. E. 789; *Ward v. Churn*, 18 Gratt. 801; *Newlin v. Beard*, 6 W. Va. 110; *Lyttle v. Cozad*, 21 W. Va. 200.

F. SUPPLYING OMISSIONS OR FILLING BLANKS AFTER EXECUTION.

1. Supplying Omitted Words or Phrases.

When it is obvious on the face of a paper, that a word or phrase has been omitted by mistake, or inadvertence, and such words are obviously and naturally suggested, upon the mere inspection of the paper, as the words which the parties must have intended to use to express their meaning, such word, or words of like import, may be supplied. *Peyton v. Harman*, 22 Gratt. 643.

P. executes his bond to H. for \$5,500 payable with interest one year after date. On the bond there is an endorsement, that one twenty-fifth of the principal of the bond with the interest

due at the end of the year, and so on from year to year, the credit not exceeding twenty-five years in all. H. brings debt upon the bond against P., and declares upon the bond omitting the endorsement. P. craves oyer of the bond and endorsement, and demurs. Held, the words "to be paid" have been obviously omitted from the endorsement by mistake, and they will be supplied. *Peyton v. Harman*, 22 Gratt. 643.

2. Filling in Blanks.

Effect of Filling and Delivery of Blank Paper by Principal.—A blank paper is signed and sealed by a principal and three others who intended to be his sureties, and it is left with the principal to be filled up and delivered by him. He does fill it up and deliver it to the obligee named therein. It is not the bond of the three, and does not bind them. But the principal having filled it up, and delivered it when thus complete, it is his bond, and binds him. *Penn v. Hamlett*, 27 Gratt. 337.

Filling Blank for Obligee's Name by Agent on Parol Authority.—In *Preston v. Hull*, 23 Gratt. 600, a paper perfect as a bond, except that there was a blank for the name of the obligee, was signed by P. and M. and put into the hands of M. for the purpose of borrowing money upon it. It was expected that F. would lend the money, but if he did not it might be gotten from some other person. M. obtained the money from H. and filled the blank in the paper with the name of H. and delivered it to him. This was done in the absence of P. and without his knowledge. It was held, that the instrument, under such circumstances, was not the bond of P.

"If the blank is filled by an agent, then the agent as certainly makes the deed as though the entire obligation had been written, signed, sealed and delivered by him. His act binds his principal not before bound. It creates

a contract having no previous existence. It is true the act in question is merely the insertion of a name. Still, its effect is to impart vitality to a piece of waste paper. It calls new rights and obligations into existence. It is followed by all the consequences resulting from the execution of the most solemn instruments. * * * The authority of the agent must be commensurate with the act of performance. * * * If the act of the agent is the execution and delivery of a deed, his authority must be by deed." *Preston v. Hull*, 23 Gratt. 600. See the title AGENCY, vol. 1, p. 246.

"In the recent case of *Preston v. Hull*, cited supra [23 Gratt. 600], Judge Staples, in an elaborate opinion, in which he reviews many of the English and American cases, conclusively shows that the law is well settled, that a paper not complete on its face, to the extent of having a blank which is essential to be filled in order to make it a perfect deed, is not the deed of the parties; and that authority by parol to an agent to fill such blank does not make the instrument a valid deed. Such authority must itself be under seal. This case is decisive of the one under consideration. If, as was held by this court in *Preston v. Hull*, a bond in which the name of the obligee was blank when it was signed by the parties, was not their deed, and that no authority by parol to fill the blank could make it valid, certainly a signature and seal on a blank piece of paper, afterwards written over without authority, or by parol authority, is not a good deed." *Penn v. Hamlett*, 27 Gratt. 337.

Filling Blank for Amount without Authority.—A paper intending to be a bond is signed in blank as to the sum by a person as surety; and the blank is afterwards filled up in his absence, and without his knowledge and without authority from him. It is not his bond. *Rhea v. Gibson*, 10 Gratt. 215.

G. VALIDITY AS COMMON-LAW BONDS OF OBLIGATIONS DEFECTIVE UNDER STATUTE.

1. General Rule.

Many cases have been decided, in which bonds taken by officers from parties who voluntarily executed them for sufficient consideration, though unauthorized by law, have been valid as common-law bonds, there being no sound objection to the validity of them. *Beale v. Downman*, 1 Call 249; *Johnston v. Meriwether*, 3 Call 523; *Prentiss v. Com.*, 5 Rand. 697; *Frazier v. Frazier*, 2 Leigh 642; *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. 407; *Porter v. Daniels*, 11 W. Va. 250; *State v. Proudfoot*, 38 W. Va. 736, 18 S. E. 949.

If for any reason a bond which was intended to be a statutory bond fails in a material respect to conform to the requirements of the statute, it will not be good as a statutory bond, but it may be valid as a common-law bond, or, if very defective, it may be altogether void. *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

"The general rule is that if bonds intended to be statutory, but too defective to fulfill all the essential requirements of the statute to be entitled to the privileges of strictly statutory bonds, are nevertheless good as common-law bonds, unless they contain provisions contrary to those prescribed by the statute, or are in violation of law, common or statutory, or public policy." *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301.

2. Illustrations.

If a forthcoming bond be not good as a statutory bond, it may be good as a bond at common law. *Johnston v. Meriwether*, 3 Call 523; *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301; *Adler v. Green*, 18 W. Va. 201.

A forthcoming bond, which provides for the delivery of the property on a day different from the day of sale fixed

in the bond, is not a good statutory bond; and the sheriff's, or other officer's return of "forfeited," on such bond is not even prima facie evidence of the truth thereof. Such a bond, though not good as a statutory bond, is good as a common-law bond, if there is no other objection to it. *Adler v. Green*, 18 W. Va. 201.

Sheriff's Bonds.—In the obligatory part of the sheriff's bond, the obligors acknowledge themselves to be held and firmly bound to the commonwealth of Virginia, in a certain sum, for the payment of which, to the treasurer of the said commonwealth, they bound themselves, etc.; the condition was, that if the said sheriff should well and truly collect and account for certain taxes, etc., and pay the same to the treasurer of this commonwealth, for the use of the said commonwealth, then, etc., this was held to be a good bond, and a judgment in an action of debt thereon was sustained. *Winslow v. Commonwealth*, 2 Hen. & M. 459.

Bonds under Void Ordinance.—The mere fact that a bond has been taken by an officer who was not authorized by law to take such bond does not render it invalid at common law. Such bond though taken under a void ordinance may still be good as common-law bonds. *Porter v. Daniels*, 11 W. Va. 250.

A bond taken by a sheriff, in whose hands there was an execution, payable to the plaintiff in the execution, and taken pursuant to the ordinance of the Virginia convention, adopted April 30, 1861, entitled: "An ordinance to provide against the sacrifice of property, and to suspend proceedings in certain cases," which bond was conditioned that the obligors should well and truly pay the debt, interest and costs for which the execution issued, when the operation of said ordinance ceases, is valid as a common-law bond, even if this ordinance is null and void. *Porter v. Daniels*, 11 W. Va. 250.

H. EFFECT OF PARTIAL INVALIDITY.

There is no valid distinction between bonds and other deeds containing conditions, covenants and grants not mala in se but illegal at the common law, and those containing conditions, covenants or grants illegal by the express prohibition of statutes. In each case the bonds are void as to the conditions, covenants or grants that are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is, where the statute has avoided the whole instrument to all intents and purposes by express words or necessary implication. *Reed v. Hedges*, 16 W. Va. 167. See also, *Pratt v. Wright*, 13 Gratt. 175.

"At common law a bond conditioned to do several things may be void for illegality as to one part, and yet be good as to the other part. 2 Thos. Coke p. 19, n. P. The same rule applies as to bonds taken by virtue of a statute unless indeed the statute expressly or by necessary implication avoids it to all intents and purposes." *Gibson v. Beckham*, 16 Gratt. 321.

"It is a doctrine well founded in the common law, recognized from a very early period, that bonds and other deeds may in many cases be good in part and void for the residue, where such residue is founded in illegality, but not mala in se, and that there is no valid distinction between bonds and other deeds containing covenants, conditions, or grounds not mala in se, but illegal at the common law, and those containing conditions, covenants, and grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void as to such conditions, covenants, or grants which are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is when the statute has not confined its prohibition to the illegal

conditions, covenants or grants, but has expressly or by necessary implication avoided the whole instrument to all intents and purposes." *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301, citing *United States v. Bradley*, 10 Pet. 343.

"A similar principle has been applied to statutory bonds where the conditions thereof either fall short or are in excess of the conditions prescribed by the statute or by the court or officer authorized to do so. In such case if the condition fall short of the requirements of the statute, the bond will be held valid as a statutory bond to the extent of the condition, unless it be so defective that it fails in every material respect to conform to the statute. On the other hand, when the condition is more onerous than required by the statute, if the bond has been voluntarily executed for a sufficient consideration which is neither malum in se nor malum prohibitum nor in violation of the policy of the law nor repugnant to the provisions of the statute, it will still be held valid as a statutory bond to the extent that the conditions thereof are authorized or required by the statute; and the onerous condition in excess of the requirements will be disregarded or treated as surplusage, unless the manner of taking or the form of the bond prescribed by the statute is made an express condition of its validity." *State v. Purcell*, 31 W. Va. 44, 5 S. E. 301, quoting *Green, P.*, in *Porter v. Daniels*, 11 W. Va. 250.

I. VALIDITY AS AFFECTED BY ALTERATIONS.

Material Alterations.—A material alteration of a bond after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party. Such alteration destroys the identity of the contract; and, therefore, if a party to the contract who has not consented to the alteration were to be held bound thereby, it would be, in

effect, imposing upon him against his will a new contract, to whose terms he never agreed. *Dobyns v. Rawley*, 76 Va. 537; *Batchelder v. White*, 80 Va. 103; *Newell v. Mayberry*, 3 Leigh 250; *Yeager v. Musgrave*, 28 W. Va. 90, 111.

If a bond is altered by the obligee, in a material point, it thereby becomes void. The tearing off the seal is a material alteration, and renders the deed void. *Piercy v. Piercy*, 5 W. Va. 199.

Immaterial Alterations.—If bond, deed or other agreement be altered in an immaterial part by a stranger without the privity or knowledge of the obligor it will not avoid the instrument. *Yeager v. Musgrave*, 28 W. Va. 90.

Quære, whether the filling the blank with the date of the bond without the knowledge of the obligor, after its delivery, is such a material alteration as will vitiate and invalidate it. *Keen v. Monroe*, 75 Va. 424.

Effect of Consent.—A consent given by an obligor to the alteration of a bond, given after the alteration is made, will not repel the plea of non est factum, but a consent given before or at the time of the alteration will be considered as a re-execution. *Cleaton v. Chambliss*, 6 Rand. 86.

Where there is evidence tending to show that the name of an additional obligor was added to a bond, after its completion and delivery to the obligee, with the consent of the obligee, and of each of the original obligors, and there is no evidence to the contrary, it is error to instruct the jury to find for one of the defendants on his plea of non est factum, if they believe that such additional obligor was added without the knowledge or consent of such defendant, or his subsequent ratification. It is error to give an instruction predicated on a view of the case unsupported by any evidence in the record. *Rocky Mount Loan, etc., Co. v. Price*, 103 Va. 298, 49 S. E. 73.

Questions of Law and Fact.—The question as to the time when, and by whom and with what intent, an alteration, apparent upon the face of a bond, was made, is a question of fact to be ascertained by a jury, and can not be inferred by the court. *Ramsey v. McCue*, 21 Gratt. 349.

When the bond was written a blank was left for the date. Whether this blank was filled before or after delivery, or whether with the knowledge or consent of the obligor was a question of fact for the jury; but whether it was material is a question of law for the court. *Keen v. Monroe*, 75 Va. 424.

Upon the question of an alteration in the bond sued on, if the case agreed does not state the alteration was made after the execution of the bond, the court, in pronouncing the conclusion of law upon the facts, can not assume that such was the fact. *Ramsey v. McCue*, 21 Gratt. 349.

For a full treatment of the question of alteration of instruments, see the title ALTERATION OF INSTRUMENTS, vol. 1, p. 307.

J. VALIDITY AS AFFECTED BY FRAUD, MISTAKE, ETC.

1. General Rules as to Pleading as Defense.

At Common Law.—It was not permitted at common law, in an action upon contracts under seal, to prove fraud in their procurement, but defendant had to resort to his independent action for relief. These defenses are allowed only by virtue of statute. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42; *Wyche v. Macklin*, 2 Rand. 426; *Columbia, etc., Ass'n v. Rocky*, 93 Va. 678, 25 S. E. 1009; *Taylor v. King*, 6 Munf. 358. See the title ACTIONS, vol. 1, p. 142.

Under Statute Allowing Equitable Defenses at Law.—Before the adoption of the act of 1831, it was held, that the defendant could not vacate a bond at law because he was imposed upon in a settlement of accounts which pre-

ceded its execution, because the bond was founded on a false or fraudulent statement of facts, or because the bond had been obtained by fraudulent misrepresentations made by the plaintiff. Under the statute however, allowing equitable defenses to be set up in an action at law, a defendant may show in an action on any contract, that the same was executed under the influence of fraud or mistake. See the title ACTIONS, vol. 1, p. 146.

Fraud in the procurement of a bond was not available as a defense at common law in an action on a bond, but is so available under § 3299 of the Va. Code, 1887, and under it the defendant can claim compensation or damages for the injury which he has suffered by reason thereof, but the plea must allege the amount to which the defendant is entitled by reason of the matters contained therein. The plea, however, under the statute, is not available as a defense to a bond given for the purchase price of real estate, if the defense is such as to require a rescission of the contract and a reinvestment of the vendor with the title of the property. *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42. See the title ACTIONS, vol. 1, p. 144.

In a court of common law, fraud may be given in evidence to vacate a deed on the plea of non est factum, if such fraud relates to the execution of the instrument, as, for example, the essential element of delivery. *American, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319. See Va. Code, 1887, § 3299.

A. & J., partners, give two notes to R. They both die, A. being the survivor. At the death of A. both notes are barred by the statute of limitations. After the death of A., R., knowing that the notes were barred by the statute, fraudulently, or under a mistake of the law, represents to B., his administratrix, that said notes are unpaid, and are valid and in full force

in law against the estates of A. & J., and proposes that if B. will give her bond to R. for one-half the amount of the notes, R. will settle the other half with J.'s representative, who is R.'s daughter; and thereupon B., trusting to these representations, executes her bond to R. for the amount of one-half of the notes. Held, if this was a misrepresentation of the law, still it is a case in which equity will relieve B.; and the defense may be made at law by plea under the statute setting out the facts. But it was in truth a misrepresentation of a fact; and the facts set out in a plea is a good defense to an action on bond by R.'s administratrix against B. *Brown v. Rice*, 26 Gratt. 467.

Scienter of Plaintiff Immaterial.—In an action at law on a bond, a plea which sets out that the defendant was induced to execute the bond by reason of certain representations of existing facts, presumably within the peculiar knowledge of the plaintiff, and upon which the defendant had a right to rely, and did rely, that these representations were material and were untrue, presents a good defense to the action. It is immaterial whether the plaintiff knew them to be false, or honestly believed them to be true. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

As Ground for Relief in Equity.—As to fraud, mistake, misrepresentation, etc., as ground for relief in equity against bonds, see post, "Proceedings for Relief," X, B. And see the titles **FRAUD AND DECEIT; JURISDICTION; MISTAKE AND ACCIDENT.**

2. Execution in Fraud of Creditors.

A bond executed by a debtor in fraud of his creditors, though void as to them, is nevertheless valid between the parties; the debtor will not be permitted to set up his own fraud in avoidance of the bond. *Burners v. Keran*, 24 Gratt. 70; *Harris v. Harris*,

23 Gratt. 737; *Martin v. Lewis*, 30 Gratt. 687.

Section 2458 of the Va. Code, 1887, provides that "every bond or other writing, given with intent to delay, hinder or defraud creditors, purchasers, or other persons, of or from what they are or may be entitled to, shall, as to such creditors, purchasers, or other persons, their representatives or assigns, be void." This section, as well as the unvarying decisions of the courts, however, declare that, as between the parties, such a writing shall be valid and binding. *Harris v. Harris*, 23 Gratt. 737; *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007; *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751. See the titles FRAUD AND DECEIT; FRAUDULENT AND VOLUNTARY CONVEYANCES.

IV. Endorsements on Bonds.

Endorsements of Equal Date with Bond.—Whatever is endorsed upon a bond or contract, bearing equal date therewith, must be taken as part of it, until the contrary be proved. *Smith v. Nicholas*, 8 Leigh 330, 356; *Gordon v. Frazier*, 2 Wash. 130.

Subsequent Endorsements.—To make a subsequent agreement, respecting a bond, a part of the bond, so as to necessitate its recognition as such in declaring on the bond, it must be so engrafted upon the bond that the original stock and the matter engrafted shall together constitute inseparable parts of an entire instrument; such is not the case if the indorsement can be regarded as a distinct and separate promise, covenant, or condition that may be pleaded in defense of the action, or made the ground of a separate action. *Carter v. Noland*, 86 Va. 570, 10 S. E. 605.

An endorsement on a bond, made after its execution, and before it passes to a holder for value, is part and parcel of the bond in the hands of such

holder; and is supported by the same valuable consideration, on which every other part of the bond rests. *Harnsberger v. Geiger*, 3 Gratt. 144.

As to endorsement as repelling presumption of payment, see post, "Presumptions as to Payment," VIII, E.

Endorsement Equivocal—Proof of Meaning.—W. H. S. executes his bond to F. S. for four thousand dollars, payable four years after date. At the time and immediately after W. H. S. signs the bond, F. S. endorses on the back thereof as follows: "Memorandum. If I do not collect the money due on the within note of my nephew, W. H. S., during my life, then it is never to be collected; and I give it to him. F. S." The indorsement being equivocal in its character, all the circumstances attending the transaction, the contemporaneous conduct and declarations of the parties, evidence of their purpose and motives, may be looked to as showing what kind of instrument was within their contemplation and design. And it was held, this endorsement was a part of the bond and irrevocable without destroying the bond. *Smith v. Spiller*, 10 Gratt. 318.

V. Interpretation, Construction and Effect.

A. BY WHAT LAWS GOVERNED.

The laws of the country where the contract is made (the contract not being made with a view to performance elsewhere), must govern it. *Warders v. Arell*, 2 Wash. 282; *Payne v. Bowlin*, 6 W. Va. 273. See the titles CONFLICT OF LAWS; CONTRACTS; INTERPRETATION AND CONSTRUCTION.

In *Turpin v. Povall*, 8 Leigh 99, upon the question whether a bond executed in Virginia, for money borrowed in Pennsylvania, is to be deemed a Virginia contract, or a contract made with reference to the law of Pennsylvania, and to be governed by that law, the

court was of the opinion that such instrument is a Virginia contract.

Where a bond dated in Texas, signed by the principal obligor, a resident of Texas, and by two sureties, residents of Virginia, payable to a resident of Virginia, where the drafts, which were the consideration of the bond, were sent to and received in Texas and the money borrowed used in Texas by the principal obligor; held, to be a contract governed by the laws of Texas, and not affected by the laws of usury in Virginia. *Backhouse v. Selden*, 29 Gratt. 581.

A special plea to an action on a bond, averring that the same was made and payable in the city of Richmond, the capital of the Confederate States, in the currency of said states, and that the makers of said bond were in said city at the time of its maturity, prepared, ready and willing to make payment, and further averring in substance, that the bond was not presented then for payment. Held, to be insufficient. *Payne v. Bowlin*, 6 W. Va. 273.

"It is well known, however, that by the comity of states and nations, and for the purpose of effectuating the agreement of the parties, the law of the place where the contract was made or was to have been performed, will be adopted and enforced in the courts where the remedy is sought to be administered, in respect to the nature and construction of the contracts, and the rights and obligations of the parties under them. In view of these principles it does not follow in the case of a personal contract or obligation like the present, that the obligors or promisors will be released from all liability thereon, because the bond was not presented in the city of Richmond for payment at the time of its maturity, and because the makers or obligors were there at the time, ready and willing to make payment, all of which the plea avers; but it does follow, that they are entitled to have the contract en-

forced as to its construction and effect, according to the *lex loci contractus*, and consequently to such measure of relief, as that law will afford, when administered in the forum where the remedy is sought." *Payne v. Bowlin*, 6 W. Va. 273.

B. AS TO LIABILITY OF OBLIGORS.

1. Nature and Extent of Liability Ascertained from Bond Itself.

General Rule.—Where the court has power to take a bond, the liability of the obligors is ascertained from the bond itself, and not from the order of the court reciting the fact of its execution. *Caskie v. Harrison*, 76 Va. 85.

A bond executed pursuant to an order made in a chancery suit requiring its execution, as a condition precedent to the enjoyment of certain rights, does not derive its efficacy from the order. The liability of the obligors is determined by the bond alone, and not by the order. The obligors are estopped to deny the recitals of the bond, even if they were in conflict with the record, and a plea of nul tiel record is inapplicable. *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484.

2. In Joint Bonds.

a. Instrument Construed as Joint Obligation.

At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by J. S., a writing is signed and sealed by T. A., in the following words: "I, T. A., join in the above obligation with J. S., and am his security for the above sum of —" (mentioning the sum specified in the condition), this, it seems, is a joint obligation; and judgment may be rendered against T. A. for the penalty, to be discharged by the sum in the condition, with interest. *Atwell v. Towles*, 1 Munf. 175.

b. Liability as Principal or Surety.

Where two or more execute a joint

bond they stand in the relation of principal and surety—each as principal quoad his own acts, and as surety quoad the transactions of his companion. *Caskie v. Harrison*, 76 Va. 85.

In a joint bond all the subscribers thereto are presumptively principals except those which have the word "security" before their names. *Harper v. McVeigh*, 82 Va. 751, 1 S. E. 193.

In *Cox v. Thomas*, 9 Gratt. 312, it was held, that deputy sheriffs having no joint interest in or entire authority over the whole office, and therefore one not being responsible for the other merely by virtue of the office, they can only be held liable for the acts of each other in consequence of an express undertaking. As therefore they do not and can not be made to stand as principals in respect to the acts of others, and as the bond makes them by its terms responsible for each other, each one must be regarded as principal, so far as his own acts are involved, and the remaining obligors as his sureties.

Effect of Agreement among Obligor as to Liability.—G. B. and K. were principal obligors in a bond. B. and K. put money in the hands of G. to pay the bond; and he bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B. paid it. After the judgment G. conveyed land to S. to secure a debt due to him and another debt due to C. Upon a bill by B. and K. against S. and C. to subject the land conveyed in the deed to S. to satisfy the debt B. had paid, S. stated in his answer that prior to the judgment he held the bond of G. B. and K., and that he had delivered it up upon receiving the bond of G. with the deed to secure it; but there was no proof of this. C. in his answer, stated that he had before the judgment bought one-half the land from G. and made payments upon it; and had afterwards given it up and taken the bond of G. for the amount, and taken the deed of

trust to secure it. Held, it was competent for G. B. and K. to contract that as between themselves, G. should be the principal and B. and K. his sureties, and that this had been done; that as between B. and K. and G., the former were entitled to be subrogated to the lien of the judgment creditor upon the land; and that they were equally entitled as against purchasers from G. who did not show a better equity. *Buchanan v. Clark*, 10 Gratt. 164.

c. Effect of Death of One Obligor.

Prior to the act of 1786 the death of one of the obligors in a joint bond wholly discharged him at law, and threw the obligation on the survivors. *Richardson v. Johnston*, 2 Call 527; *Elliott v. Lyell*, 3 Call 268; *Watkins v. Tate*, 3 Call 521; *Atwell v. Milton*, 4 Hen. & M. 256; *Atwell v. Towles*, 1 Munf. 175; *Somerville v. Grim*, 17 W. Va. 803; *Reynolds v. Hurst*, 18 W. Va. 654. And see *Stevens v. Taliaferro*, 1 Wash. 155.

If a bond be made joint, without fraud or mistake, equity will not charge the executor of the surety, who was discharged, at law, by his death in the lifetime of the principal. Aliter, if the lending had been to both. *Harrison v. Field*, 2 Wash. 136, reversing the decree of the chancellor in *Wythe* 273.

In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations," if it appear from the declaration that one of the joint covenantors survived, it is a radical defect, and not cured by verdict. *Atwell v. Milton*, 4 Hen. & M. 253.

"Before our statute if one obligor in a joint bond was dead and the other living, the action could only be against him who survived. It was gone forever as to the representatives of the deceased obligor. His estate was entirely exonerated from the payment of the debt by his death; and the burden

was wholly upon the obligor that survived." *Somerville v. Grim*, 17 W. Va. 803, citing *Harrison v. Field*, 2 Wash. 136; *Elliott v. Lyell*, 3 Call 268; *Chandler v. Neale*, 2 Hen. & M. 124; *Atwell v. Towles*, 1 Munf. 175; *Braxton v. Hilyard*, 2 Munf. 49.

If the last surviving obligor died the action remained against his representatives. *Somerville v. Grim*, 17 W. Va. 803.

Where a joint bond was given before the act of 1786, and after that act went into operation, one of the obligors died, living the other, the obligation survived, and the executors of the deceased were exonerated. *Elliott v. Lyell*, 3 Call 268, cited and approved in *Atwell v. Milton*, 4 Hen. & M. 256; *Somerville v. Grim*, 17 W. Va. 808; *Reynolds v. Hurst*, 18 W. Va. 654.

By the act of 1786 "the representatives of one jointly bound with another for the payment of a debt, and dying in the lifetime of the latter, may be charged, as if the obligors had been bound severally as well as jointly," *Elliott v. Lyell*, 3 Call 268, in which it is held, that this act of 1786 should not affect prior but only subsequent contracts. See also, *Stevens v. Taliaferro*, 1 Wash. 155.

Under Va. Code, 1887, § 2855, the representative of one bound with another, either jointly or as a partner, by judgment, bond, note, or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner as such representative might have been charged, if those bound jointly or as partners, had been bound severally as well as jointly, otherwise than as partners.

d. Execution against Body of One Obligor as Satisfaction of Debt.

The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar

an action against the other obligor. *Atwell v. Towles*, 1 Munf. 175.

3. In Joint and Several Bonds.

a. Instruments Construed as Joint and Several Obligations.

A sealed instrument in the singular number, but signed and sealed by two persons, is joint and several. As, for instance, the writing begins, "I promise to pay," etc., and concludes, "I bind myself, my heirs," etc., without mentioning any name in it, and is signed and sealed by both defendants. *Keller v. McHuffman*, 15 W. Va. 64; *Holman v. Gilliam*, 6 Rand. 39.

"A particular form of expression which will make an unsealed contract joint and several, will not cease to make it so, merely because seals are added to it. The effect of the seals is not to change the meaning of the parties, but merely to add to the solemnity and dignity of the instrument." *Holman v. Gilliam*, 6 Rand. 39.

An action of debt is brought upon an instrument of writing in these words, viz: "On demand, I promise to pay to David Keller the just and full sum of \$200.00 for value received, as witness my hand and seal the 1st day of March, 1862. Thomas McHuffman, [Seal.] Security:—David M. Riffe," by the administrator of the payee against the said McHuffman and David Riffe jointly on the 9th day of April, 1872, in the circuit court of Monroe county. Held, that said instrument of writing is a joint and several promise to pay as to both defendants, and that, *prima facie* at least, said instrument of writing is on its face as to the defendant McHuffman his single bill obligatory, and as to the defendant Riffe his promissory note, and that the deceased payee during his life, and his personal representative after his death, had the right to an action of debt against said McHuffman and Riffe jointly thereon, and was not bound to sue them separately in separate actions upon said instru-

ment of writing. *Keller v. McMuffman*, 15 W. Va. 64.

b. Effect of Subsequent Addition of Obligor.

A joint and several bond is executed by several persons, and delivered to the obligee; and afterwards, with the consent of the obligee, but without the knowledge of the obligors, another person executes it. As to those who first signed it, it is joint as between themselves, and several as to the person last executing it. *Nash v. Fugate*, 24 Gratt. 202.

In debt on bond for money payable twelve months after date against obligors, the declaration counts against them as joint obligors; but it appears, by defendant's pleas and plaintiff's replications, as well as by evidence at the trial, that in fact the bond was first sealed and delivered by three of the obligors, of whom one was principal and the other two sureties; and that the fourth obligor sealed and delivered it some time after the debt fell due, with a view in so doing to constitute himself as surety in place of one of the original sureties; and this was done with the assent of the obligee of the principal obligor, and of the surety for whom the fourth obligor was to be substituted, but without the consent or knowledge of the other original surety. Held, the original obligation was the joint contract of the three obligors, but the obligation of the fourth obligor was his several contract, and therefore plaintiff can not recover joint judgment against the four obligors. *Baber v. Cook*, 11 Leigh 606.

c. Liability of Co-Obligor Described as Surety.

A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, etc., then this obligation to be void," etc. *Ward v. Johnston*, 1 Munf. 45.

4. Effect of Failure to Mention Heirs of Obligators.

In the obligation of a bond, the obligors acknowledge themselves (not naming their heirs) to be held and firmly bound to the obligee, his heirs, executors, etc., in a penal sum; the condition provides, that if the obligors, or either, or any of their heirs, executors or administrators, shall pay a less sum specified, on or before a given day, then the obligation is to be void. Held, the heirs of the obligors are not bound by the instrument. *Huston v. Cantril*, 11 Leigh 136.

C. INTERPRETATION OF PROVISIONS AS TO PAYMENT.

In General.—Generally, as to the interpretation and construction of provisions in bonds, notes, etc., as to the time and medium of payment, etc., see the title PAYMENT.

Provisions of Instrument Alone Looked to.—A bond executed between the 1st of January, 1862, and the 10th of April, 1865, payable at a future day in a currency designated in the bond, is to be paid in the currency designated. *Hilb v. Peyton*, 21 Gratt. 386.

"The case presents here as it did to the court below a single question, and that is, what is the legal construction and legal effect of the contract which the parties entered into, reduced to writing, signed and sealed for themselves? That writing, and that alone must be looked to as containing the true understanding and agreement of the parties." *Hilb v. Peyton*, 21 Gratt. 386.

P. executes his bond to H. for \$5,000, dated June 9, 1863, and payable two years after date, without interest, "in such funds as the banks receive and pay out." Parol evidence is not admissible under § 2 of the adjustment act, of March, 1866, to prove the kind of currency in which the bond was to be paid, or with reference to which, as a standard of value, it was made and entered into. Such a bond creates a con-

tract of hazard. *Hilb v. Peyton*, 21 Gratt. 386.

"Where the parties themselves have stipulated in writing as to the kind of currency in which the obligation is to be fulfilled or performed, then this section clearly does not apply. It is only in a case where the parties have not stipulated plainly and unmistakably as to the kind of currency in which the obligation is solvable, that parol evidence can be heard." *Hilb v. Peyton*, 21 Gratt. 386.

The most just and reasonable interpretation of the words "current funds," is, that they are intended to guard against any contingency of an obligation to pay in coin. *Meredith v. Salmon*, 21 Gratt. 762.

The words of the bond that it is "to be paid in current funds," do not necessarily raise the presumption, that it is to be paid in another and more valuable medium; but their proper interpretation depends upon the time when and the circumstances under which they are used. *Meredith v. Salmon*, 21 Gratt. 762.

Construction of Bonds "Payable on Demand."—Where in a bond for the payment of money the words "on demand" are used, it is payable at once, unless there be some plain provision in the bond that it shall not be so paid. *Omohundro v. Omohundro*, 21 Gratt. 626.

A bond payable on demand is due and payable from its date. *Carter v. Noland*, 86 Va. 568, 10 S. E. 605, citing *Payne v. Britton*, 6 Rand. 104.

"These words 'on demand' have a plain, distinct, clearly defined, legal and popular signification, well known to the courts and to the people. When an obligation for money or its equivalent is executed containing this provision, the parties perfectly understand that the debt is payable presently; that it is due immediately and bears interest from its date." *Staples, J.*, in *Omohundro v. Omohun-*

dro, 21 Gratt. 626; approved in *McVeigh v. Howard*, 87 Va. 599, 13 S. E. 31.

On the 15th of November 1862, H. executed his bond to S. for \$600, payable on demand, it being for money borrowed, upon a condition, inserted at the instance of H. that no interest will be required until the money is demanded, and then a reasonable time to be given to pay, interest to run from the demand. The loan was in Confederate money. Held, H. had the right to pay the debt at any time, though S. made no demand. *Stover v. Hamilton*, 21 Gratt. 273.

Effect of Words "Payable When Called for."—S. borrowed of R., his brother, Confederate money, and gave a bond for it as follows: On demand, I promise to pay R. the sum of \$12,800, value received, borrowed money this date, to be paid when called for, in Confederate money, or whatever money may be current of the state, or our banks pay out to depositors. Witness my hand and seal. The bond bears date May 22, 1863. Held, the debtor had a right to discharge it immediately with Confederate treasury notes. *Omohundro v. Omohundro*, 21 Gratt. 626.

The words "to be paid when called for," do not change the legal effect of the instrument. *Omohundro v. Omohundro*, 21 Gratt. 626.

If it be a bond for a commodity, though a special demand may be necessary to entitle R. to sue, the debtor may pay without such demand. *Omohundro v. Omohundro*, 21 Gratt. 626.

D. CONCLUSIVENESS.

"There seems no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive against all who seal it of everything admitted in it. *Shaw v. McCullough*, 3 West Va. Rep. 260; *Allen v. Tucker*, 3 J. J. Marshall, 164; 1 Greenl. Ev. sec. 22; *Cox v. Thomas*, 9 Gratt. 312; *Cordle v. Burch*, 10 Gratt.

480; *Cecil v. Early and others*, 10 Gratt. 198." *Hoke v. Hoke*, 3 W. Va. 561. See the title **ESTOPPEL**.

If a bond recite a fact, though the fact recited be a matter which ought regularly to appear of record, the parties, obligors in the bond, will be estopped from denying the truth of such recital. Thus if the bond recites that a certain person was sheriff and a certain other person his deputy, though these facts appear of record, yet they need not be proven in a suit on such bond otherwise than by the production of the bond; for the obligors in it are estopped from denying the truth of the recital. *Bank v. Fleshman*, 22 W. Va. 317; *Cox v. Thomas*, 9 Gratt. 320.

H. executed a bond for the payment of a sum of money to H. as executor. On suit brought H. pleaded that the plaintiff was not at the date of the bond, executor, etc., to which replication was made that H. was estopped from his bond from denying what was admitted therein, and the court below on demurrer to this replication held, it was well taken. Held, that there is no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive against all who seal it, of everything admitted in it; that the replication should not have been held bad on demurrer. The plea itself being bad, judgment should have been to sustain the demurrer and hold the plea bad. *Hoke v. Hoke*, 3 W. Va. 561.

VI. Negotiability and Transfer.

A. HOW TITLE TRANSFERRED.

1. In General.

Title to a bond can only be transferred to another by a written assignment, or by delivering it to the other with the intent of transferring it. *Arnold v. Barrow*, 2 Pat. & H. 1.

Though assignments of bonds are now permitted, and sometimes a transfer without assignment is held to pass the right to property therein, yet to

such transfer two things are essential: (1) consideration; and (2) the act of transfer. It is not a mere delivery of possession, without intent to pass the property, that constitutes the transfer. There must be an intent to transfer, and if there is no such intent, the holder has no right to property. *Brown v. Taylor*, 32 Gratt. 135.

2. Assignment.

For a full treatment of the question of the assignment of bonds, their assignability, the manner, requisites and effect of assignment, actions on assigned bonds, etc., see the title **ASSIGNMENTS**, vol. 1, p. 745.

B. APPLICATION OF DOCTRINE OF CAVEAT EMPTOR.

The doctrine of caveat emptor applies as well to the purchaser of a bond as to any other property; when he takes the assignment of the bond and the deed as security for its payment, he is affected with notice of every bond mentioned in the deed. *Gibbens v. Ritter*, 1 Va. Dec. 106.

"Every consideration that applies the principle of caveat emptor to the case of sales of property by one having possession without title, has additional force in the case of bonds and other choses in action; and accordingly the courts have uniformly decided that as to them the rule caveat emptor applies. See opinion of Tucker, P., in *Wilkinson v. Holloway*, 7 Leigh 277." *Brown v. Taylor*, 32 Gratt. 135.

C. CONTRACTS FOR TRANSFER.

Necessity for Consideration.—A written agreement, not under seal, to deliver bonds to a certain amount, must be considered nudum pactum, if no consideration for the contract be stated on its face, or disclosed by testimony. *Beverleys v. Holmes*, 4 Munf. 95. See the title **CONTRACTS**.

Purchase at Discount.—A bond may be sold for much less than its nominal amount, and such sale will be enforced in a court of equity, as well as in a

court of law, if no fraud or usury appear in the transaction. *Kenner v. Hord*, 2 Hen. & M. 14.

A fair purchase of a bond, at any discount, is not usurious. See, accordant, *Kenner v. Hord*, 2 Hen. & M. 14; *Musgrove v. Gibbs*, 1 Dall. 217; *Wycoff v. Longhead*, 2 Dall. 92; *Hansbrough v. Baylor*, 2 Munf. 36.

Contract for Purchase of Bonds Constructed.—Plaintiff purchased of defendants several bonds due their testator. They agreed that in case any part of said bonds had been paid to certain attorneys, said sums should be refunded to the said purchaser. In a bond given by the defendants for the due execution of the contract, the sum then due on said bonds is recited, and that "all which bonds, together with the interest accruing thereon, still remained due and unpaid." The attorneys referred to had received £920, 14s, 11d; but refused to pay the interest on it which was demanded. The amount due by the assigned bonds having been reported less than above recited, one of the defendants agreed to make a deduction therefor, and a referee stated said deduction erroneously. The plaintiff agreed to rectify mistakes. Judgments at law were obtained against plaintiff on his bonds given for the purchase money of the bonds sold him; and he made no claim for the deduction aforesaid; but afterwards obtained an injunction. The defendants in a suppletory answer retracted their agreement to make the deduction aforesaid. It was held, that the purchaser was not entitled to any deduction; and that the sum due on the bonds was in fact greater than that stated in the agreement; and the defendants were credited by the excess. The court of appeals, however, allowed the deduction. *Hylton v. Hunter*, Wythe 195.

D. EFFECT OF TRANSFER BY ONE JOINT OBLIGEE.

When the interest of two obligees

is shown by the face of the bond to be joint, the possession of the bond by one of them could not mislead a purchaser from him; and though each might sell his own interest, neither could dispose of the interest of the other without his consent. *Brown v. Dickenson*, 27 Gratt. 690.

Three bonds are executed to A. and G., and are left in the possession of G. A. sold the bonds to E., but they being in the possession of G. were not delivered to E. G. sold and delivered the bonds to D. In a suit by E. against D. to recover the bonds, the deposition of A. was taken to prove that G. owed him, and had agreed that he should have the bonds; but at the time of taking the deposition of A., G. was dead. Held, the bonds having been executed to A. and G., their joint interest appeared upon the face of the bonds; and the possession of them by G. could not mislead a purchaser from him. Though each might sell his own interest, neither could dispose of the interest of the other without his consent. Though the bonds were sold by G. and assigned to D., D. only acquired the interest of G. in the bonds; and E. is entitled to the interest of A. in them. A. is liable to E., on his sale of the bonds to E., if he does not recover them; and as G. is dead, A. is not a competent witness, either at common law or under the statute, to prove that G. had agreed with him that the bonds should belong to A., though A. is not a party in the suit. *Brown v. Dickenson*, 27 Gratt. 690.

VII. Interest.

Generally, as to the allowance of interest on bonds, manner of computing, etc., see the title INTEREST.

As to statutory provisions in Virginia and West Virginia providing for the recovery of the principal and interest in actions on bonds, see post, "Amount of Recovery," IX, N, 2.

VIII. Payment and Discharge.

A. POSSESSION AS JUSTIFYING PAYMENT TO HOLDER.

The mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect the same. *Brown v. Taylor*, 32 Gratt. 135; *Tate v. Tate*, 85 Va. 205, 7 S. E. 352; *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217; *Donahue v. Fackler*, 21 W. Va. 130; *Flesher v. Hasler*, 29 W. Va. 405, 1 S. E. 580.

"The court has approved the doctrine of caveat emptor in a very recent case, and one which was much stronger than the one at bar. It was held, in *Hess v. Rader*, 26 Gratt. 746; *Lloyd v. Erwin*, 29 Gratt. 598, that the payment of a bond given for the purchase of land, made by a commissioner of a chancery court, and paid by the purchaser to the commissioner named in the decree, was a void payment, because the commissioner had not given the bond required by the court, and was therefore without authority to collect the bond of the purchaser in his hands." *Brown v. Taylor*, 32 Gratt. 135.

"The possession of certain kinds of commercial paper, such as negotiable notes and bills of exchange, payable to order, and which pass from hand to hand by delivery, and are used as money in the multiform transactions of trade and commerce, carries with it the authority to collect by the holder. This grows out of the necessities of commerce and usages of trade. But the mere possession of a bond or other documentary evidence of debt, is not such an evidence of property as will justify a payment to the holder without an authority, express or implied, from the true owner. To hold otherwise, would produce mischiefs without remedy. Bonds and other documentary evidence of debt, are often pledged as collaterals or held as security. They are often lost or stolen. It

will not do, therefore, to say that a party having possession of such a paper, no matter how obtained, or for what purpose held, may collect it without authority, either express or implied, from the true owner. Indeed at common law, the property in these choses in action could not pass even where they were actually assigned and delivered. Under our law, assignments are permitted, and sometimes a transfer without assignment is held to pass the right of property, but to such transfer two things are necessary: 1. Consideration; and 2. The act of transfer. It is not a mere delivery of possession, without intent to pass the property, that constitutes the transfer. There must be an intent to transfer, and if there is no such intent, the holder has no right of property. He has no right to sell, nor has he a right to receive payment from the debtor, unless by authority express or implied." *Brown v. Taylor*, 32 Gratt. 135.

B. AUTHORITY OF AGENT TO RECEIVE.

The authority of an agent to collect debts evidenced by bonds is not suspended because it is illegal to remit the amount so received, to his principal; in such case it is the duty of the agent to receive payment and the duty of the obligor to pay. *Hale v. Wall*, 22 Gratt. 424.

Generally, as to the authority of agents to collect, receive payment, etc., see the title AGENCY, vol. 1, p. 240.

C. TIME OF PAYMENT.

In General.—As to the interpretation of provisions in bonds as to payment "on demand" or "on call," see ante, "Interpretation of Provisions as to Payment," V, C.

For the general principles as to time of payment of indebtedness, see the title PAYMENT.

Effect of Extension of Time of Payment.—A covenant by the holder of a

bond with the principal obligor, to give a specific time for payment, does not release the surety at law. His only remedy is in equity. *Devers v. Ross*, 10 Gratt. 252.

A parol agreement to give time to the principal in a bond, is no defense at law to an action on the bond against the surety. *Tremper v. Hemphill*, 8 Leigh 623; *Steele v. Boyd*, 6 Leigh 547.

If an obligee in a bond executed by a principal and sureties without the consent of the sureties make a parol contract, whereby he gives further time to the principal, the sureties are thereby discharged in equity, but not at law. *Sayre v. King*, 17 W. Va. 562. See the titles PAYMENT; SURETYSHIP.

D. MEDIUM OF PAYMENT.

Generally, as to the medium of payment of obligations, see the title PAYMENT.

As to the meaning of the words "current funds" used in bonds, see ante, "Interpretation of Provisions as to Payment," V, C.

E. PRESUMPTIONS AS TO PAYMENT.

1. From Lapse of Time.

In General.—The common-law rule of presumption of payment of bonds arising from the lapse of time has not been affected by the statutory provisions adopted at the revisal of 1849, prescribing the limitation of such instruments. *Booker v. Booker*, 29 Gratt. 605; *Jameson v. Rixey*, 94 Va. 346, 26 S. E. 861; *Lightfoot v. Green*, 91 Va. 514, 22 S. E. 242; *Bowman v. Hicks*, 80 Va. 810; *Norvell v. Little*, 79 Va. 143; *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Udike v. Lane*, 78 Va. 136; *Brewis v. Lawson*, 76 Va. 45. See post, "Limitation of Actions," IX, B. And see generally, the titles ACTIONS, vol. 1, p. 122; PAYMENT.

It has been insisted that since the passage of a statute of limitations to

suits on bonds, that no presumption of payment of a bond from lapse of time can arise. This position does not seem to be sound. Though doubtless the presumption of payment had its origin in the absence of any statute of limitation, nevertheless it is held, that though a party does not plead the statute of limitations, he may rely on the presumption of payment from lapse of time. The presumption of payment from lapse of time is in no manner affected by the passage of an act of limitation to suits upon bonds. This conclusion is consonant to reason and supported by the English authorities. *Hale v. Pack*, 10 W. Va. 145.

Length of Time Necessary to Raise Presumption.—A bond dated more than twenty years before it was exhibited for payment, shall be taken prima facie, as paid. *Tinsley v. Anderson*, 3 Call 329.

The common-law rule of presumption of payment only applies to cases where twenty years have elapsed after the right of action accrued. *Udike v. Lane*, 78 Va. 132.

"According to a well-settled rule of the common law, a bond is presumed to have been paid after the lapse of twenty years from the time it becomes due. It is, however, a mere presumption which may be repelled by satisfactory evidence; but in the absence of such evidence, this presumption is of itself sufficient to sustain a plea of payment. If a shorter period than twenty years has elapsed, even a day, this legal presumption does not arise. In such a case, however, the lapse of time may be relied on in connection with other circumstances as evidence of payment. 2 Minor's Institutes, page 886, and cases there cited; 2 Best on Evidence, 696." *Booker v. Booker*, 29 Gratt. 605.

While the mere lapse of twenty years without explanatory circumstances affords a presumption of law,

that the debt is paid, even though it be due by specialty, still payment may be inferred by the jury from circumstances with the lapse of a shorter period of time than twenty years. When an action is brought on a bond or covenant for the payment of money, if twenty years elapse between the time of its becoming due and of the institution of the action or proceeding, the defendant may without pleading the statute of limitations rely upon presumption of payment; and upon issue joined on plea of payment, payment may be inferred by the court or jury, from circumstances, coupled with a lapse of a shorter period than twenty years. *Calwell v. Prindle*, 19 W. Va. 604, 640; *Sadler v. Kennedy*, 11 W. Va. 187; *Hale v. Pack*, 10 W. Va. 145; *Perkins v. Hawkins*, 9 Gratt. 656.

The mere lapse of fourteen years since the debt became due in this case, unconnected with pertinent circumstances proved, from which an inference of payment of the debt may be reasonably drawn, does not authorize a presumption of payment by a court or jury. *Calwell v. Prindle*, 11 W. Va. 307, 329.

An action of debt on a bond brought less than eighteen years after right of action accrued, will not be barred and by analogy to the statute a suit in equity to subject land conveyed in trust to secure a debt, the bond for which has been lost is not barred. *Coffman v. Shafer*, 29 Gratt. 173.

In *Norvell v. Little*, 79 Va. 141, the right of action on bond accrued September 13, 1857, and time ceased to run against it December 3, 1881, by entry of decree for an account of debts in creditor's suit. After deducting stay period, less than twenty years remained, and common-law presumption of payment arose not. Yet the record discloses circumstances, which, taken in connection with the lapse of time, sustain a plea of payment.

Rebuttal of Presumption.—When

more than twenty years have elapsed between the date of payment of a bond and the institution of suit thereon, it affords a presumption of payment, which the obligee may rebut by satisfactory evidence; and whether the evidence is sufficient for that purpose, is a question for the jury, and not for the court. *Booker v. Booker*, 29 Gratt. 605; *Norvell v. Little*, 79 Va. 141.

Even if the time had elapsed from which the legal presumption of payment might arise, yet the circumstances may repel that presumption. *Erschine v. North*, 14 Gratt. 60.

The presumption of payment is not a legal presumption absolutely conclusive, but it is a presumption of fact, which, though not conclusive, is yet prima facie proof of payment. If less than twenty years, though nearly that time, have elapsed, all the circumstances are considered, including lapse of time, and their natural weight as evidence is to be given to each circumstance, including lapse of time; but if twenty years have elapsed a legal presumption arises, which must be accepted as proof, unless the contrary appears by evidence. But this presumption may be rebutted by proof which is satisfactory that the debt has not been paid, such as the proof of payment of interest within the twenty years, the continued absence from the country of the obligee, the continued insolvency of the defendant or obligor, or other strong circumstances showing nonpayment, or showing good causes for longer forbearance. *Hale v. Pack*, 10 W. Va. 152; *Eustace v. Gaskins*, 1 Wash, 188.

Presumption of payment from lapse of time has no reference to the positive bar of the statute, but is repelled by proof, and in case at bar is repelled by testimony of principal obligor, the endorsements of interest payments on the bond, and other circumstances. *Coles v. Ballard*, 78 Va. 139.

2. Delivery to Obligor as Evidence of Payment.

The circumstance that the bond has been delivered up to the obligor is in itself presumptive evidence that it has been paid. *Lindsay v. McCormick*, 82 Va. 479, 5 S. E. 534.

F. EFFECT OF PARTIAL PERFORMANCE OF COLLATERAL AGREEMENT.

Where a debtor has agreed to do a collateral thing in satisfaction of his bond to his creditor, and dies after having partially performed the agreement, the bond should not be treated as paid, but the debtor should have credit thereon for the money paid, or the value of the services rendered in pursuance of the agreement. *Hughes v. Patterson*, 91 Va. 664, 22 S. E. 485.

G. EFFECT OF PAYMENT BY SURETY.

It is well settled, that where a surety pays a debt of his principal, which is evidenced by bond, the surety is not substituted to the rights of the creditor so far as to make him a bond creditor. The payment completely discharges and destroys the bond and leaves the surety to his remedy on his account for money paid for the use of his principal. The only contract available to the surety after such discharge of the bond, is an implied promise that the debtor will repay him the amount so paid for his use. *Conrad v. Buck*, 21 W. Va. 410; *Powell v. White*, 11 Leigh 309; *Kendrick v. Forney*, 22 Gratt. 748.

A bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal, without assignment by the creditor, or an agreement to assign, is forever dead as a security as well in equity as at law. There can be no subrogation in such a case. *Cromer v. Cromer*, 29 Gratt. 280. See the titles SUBROGATION; SURETYSHIP.

H. EFFECT OF PAYMENT TO OBLIGEE AFTER ASSIGNMENT.

A bond which has been assigned by the obligee is paid to the obligee before it is due, without notice of the assignment. The payment is valid, and the assignee can not recover upon the bond from the obligor. *Preston v. Grayson County*, 30 Gratt. 496. See the title ASSIGNMENTS, vol. 1, p. 745.

IX. Actions on Bonds.

A. JURISDICTION.

1. How Determined Where Proceeding on Penal Bond.

Where the proceeding before a court of justice is on a penal bond, with condition for the payment of money, the jurisdiction shall be determined as if the undertaking to pay such money had been without a penalty. And where jurisdiction depends on the amount of a judgment, if it be on such bond, the jurisdiction shall be determined by the sum, payment whereof will discharge the judgment. Va. Code, 1887, ch. 171, § 3494, p. 831.

Debt on a bill penal for \$100, conditioned to pay \$47. The defendant moved the court to stay proceedings, because the penalty was inserted for the purpose of giving the court a jurisdiction which the law withheld. Decided, that the superior court ought not to sustain the motion, but declined deciding whether the fact alleged would avail, if pleaded. *Heath v. Blaker*, 2 va. Cas. 215.

2. Equity Jurisdiction.

See post, "Proceedings in Equity for Enforcement of or Relief against Bonds," X.

B. LIMITATION OF ACTIONS.

In General.—Prior to July 1, 1850, there was no positive limitation of time as to the right of action upon bonds secured by deed of trust. Even then, however, the common-law presumption of payment arose after the lapse of

twenty years, which presumption might be rebutted by showing payment made during that period. After the passage of the statute the limitation was fixed to twenty years, excluding the period of the stay law and subject to a further exception in the case of an order of an account of debts which stops the operation of the statute as to those creditors who come in under the decree, or otherwise become parties to the suit. *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Callaway v. Webster*, 7 Va. Law Reg. 40 (May, 1901); *Norvell v. Little*, 79 Va. 141; *Updike v. Lane*, 78 Va. 132. See the title LIMITATION OF ACTIONS.

As to the presumption of payment from lapse of time, see ante, "Presumptions as to Payment," VIII, E.

By Va. Code, 1849, which took effect July 1, 1850, a limitation of twenty years was imposed to actions on such instruments entered into before the Code went into operation, the time to be computed from July 2, 1850. (See Va. Code, 1873, ch. 146, §§ 8, 22; ch. 209, § 1.) *Brewis v. Lawson*, 76 Va. 36; *Coles v. Ballard*, 78 Va. 139; *Updike v. Lane*, 78 Va. 132; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504.

Exclusion of War and Stay Period.

—From the twenty years between maturity of bond and action brought, the period between April 17, 1861, and January 1, 1869, must be eliminated as respects both the statutory bar of limitations, and the common-law presumption of payment. The object of the legislature was to protect debtors from immediate enforced collections, without prejudice to the rights of creditors. *Norvell v. Little*, 79 Va. 141; *Updike v. Lane*, 78 Va. 132; *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241.

If the parties to the bond reside in a county whose condition was such, during the war, as to render it highly improbable that debts could or would be collected the time during which the war continued, should not be con-

sidered as forming a part of the time whose lapse gives rise to such presumptions of payment. *Hale v. Pack*, 10 W. va. 145.

Exclusion of Time in Accordance with Understanding of Parties.—If it be shown that by the understanding of the parties by whom the bond was executed it was not to be paid till a future time, the time which elapsed from the giving of the bond to such future time, should not be considered as forming any part of the time whose lapse gives rise to such presumption, though the bond on its face be payable on demand. *Hale v. Pack*, 10 W. Va. 145.

Effect of Payment within Twenty Years.—Although after July 1, 1850, a limit of twenty years was prescribed, an order for an account of debts in the case at bar, which was a suit to settle the estate of a deceased obligor, stopped the running of the statute. The presumption of payment after the lapse of twenty years is repelled by a payment within that time. *Bell v. Wood*, 94 Va. 677, 27 S. E. 504.

C. PARTIES.

1. Parties Plaintiff.

a. Who May Sue.

In General.—When a debt exists from one person to another, and an obligation or bond is given to the debtor to discharge such debt, he alone can maintain an action for the breach of such obligation. *Jones v. Thomas*, 21 Gratt. 96.

A. T. executes his bond as follows: March 12th, 1863. I hereby bind myself, my heirs, etc., to pay — the amount of principal and interest due from W. A. J. on the tract of land purchased by him of G. W. J. and wife. Witness my hand and seal the day and date above. He delivers this bond to W. A. J. W. A. J. may recover upon the bond against A. T. if A. T. has not paid the debt, though it is not averred or proved that W. A. J. has paid it, or has been otherwise injured by the fail-

ure of A. T. to pay it. *Jones v. Thomas*, 21 Gratt. 96. See generally, the title PARTIES.

Neither the scire facias nor any other part of the record, showing what was the character of the obligation or other liability upon which the original judgment was rendered, and the defendant's plea not averring that it was such a statutory bond as required that there should be a relator in any action brought upon it, and that the relator should be the party, having the legal right to sue, it must be regarded as a common-law bond or liability subject to be sued on in the names of the payees without a relator, or for the benefit of the holder or any party entitled to the benefit of it. *Richardson v. Prince George Justices*, 11 Gratt. 190.

Sufficient Showing of Interest to Justify Use of Plaintiff's Name.—In a declaration in a suit on a lost bond, it is alleged that the bond was given to one of the plaintiffs, who, by the affidavit filed on the loss of the bond, is alleged to be the wife of the other plaintiff, and it is held, that a sufficient interest appears in the female plaintiff, to justify the use of her name as plaintiff, without further averment to disclose her interest. *Hawver v. Seibert*, 4 W. Va. 586.

Action by Obligee Who Is One of the Obligors.—When a bond is joint and several, and the obligee is one of the obligors, he may maintain an action at law in his own name against one of the other obligors, but such suit could not be maintained at law, if the bond was a joint bond and not a joint and several bond. *Booth v. Kinsey*, 8 Gratt. 563; *VanWinkle v. Blackford*, 28 W. va. 671.

"Where a statute authorizes the assignee of a bond to sue, in his own name, he may maintain a suit thereon at law, though the same person be both obligor and obligee in the same bond. * * * So also when the bond is joint and several and the obligee is

one of the obligors, he may, I think, maintain an action at law in his own name against one of the other obligors." *Booth v. Kinsey*, 8 Gratt. 560.

Action by Heir on Bond to Ancestor for Quiet Enjoyment.—The heir may maintain an action of debt on a bond to his ancestor, conditioned for quiet enjoyment of lands, where the breach has happened since the death of the ancestor. *Eppes v. Demoville*, 2 Call 22.

Generally, as to actions by assignees, see the title ASSIGNMENTS, vol. 1, p. 786.

Generally as to parties in actions on joint and on joint and several contracts, see the title CONTRACTS.

b. Joinder of Obligees in Suit on Joint Bond.

All the obligees in a joint bond must join in an action thereon, or some sufficient excuse for not joining them must be stated in the declaration, or the objection is fatal on general demurrer. *Strange v. Floyd*, 9 Gratt. 474, cited in *Peerce v. Athey*, 4 W. Va. 22.

"The bond, as stated in the declaration, is a joint bond to the plaintiff and two others. And there is no better settled rule of law (except so far as it may be affected by the second section of the 116th chapter of the Code, which does not apply to this case), than that all the obligees in a joint bond ought to be joined in the action thereon; or the death of such as are not so joined, or some other sufficient excuse for not joining them, ought to be averred in the declaration; and that if it appear upon the face of the declaration that there are other obligees who ought to be, but are not, joined in the action, the objection is fatal on general demurrer. 1 Chitty's Pl. 7 and 8; 1 Wms. Saund. R. 153-6, and 290-292, and notes; *Scott v. Godwin*, 1 Bos. & Pul. 67; *Baker v. Jewell*, 6 Mass. R. 460." *Strange v. Floyd*, 9 Gratt. 474.

2. Parties Defendant.

In Actions on Joint Bonds.—In *Atwell v. Towles*, 1 Munf. 175, which was an action on a joint bond, made in the year 1783, it was held, that if both obligors are alive, the action must be against both.

In Actions on Joint and Several Bonds.—"When two parties execute a joint and several obligation to a third person, he may at his option treat it as a joint obligation and sue them both, or he may treat it as a several obligation and sue only one of them. If he chooses to treat it as a joint obligation and sue both the obligors, though the declaration may show that it is a joint and several obligation, still as he has elected to treat it as a joint obligation, the parties to the suit, plaintiff and defendants, are subjected at common law to all the consequences flowing from the settled rules of the common law governing joint actions. See *Moffett v. Bickle*, 21 Gratt. 282; *Taylor v. Beck*, 3 Rand. 316. And they are still subjected to these consequences except so far as it has been modified by statute law. See *Choen v. Guthrie*, 15 W. Va. 100." *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 455.

A suit on a joint and several bond must be brought either against all the obligors jointly, or one of them singly, and not against any intermediate number; and if an error in this respect appears on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement. *Leftwich v. Berkeley*, 1 Hen. & M. 61; *Winslow v. Com.*, 2 Hen. & M. 459; *Newell v. Wood*, 1 Munf. 555. And see *Moss v. Moss*, 4 Hen. & M. 293. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 8.

"In *Leftwich v. Berkeley* [1 Hen. & M. 61], the court took notice of the bond as part of the record, though no oyer was demanded; but the error there also appeared in the declaration; so

that I lay no stress upon that case as to this point. Now here, by the oyer, it appears that the bond was several as well as joint; and therefore, according to the principles established in that case, as well as in *Berkeley v. Boxley* [October term, 1805, MS.], the suit might be maintained against either of the obligors alone, or against the whole jointly." *Meredith v. Duval*, 1 Munf. 76.

Where Death of Omitted Obligor Appears from Declaration.—In *Winslow v. Com.*, 2 Hen. & M. 459, suit was brought on a sheriff's bond against five obligors, the sixth being omitted. Upon objection that it was not stated in the declaration that the sheriff was bound in the same bond, the court said: "This was not necessary, it appearing from the declaration that he is dead. The court will presume that his name is in the bond, which is not spread upon the record, and which the defendants have not denied to be their act and deed. And this circumstance, viz., that it appears that the sheriff was dead before this suit was brought, seems to me to distinguish this case from *Leftwich v. Berkeley*, 1 Hen. & M. 61. There it appeared, there was another obligor not named a defendant, and not appearing to be dead; and, therefore, the judgment was reversed, because all the obligors who are alive must be sued jointly, or each of them severally. But, as all the surviving obligors are brought before the court at once, I see no reason to consider it as an objection that they have not been severally sued. They might have pleaded severally, if they had a several defense. Having made none, it is to be presumed that they have none to make."

Personal Representatives of Deceased Obligor.—As has already been seen, before the statute of 1786, upon a death of one obligor on a joint bond the action could only be against him who survived, and was gone forever

as to representatives of the deceased obligor, but if the last surviving obligor died, action remained against his representatives. After 1786, however, the representatives of one jointly bound with another for the payment of a debt may be charged as if the obligors had been bound severally as well as jointly. *Elliott v. Lyell*, 3 Call 268; *Somerville v. Grim*, 17 W. Va. 808. See ante, "Effect of Death of One Obligor," V, B, 2, c.

Objections for Nonjoinder.—Where on a joint obligation one is sued, the defendant can not take advantage of the nonjoinder except by plea in abatement alleging the joint obligation, and that the co-obligor is alive. *Reynolds v. Hurst*, 18 W. Va. 648. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 8.

"If at common law a plaintiff sued one upon a joint obligation made by two, whether this appeared on the face of the declaration or when the obligation was offered in evidence, the defendant could not take advantage of the fact by demurrer or motion to exclude; his only remedy was by plea in abatement, in which he must have alleged the joint character of the obligation, and that the party not sued was alive. In no other way could he take advantage of the nonjoinder. If the party was dead, not joining him was correct pleading; if he was alive, that must have been shown by plea and in no other way." *Reynolds v. Hurst*, 18 W. Va. 648.

"If this is true as to a joint obligation, how much stronger is it, where the obligation is both joint and several." *Reynolds v. Hurst*, 18 W. Va. 648.

D. FORM OF ACTION.

1. Assumpsit.

Neither at common law nor under § 10, Va. Code, 1868, will an action of assumpsit lie on a writing obligatory which is not a money bond. *State v.*

Harmon, 15 W. Va. 115; *Beirne v. Dunlap*, 8 Leigh 514.

In the absence of express legislation in relation to the pleadings in assumpsit upon a sealed instrument by which there is a promise, undertaking or obligation to pay money, it is advisable, as being more safe and simple, under the present state of the law, to bring debt, where it will lie, instead of assumpsit under § 10, ch. 99, Code of West Virginia. *State v. Harmon*, 15 W. Va. 115.

By § 3246a of the Va. Code of 1904, it is provided that in any case in which an action of covenant will lie there may be maintained an action of assumpsit. See generally, the title ASSUMPSIT, ante, p. 1.

2. Covenant.

"The action of debt only lies for money. On an obligation to pay or deliver any other article, covenant is the proper remedy; and the recovery is, of a compensation in damages. Bonds, bank notes and other choses in action are not money, but stand in the same category with other articles in this respect. When an obligation is in a simple and single form, to pay money, or to deliver any other article, there is no difficulty; and in the former case debt, and in the latter, covenant is the appropriate remedy." *Butcher v. Carlile*, 12 Gratt. 520. See also, *Minnick v. Williams*, 77 Va. 758. See the title COVENANTS.

Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failure to pay the penalty; but, where such stipulation is either expressed or implied, the failure to perform the condition may be assigned as the breach. *Ward v. Johnston*, 1 Munf. 45. And see *Supervisors of Jackson Co. v. Leonard*, 16 W. Va. 470.

In *Supervisors of Jackson Co. v. Leonard*, 16 W. Va. 470, it was held,

that covenant could not be maintained upon the condition of the bond, there being no act stipulated to be done in the condition, and the condition merely showing a matter of defeasance.

"It appears plain from all authorities, that to sustain an action of covenant upon a bond, there must appear in the condition an agreement to do the specific act secured by the penalty of the bond; and if such agreement does not appear, then the true remedy is to sue the obligor on the bond for the penalty, to be discharged by the payment of the damages sustained by the obligee, as provided by § 17, ch. 131, Code of West Virginia." *Supervisors of Jackson Co. v. Leonard*, 16 W. Va. 470.

When the obligation is to pay money in a fixed quantity of some other article, as in so many bushels of wheat, or in wheat at a certain price per bushel, or in bonds, bank notes, or other choses in action, of a certain nominal amount, the authorities all seem to agree, that the meaning and effect of the obligation is the same as if it had been in the simple form of an obligation to deliver the article; and that covenant is the proper remedy. *Butcher v. Carlile*, 12 Gratt. 520. See also, *Dungan v. Henderlite*, 21 Gratt. 149; *Minnick v. Williams*, 77 Va. 758.

On September 14, 1862, H. binds himself by bond to pay to D. twelve months after date, \$800 for the purchase money of land, describing it, "payable in the currency of Virginia and North Carolina money." This is a promise to pay this sum in the currency named; and an action of debt can not be maintained upon it. *Dungan v. Henderlite*, 21 Gratt. 149.

"*Beirne v. Dunlap* [8 Leigh 514] is a case exactly in point, and its authority is not in the least degree shaken by the cases relied upon by the learned counsel for the appellants." *Dungan v. Henderlite*, 21 Gratt. 149.

In *Beirne v. Dunlap*, 8 Leigh 514, the

obligation was to pay "the sum of \$813.79 in notes of the United States, or in either of the Virginia banks." It was held, by the unanimous opinion of the court, that the action of debt would not lie; but that covenant was the proper remedy.

"The action of debt will only lie upon a money or tobacco bond. An obligation to deliver wheat or bullion, or bank notes, will not sustain such action. For it is determinate in its character, and does not generally lie where the amount of the recovery in money must be ascertained by evidence of value and by the intervention of a jury." *Beirne v. Dunlap*, 8 Leigh 514.

Where the obligation is to pay a certain amount in annual installments the proper remedy is by an action of covenant for the recovering of the installments as they fall due. *Peyton v. Harman*, 22 Gratt. 643.

3. Debt.

General Rule.—An action of debt only lies for money. *Butcher v. Carlile*, 12 Gratt. 520; *Dungan v. Henderlite*, 21 Gratt. 149. See the title DEBT, THE ACTION OF.

An action of debt will lie on a bond where the bond on its face calls for money. *Dearing v. Rucker*, 18 Gratt. 426; *Butcher v. Carlile*, 12 Gratt. 520; *Wall v. Atwell*, 21 Gratt. 401; *Reynolds v. Hurst*, 18 W. Va. 648.

"The action of debt will lie only upon a money or tobacco bond." *Beirne v. Dunlap*, 8 Leigh 514.

Whether a bond be declared on as a single bill without noticing the condition, or, as allowed by statute, the condition be set out and the declaration and breaches be assigned therein, the form of action in either case is debt. *Reynolds v. Hurst*, 18 W. Va. 648.

Debt can not be maintained on the bond, until the whole is due; and, therefore, the demurrer should be sustained. *Peyton v. Harman*, 22 Gratt. 643.

Instruments on Which Debt Maintained.—By a bond dated March 27, 1840, the obligor bound himself to pay to the obligee or order, on or before March 25, 1842, a certain sum of money, with interest; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie; and it is not necessary to notice the provision as to the mode of payment in the declaration. *Butcher v. Carlile*, 12 Gratt. 520.

In *Butcher v. Carlile*, 12 Gratt. 520, the court held, that an action of debt would lie in such a case, because the obligation was for the payment of a sum of money, with a mere privilege to the obligor to discharge it in notes or bonds of the description mentioned on or before the day on which it became payable; and having failed so to discharge it, he is liable to an action of debt for the money. The promise to pay was absolute and the form of expression, "which sum may be discharged," etc., indicates mere permission or privilege. The obligee had only a right to demand money. See also, *Dungan v. Henderlite*, 21 Gratt. 149; *Burr v. Brown*, 5 W. Va. 241.

Obligor, by writing obligatory dated October 4, 1869, binds himself to pay obligee in monthly installments, to commence from that day, \$350 either in goods at regular prices, or in current money; and at the times the amounts are payable, neither delivers the goods at regular prices, nor pays the money. It was held, this is an obligation to pay money, with the privilege to the obligor to discharge the money obligation by the delivery of the goods at regular prices in equal amount, on or before the time of payment; and the obligor, failing within that time either to pay the money or so to deliver the goods, is liable to an action of debt thereon. *Minnick v. Williams*, 77 Va. 758, citing *Crawford v. Daigh*, 2 Va. Cas. 521.

"When an obligation is to pay money in a fixed quantity of some other article, as of goods, bonds, or other articles other than money, of a certain nominal amount, covenant will lie. But when the obligation is to pay a sum of money, or some other article, in the alternative, on or before a certain day, or to pay a sum of money, with a privilege to the obligor to pay it in some other article, on or before a certain day, the obligor has his election to deliver the article on or before the day; but if he fail to do so, he is liable absolutely for the money, and to an action of debt for its recovery." *Minnick v. Williams*, 77 Va. 758.

T. executes his bond to S. by which on demand he promises to pay to S. in gold or silver or the equivalent thereof, \$2,400. This is a promise to pay \$2,400 in gold or silver coin or the equivalent thereof, and debt may be maintained upon it. *Turpin v. Sledd*, 23 Gratt. 238.

"Such being the obligation of the plaintiff in error, it is a contract for a sum certain in money; and although he has the privilege to discharge it with an equivalent of bank notes or other inferior currency, debt will lie, as was held by this court in *Butcher v. Carlile*, 12 Gratt. 520." *Turpin v. Sledd*, 23 Gratt. 238.

4. Suits in Equity.

Generally, as to jurisdiction of courts of equity to enforce the payment of bonds for money, to grant relief on lost bonds, etc., see post, "Proceedings in Equity for Enforcement of or Relief against Bonds," X. And see the titles JURISDICTION; LOST INSTRUMENTS AND RECORDS.

E. NECESSITY FOR DEMAND.

A special demand need not be made before the writ issues on a single bill under a penalty, and interest may be recovered without such demand. *Payne v. Britton*, 6 Rand. 101.

F. NECESSITY FOR APPEARANCE BAIL.

Appearance bail is not required in actions of debt on bonds with collateral conditions; and in such cases, it is error to enter a judgment by default against the sheriff, for not returning appearance bail. *Ruffin v. Call*, 2 Wash. 181. See also, *Nadenbush v. Lane*, 4 Rand. 413.

"The court is of opinion, that appearance bail is not required by law, in actions of debt on bonds with collateral conditions, and not for the payment of tobacco or money only." *Ruffin v. Call*, 2 Wash. 181.

G. DECLARATION.

1. Averment as to Use or Consideration for Which Given.

In *Peter v. Cocke*, 1 Wash. 257, it was held, that it was unnecessary to state in the declaration, the use or consideration for which the bond was given; and if it had been stated, it would have been mere surplusage.

In a declaration on a covenant, it should be set out without any intermediate inducements or statement of the consideration; but if averments are made, which may be treated as mere surplusage, they will not vitiate the declaration. *Jones v. Thomas*, 21 Gratt. 96.

2. Averments as to Execution of Bond.

Execution by Member of Firm.—A declaration in debt against two partners in trade, charging that one of them executed the deed for himself and another (without any other averment), is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him. *Garland v. Davidson*, 3 Munf. 189.

In an action of debt, the declaration being against A. and B., merchants and partners, and charging that A. for himself, and B. by his certain bill penal bound himself and his heirs, etc. (the bill penal being in that form), without

containing any farther averments, was adjudged to be insufficient in law to maintain the action. *Shelton v. Pollock*, 1 Hen. & M. 423.

Averments as to Covenant with Plaintiff.—Though in an action on a bond the declaration does not, in its commencement, aver that the defendant covenanted with the plaintiff, yet if it does so in a subsequent part of it, this is substantially sufficient. *Jones v. Thomas*, 21 Gratt. 96.

3. Allegations as to Death of Co-Obligor in Actions on Joint Bonds.

In an action of debt against one obligor only, if the declaration describes the bond as joint, and does not state the other obligor to be dead, it is a fatal error, though not pleaded in abatement, and is not cured by verdict. *Newman v. Graham*, 3 Munf. 187.

"The declaration in this case having stated, that one Catesby Graham was jointly bound with the appellant, in the bond on which this suit is founded; and the said Catesby Graham not being shown to be dead, the court (upon the authority of the case of *Leftwich v. Berkeley*) is of opinion, that it was not competent to the appellee to maintain his action separately against the appellant; on this ground (without deciding on any other), the court is of opinion to reverse the judgment of the superior court with costs, and enter judgment for the appellant." *Newman v. Graham*, 3 Munf. 187.

In an action against the representatives of one of two joint obligors in a bond, dated in 1783, it is essential to state in the declaration that that obligor survived his companion. See *Atwell v. Milton*, 4 Hen. & M. 253; *Atwell v. Towles*, 1 Munf. 181; *Braxton v. Hilyard*, 2 Munf. 49.

"Being a joint bond, therefore, and made in the year 1783, it is of the very substance and gist of the action, when one obligor or his representatives is sued, to aver in the declaration that that obligor survived his companion;

for, if they are both alive, the action must be against both; and, if his companion survived him, the action against his representatives is gone for ever. I do not require any particular technical form of words in the declaration to charge this, but the fact must be substantially stated; it can not be dispensed with, under the decisions of this court, which are too numerous and too well known to the bar to be particularly mentioned." *Atwell v. Towles*, 1 Munf. 175.

Quære, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his, had paid the debt (without stating that such other obligor was dead, or that the defendant's intestate had survived him); and alleging, in assigning the breach, that right of action had accrued, under the premises against the defendant's intestate (without setting forth in what manner), be good after verdict? *Atwell v. Towles*, 1 Munf. 175.

4. Averments as to Date of Bond.

In *Ross v. Overton*, 3 Call 309, the court sets out the rule laid down in 1 Ld. Raym. 335; namely, that if a bond has either none, or an impossible date, the plaintiff may aver any day which he can prove the bond to have been delivered on.

5. Averment of Legal Effect of Bond.

A declaration upon a bond need give only its legal effect, and must do that, so far as pertinent to the action. *State v. McGuire*, 46 W. Va. 328, 33 S. E. 313.

In *Henderson v. Stringer*, 6 Gratt. 130, it was held, that it was sufficient to set out the bond according to its legal effect; and as the suit was against the obligor only, it was only necessary so to describe it, as to show that he was bound.

6. Averment of Performance of Conditions Precedent.

In an action of debt on a bond the

setting out the performance of a condition precedent in the language of the condition is sufficient. *Smith v. Lloyd*, 16 Gratt. 295.

7. Setting Out Conditions and Assigning Breaches.

a. Necessity and Propriety of Setting Out Conditions.

In General.—"In Gould's Pleadings, ch. 4, § 17, p. 176, it is said: 'It is never necessary by the common law for the plaintiff in his declaration to state, or in any manner to take notice of, any condition subsequent annexed to the right which he asserts; for the office of such a condition is not to create the right on which the plaintiff founds his demand, but to qualify or defeat it. The condition, therefore, if performed or complied with, furnishes matter of defense which it is for the defendant to plead. Thus, in debt on a bond, it is not necessary for the plaintiff, in his declaration, to state or count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant, if it affords him any defense, as it does if performed.'" *Carter v. Noland*, 86 Va. 568, 10 S. E. 605.

The rule at common law was for the plaintiff to count upon the bond, and for the obligor in the bond, if the condition amounted to a defeasance or a covenant not to put the bond in force, at any time to plead the covenant to the action on the bond as a release or in bar; but if the covenant was not to put the bond in force for a limited time, the obligor was compelled to resort to an action on the covenant. *Carter v. Noland*, 86 Va. 568, 10 S. E. 605.

Necessity for Recognition of Subsequent Agreement Respecting Bond.—

In order to make a subsequent agreement respecting a bond a part of the bond, so as to necessitate its recognition as such in declaring on the bond, it must be so engrafted upon the bond that the original and engrafted matter

shall constitute inseparable parts of an entire instrument. Otherwise the endorsement must be pleaded as a matter of defense. *Carter v. Noland*, 86 Va. 568, 10 S. E. 605.

In an action of debt on a single bill, the plaintiff declared on the bond, taking no notice of the endorsement thereon in the words and figures following: "March 27, 1875. By amount paid for me by the Lucketts, in purchase of farm, at five hundred dollars; by B. P. Noland's due bill of this date for five hundred dollars; and it is agreed that no more of this note shall be demanded of the said Noland until the marble quarry is in successful operation and he receives therefrom enough to pay the balance of this note, or he can sell his stock for enough to pay said note, as per receipt given him. B. F. Carter." Held, this endorsement did not become an integral part of the original instrument, making it a new and different bond from what it was at first, and that bond, therefore, as it appeared on oyer, did not vary materially from that described in the declaration. *Carter v. Noland*, 86 Va. 568, 10 S. E. 605.

b. Methods of Declaring on Bonds with Collateral Conditions.

In General.—Both in Virginia and West Virginia there are two ways of declaring on a bond with collateral condition. One method is simply to declare on the obligation without setting forth the conditions. If this is done, the declaration will be good until the defendant craves oyer of the obligation and thereby makes the condition a part of the declaration. If after such oyer the defendant pleads conditions performed, the plaintiff ought not to reply generally, but to sustain his declaration, the plaintiff must in such case, by a replication, allege a breach of the conditions. *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 455; *Reynolds v. Hurst*, 18 W. Va. 648; *Green v. Bailey*, 5 Munf. 246.

The other and better mode, however, of pleading in such a case, is to set out in the declaration the conditions of the obligation, and assign the breaches of it. *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 455; *Reynolds v. Hurst*, 18 W. Va. 648; *Allison v. Bank*, 6 Rand. 227.

"There are two modes of declaring upon the bond, one by declaring upon it as a single bill without noticing the condition, in which case the defendant craves oyer of the condition and pleads performance, and the plaintiff replies by assigning breaches. The other is to set out the condition in the declaration and assign the breaches in it." *Reynolds v. Hurst*, 18 W. Va. 648.

"Or, if the defendant fails to plead, and the case goes to a writ of inquiry without plea, the plaintiff must assign his breaches by suggestion thereof in writing." *Reynolds v. Hurst*, 18 W. Va. 648.

In debt on a bond with collateral condition, if the condition be not set out in the declaration, nor made part thereof by oyer, it should be distinctly stated in a replication. *Graham v. Graham*, 4 Munf. 205.

Illustrations.—B., J. and M. execute their joint and several bond to the plaintiff with a condition reciting that B. was agent of plaintiff, and that if he should waste or misapply the funds of the plaintiff which came into his hands as such agent, etc., then the obligors in the bond should recompense the plaintiff for losses so arising, then the obligation was to be void, or else remain in full force. The plaintiff sued all the obligors in this bond in an action of debt setting forth in his declaration only the obligatory part of the bond and taking no notice of the condition. The defendants pleaded conditions performed and set-off, without craving oyer of the bond, or writing out his plea of set-off, or filing with it any bill or particulars. The plaintiff replied generally to these pleas,

and at a subsequent term withdrew his general replication to the plea of conditions performed; and leave was given him to file a special replication, which was done, and the defendants demurred thereto, and the court sustained the demurrer, but failed to hold, as it should have done, that the plea of conditions performed without craving oyer of the bond was improper, and instead of striking it from the record, as it should have done, gave the plaintiff leave to file another special replication thereto. This the plaintiff did, setting forth in it the condition of the bond and its breach by the principal in the bond in not paying over moneys collected by the principal in the bond as the plaintiff's agent. The record states that to this special replication the defendants pleaded the general issue which this court construes as meaning they filed a general rejoinder. The defendants also offered another plea of set-off, not written out, out filed with it a bill of particulars for services rendered by B. as agent for the plaintiff, though not stating on the face of the bill of particulars that the defendant B. was the principal in the bond. The court refused to permit this plea of set-off to be filed, and on the trial refused to permit proof of these services, and on the plea of conditions performed, entered up judgment for the plaintiff. Held, that this judgment and all the pleadings and proceedings subsequent to the declaration must be set aside, and a repleader awarded, and leave given to the plaintiff to amend his declaration if it thinks proper, so as to set forth the bond and its conditions in the declaration, and allege therein the breaches of the conditions; this being regarded as the preferable mode of declaring on such a bond. *B. & O. R. Co. v. Bitner*, 15 W. Va. 467.

"The declaration is similar to that filed in the case of *The Baltimore and Ohio Railroad Co. v. Henry Bitner* [15 W. Va. 455] *supra*. And as held

in that case, it must upon the authorities be held to be sufficient, though the better mode of declaring on a bond with conditions is to set forth the bond and its conditions and allege the breaches of the conditions in the declaration." *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 467.

c. Assignment of Breaches.

(1) Necessity and Effect.

In actions upon bonds with collateral conditions for the payment of money or for the performance of some specific duty, it is necessary to aver the breach of the condition. *Reynolds v. Hurst*, 18 W. Va. 648.

In an action on a bond with collateral condition the breach of the condition is the gist of the action, for without a breach there is no cause of action. But the breach assigned must be of the condition set forth in the bond, and, if the condition of the bond is to pay costs and damages sustained by any one by reason of suing out an action of detinue, and the breach assigned is a failure to pay damages sustained by reason of the seizure and sale of the plaintiff's property taken in the action of detinue, as in the case at bar, the declaration is bad on demurrer. *Jackson v. Hopkins*, 92 Va. 601, 24 S. E. 234.

An averment of a breach of the condition of a bond, although it may not entitle the plaintiff to all he demands, will entitle him to recover what he is legally entitled to in consequence of the breach. *M'Dowell v. Burwell*, 4 Rand. 317.

(2) Assignment of Several Breaches.

In General.—At common law the penalty of a bond with a collateral condition is forfeited by the breach of the condition, and then becomes a debt, and as such is recoverable by an action of debt, the relief to the obligor being in a court of equity alone, which was accustomed to enjoin the obligee from compelling the obligor to pay the penalty, provided the latter would

pay the actual damages sustained in consequence of the breach of the stipulation. Subsequently by stat. 8, 9, William III, ch. 11, § 8, instead of having to resort to a court of equity, the obligee could assign as many breaches of the condition, as he chose, and a jury ascertained the actual damages sustained by reason of the breaches; and upon this verdict, judgment was entered for the penalty of the bond, to be discharged by the payment of the damages assessed by the jury. This statute was adopted in 1 Rev. Code, 1819, p. 509, § 82, and was continued in the Codes of 1849 and 1860. *Reynolds v. Hurst*, 18 W. Va. 648.

Under § 17, ch. 131, W. Va. Code, 1899, "In an action on an annuity bond, or a bond for money payable by installments, where there are further payments of the annuity, or further installments to become due after the commencement of the action, or in any other action for a penalty for the nonperformance of a condition, covenant or agreement, the plaintiff may assign as many breaches as he thinks fit. If there be judgment for the plaintiff on a demurrer, or by confession, or by default or nil dicit, he may so assign after such judgment." *Supervisors of Jackson Co. v. Leonard*, 16 W. Va. 470. See post, "Amount of Recovery," IX, N, 2.

Demurrer to Assignment of Breaches.

—Where a declaration on a bond with collateral condition contains a general and also special assignments of breaches, the defendant may properly demur to the declaration and to each assignment of breaches. *Wheeling v. Black*, 25 W. Va. 266.

If in such case the demurrer is simply to the declaration and the latter contains matter sufficient to maintain the action, the demurrer must be overruled, although some of the breaches assigned are insufficient, and the grounds of such insufficiency are

specified in the demurrer. *Wheeling v. Black*, 25 W. Va. 266.

In a declaration on a bond with collateral condition, if there be two assignments of breaches, and either assignment be good, and the whole declaration is demurred to, the demurrer ought to be overruled. *Martin v. Sturm*, 5 Rand. 693.

(3) Manner and Sufficiency.

(a) Assignment in Words of Condition or Words of Equal Import.

In an action on a bond with collateral condition, if the breach be assigned in as general terms as those of the condition, it is sufficient. *Winslow v. Com.*, 2 Hen. & M. 459.

It is a general rule in actions on such bonds, that the breaches will be sufficiently assigned by negating the words of the condition. *Wheeling v. Black*, 25 W. Va. 266.

"Several objections are alleged to the general assignment. It may be stated as the general rule, especially in this state, as inherited from the state of Virginia, that the breaches will be sufficiently assigned by negating the words of the condition of the bond sued on. *Branch v. Randolph*, 5 Call 546; *Craghill v. Page*, 2 Hen. & M. 446." *Wheeling v. Black*, 25 W. Va. 266.

In a debt on a bond with collateral condition, if the breach be assigned in the very words of the condition, it is sufficient. *Craghill v. Page*, 2 Hen. & M. 446.

"The errors assigned are: 1. That the breach is too general. The breach assigned in the case of *Meriwether v. Johnston*, was equally so, 3 Call 524. And in *Branch v. Randolph*, Governor, etc., October term, 1805 (MS.), the breach is nearly in the same words as in the present declaration. Yet both those cases were affirmed." *Craghill v. Page*, 2 Hen. & M. 446.

Where the condition of a bond provides for a single act to be done the breach is well assigned if it be in the

words of the condition, or words which import the same thing. *Com. v. Fry*, 4 W. Va. 721.

(b) Necessity for Assignment of Particular Breach.

Where the consideration of the bond requires many things, the omission of any one of which would constitute a breach, a particular breach should be specified in the assignment. *Com. v. Fry*, 4 W. Va. 721.

(c) Assignment of Breach by Way of Recital without Direct Averment.

In debt on bond with collateral condition, an assignment of a breach commencing "and whereas," etc., and continuing by way of recital, to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer. *Syme v. Griffin*, 4 Hen. & M. 277.

8. Averment of Nonpayment and Demand of Penalty.

a. Necessity for.

In actions of debt on penal bonds executed to individuals, whether the bond be declared on as a single bill without noticing the condition, or, as allowed by statute, the condition be set out and the declaration and breaches be assigned therein, the defendant must demand the penalty of the bond and allege its nonpayment as in all other cases of action of debt. 1 Rev. Code, 1819, p. 509, § 82; Va. Code, 1849, ch. 172; Va. Code, 1860, ch. 172; Va. Code, 1887, ch. 160; W. Va. Code, 1899, ch. 126; *Braxton v. Lipscomb*, 2 Munf. 282; *Buckner v. Blair*, 2 Munf. 336; *Green v. Dulany*, 2 Munf. 518; *Hill v. Harvey*, 2 Munf. 525; *Ward v. Fairfax Justices*, 4 Munf. 494; *Norvell v. Hudgins*, 4 Munf. 496; *Nicholson v. Dixon*, 5 Munf. 198; *Green v. Bailey*, 5 Munf. 246; *Nadenbush v. Lane*, 4 Rand. 413; *Allison v. Bank*, 6 Rand. 227; *Strange v. Floyd*, 9 Gratt. 474; *Douglass v. Central Land Co.*, 12 W. Va. 510; *Reynolds v. Hurst*, 18 W. Va. 648; *State v. Phares*, 24 W. Va. 657;

Rigg v. Parsons, 29 W. Va. 522, 2 S. E. 81; *Moundsville, etc., R. Co. v. Wilson*, 52 W. Va. 647, 44 S. E. 169.

If it does not, the defect will be fatal on general demurrer. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. 81.

"In actions on common penal bonds for the payment of money, or for the performance of some specific duty to any private person, it is necessary in the declaration to aver the nonpayment of the penalty, as well as the breach of the condition, and such are all the forms." *State v. Phares*, 24 W. Va. 657.

"In *Reynolds v. Hurst*, 18 W. Va. 648, this court, upon mature consideration, and after reviewing the decisions on the subject, unanimously decided that, 'in a declaration in debt on a penal bond payable to an individual, there must be an averment of the nonpayment of the penalty; otherwise as to official bonds.' This decision has since been approved in other cases. *State v. Phares*, 24 W. Va. 657, 660. It is clear, therefore, that the declaration at bar is fatally defective and insufficient, and that the ruling and judgment of the circuit court is correct." *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. 81.

Official bonds payable to the state form an exception to this rule. *Reynolds v. Hurst*, 18 W. Va. 648; *State v. Phares*, 24 W. Va. 657; *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. 81. See the title PUBLIC OFFICERS.

b. Manner and Sufficiency of Alleging Nonpayment.

(1) General Rule.

"A long train of Virginia decisions has settled beyond controversy that in that state, and in this, in an action for the recovery of a debt, whether it be assumpsit or debt, the plaintiff in his declaration must not only allege the nonpayment of his debt, but this allegation of nonpayment must be general and not confined to the time when it became due, and must, therefore, be extended to every person

who had a right to receive the payment either at the time it fell due or at any subsequent time." *Douglass v. Central Land Co.*, 12 W. Va. 502.

Allegation of Nonpayment by Either Obligor.—If two obligors execute a bond and only one is sued thereon, the declaration must negative the payment by either obligor. *Hill v. Harvey*, 2 Munf. 525; *Douglass v. Central Land Co.*, 12 W. Va. 511.

Declaration upon a bond given by the defendant, and by J. S. deceased, whom the defendant survived; breach, that the defendant had not paid. Quære; if it should not also have averred nonpayment by J. S.? *Peter v. Cocke*, 1 Wash. 257.

In *Vandiver v. Hyre*, 5 W. Va. 414, which was an action on a bond,oyer was prayed and granted and demurrer was entered. It appearing that the declaration failed to aver the nonpayment of the debt by the co-obligors, it was held, that the declaration was fatally defective and the demurrer should have been sustained.

This case was, however, overruled in *Reynolds v. Hurst*, 18 W. Va. 648, in which the court held, that in an action against one on a joint and several obligation the declaration need not refer to the other obligors nor allege nonpayment as to them.

"I understand the authorities to be, that where one is sued on a joint obligation, the averment of promise and nonpayment on the part of the one sued is sufficient without noticing the other, and that defendant can neither by demurrer nor on the trial prevent a recovery; his only remedy is by plea in abatement. More especially is this true, where the obligation is joint and several. In suing on it in its several characters its legal effect makes it only the bond of the one sued, and as to that suit the bond must be treated, as if no other person had executed it. I am therefore of opinion to overrule the case of *Vandiver v. Hyre*, 5 W. Va. 414,

and to hold, that if there had been an averment of the nonpayment of the penalty of the bond by the defendant in this case it would have been sufficient without averring nonpayment by the other parties, who signed this bond." *Reynolds v. Hurst*, 18 W. Va. 648.

Averment of Nonpayment to All of the Obligees.—In an action on a bond to more than one obligee, nonpayment of the debt to all the obligees must be averred in substance in the declaration, or the objection will be fatal on general demurrer. *Strange v. Floyd*, 9 Gratt. 474; *Douglass v. Central Land Co.*, 12 W. Va. 502.

Allegations of Nonpayment in Actions on Assigned Bonds.—If the suit be on a bond which has been assigned, the allegation must be, that the debt has not been paid to the obligee nor to his assignee. *Douglass v. Central Land Co.*, 12 W. Va. 502; *Braxton v. Lipscomb*, 2 Munf. 282.

In debt on a bond, by the administrator of the assignee of the obligee against the administrator of the obligor, the declaration was held to be essentially defective on general demurrer, because it did not aver nonpayment by the defendant to the assignor, before notice of the assignment, nor to the plaintiff's intestate in his lifetime afterwards. *Mitchell v. Thompson*, 2 Pat. & H. 424. See generally, the title ASSIGNMENTS, vol. 1, p. 792.

(2) Averment in General Terms Sufficient.

The averment of nonpayment of the penalty of a bond need be only in the most general terms. *Moundsville, etc., R. Co. v. Wilson*, 52 W. Va. 647, 44 S. E. 169, citing *Cobbs v. Fountaine*, 3 Rand. 484.

The words in a declaration on a penal bond that the defendants "the same to pay hath hitherto wholly neglected and refused and still do neglect and refuse," held to be a sufficient allegation of nonpayment of the penalty

on general demurrer. *Moundville, etc., R. Co. v. Wilson*, 52 W. Va. 647, 44 S. E. 169.

"The averment in this case is in these words: 'Yet the said defendants, although often requested, have not nor has either of them as yet paid the said plaintiff the said sum of twenty thousand dollars or part thereof, but the same to pay hath hitherto wholly neglected and refused and still do neglect and refuse.' This is undoubtedly broad enough to cover the obligees and assignors of the bond, although it might have easily been made more specific without the pleader becoming prolix." *Moundville, etc., R. Co. v. Wilson*, 52 W. Va. 647, 44 S. E. 169.

c. Demand of Penalty.

In debt on a judgment for the penalty of a bond, "to be discharged by a smaller sum with interest," the declaration ought not to demand the smaller sum with interest till paid, but, "the penalty to be discharged thereby." And error in this respect is fatal, even after verdict. *Anderson v. Price*, 4 Munf. 307.

Manner of Declaring on Specialty for Payment of Money with Interest.—

Where a specialty is for the payment of money with interest, the practice is to claim and recover the interest with the principal. *Hammitt v. Bullett*, 1 Call 567.

9. Laying Damages.

In General.—In *Taylor v. M'Clean*, 3 Call 557, it was held, that in an action of debt on a bond for the payment of sterling money, damages need not be laid in the declaration or found by the jury.

In *Woodson v. Johns*, 3 Munf. 230, it was held, that in debt on a bond with collateral condition the plaintiff can not recover any damages not demanded in the declaration, or in the assignment of breaches.

In *Craghill v. Page*, 2 Hen. & M. 446, however, no damages were laid in the declaration in an action of debt on

a bond with a collateral condition; but the judgment was nevertheless sustained.

"I do not think, that in an action upon a bond with collateral condition, it is necessary to state, in the conclusion of the declaration, the amount of damages sustained; for, if it be stated, the plaintiff, in such cases, can recover more damages than are laid in the declaration." *Allison v. Bank*, 6 Rand. 204.

Allegation of Injury to Plaintiff from Breaches.—In an action for the penalty of a bond, it is not necessary to state that in consequence of the refusal of the defendant to pay, the plaintiff sustained damage. *Allison v. Bank*, 6 Rand. 204.

"A plaintiff is not bound, even since the statute, to do more than to state the condition of the bond, and to assign the breaches; nor is it usual for him in assigning breaches, either in the declaration or replication, to state the damages occasioned by the breaches. The plaintiff's right to recover a judgment for the whole penalty, is established by any breach of the condition; and it is the province of the jury to assess the amount of damage sustained, and by payment of which, the judgment for the penalty is to be discharged." *Allison v. Bank*, 6 Rand. 204.

H. PLEAS.

1. General Rules as to What May Be Pleaded as Defense.

Want, Illegality, or failure of Consideration.—In an action on a bond a party can not defend on the ground of a want of consideration. *Harris v. Harris*, 23 Gratt. 737.

Generally, as to the effect of want, illegality or failure of consideration as a defense, see ante, "Consideration," III, C.

Since the statute allowing the defense of failure of consideration to be made in an action on a sealed instrument, defendant may set up this de-

fense either at law or in equity; and it is not necessary in order to give the court of equity jurisdiction in such case that defendant should offer any excuse for not making such defense in a court of law. *Ludington v. Tiffany*, 6 W. Va. 11.

Generally, as to equitable defenses, see the title **ACTIONS**, vol. 1, p. 146.

Alterations.—As to the effect of alterations in the instrument, as a defense to actions on bonds, see ante, "Validity as Affected by Alterations," III, I. And see the title **ALTERATION OF INSTRUMENTS**, vol. 1, p. 307.

Fraud, Accident or Mistake.—As to the right to defend in an action on a bond, on the ground of fraud, accident or mistake, see ante, "Validity as Affected by Fraud, Mistake, etc.," III, J. And see the titles **ACTIONS**, vol. 1, p. 146; **FRAUD AND DECEIT**; **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

In a debt on a bond, a plea, that the bond was obtained by fraud, covin, etc., without saying whether the fraud was in the consideration of the bond, or in its execution, is immaterial. *Tomlinson v. Mason*, 6 Rand. 169; *Wyche v. Macklin*, 2 Rand. 426.

Effect of Plea of Fraud with Issue Found against Defendant.—In debt on a bond, if the defendant plead that the same was obtained by false suggestions and misrepresentations by the plaintiff, "as per preamble in the said bond;" and the plaintiff join issue as to the fact; which issue is found against him by a jury whatever estoppel (if any) might have been to such plea, is thereby waived, and judgment ought to be for the defendant. *Chew v. Moffett*, 6 Munf. 120.

Usury.—As to usury as ground for relief, see the title **USURY**.

Discharge or Payment.—What amounts to a discharge of a bond at law, is a good plea, but what falls short of operating a release or discharge of

the whole bond is not so. *Tremper v. Hemphill*, 8 Leigh 623.

"The common law knows no distinction between principal and surety in an action of debt on a bond; and hence a covenant not to sue the principal can not be pleaded by the surety as a release; for the principle is laid down without limitation, that any covenant not to sue one of two obligors is not to be pleaded as a release by the other." *Tremper v. Hemphill*, 8 Leigh 623.

Plea of Notice by Surety to Creditor to Sue.—A plea under the statute, Va. Code, ch. 101, for relief of sureties, reciting that A was the security of B, and had given the plaintiff, who was the payee in a bond, notice in writing, forthwith to institute suit thereon, and that the plaintiff, notwithstanding said notice, had failed for a long space of time; to wit, — years, to bring suit thereon, and until after the death of the principal in said bond, so that the plaintiff's right to collect said debt of him has been forfeited and gone, is held to be sufficient. *Gillilan v. Ludington*, 6 W. Va. 128.

A plaintiff who has received notice under the statute, and fails to comply with its provisions by instituting suit within a reasonable time against resident, solvent debtors, and prosecuting it with diligence to judgment and execution, is not at liberty to show that the defendant has sustained no injury or loss by his omission; not having put that fact in issue by the pleadings. *Gillilan v. Ludington*, 6 W. Va. 128.

"The only issue found for the defendant was the one made on the plea of notice to Myles under the statute above cited. Code, 1849, ch. 146, § 4, p. 587. A failure of the creditor to sue upon the requisition of the surety does not, at common law, impose a forfeiture of his right to recover from the surety. *Croughton v. Duval*, 3 Call 73; *Norris v. Crummey*, 2 Rand. 323; *Calvert v. Gordon*, 14 Eng. C. L. 809. But under

this statute the penalty of such failure is an absolute forfeiture of all right to demand the debt from the surety. The statute is, then, both penal and in derogation of the common law, and must, therefore, in accordance with the well-established rules of construction, be construed strictly; and a defendant, in order to avail himself of its protection, must bring himself clearly within its provisions. He must conform to it in every essential." *Gillilan v. Ludington*, 6 W. Va. 128. See the title SURETYSHIP.

Parol Agreement by Obligee.—An obligor can not be permitted under the law to set up and prove, in avoidance of his solemn obligation, a parol promise by the obligee that he would never require payment of the said bond but would surrender and give the same to the said obligor as her portion of his estate. *Chapman v. Persinger*, 87 Va. 581, 13 S. E. 549; *Towner v. Lucas*, 13 Gratt. 705, 722; *Harris v. Harris*, 23 Gratt. 766.

In an action on a bond against a surety, a plea that the creditor has made a parol agreement with the principal to give him time, without the privity of the surety, presents no bar to the action, and will be rejected. *Stephoe v. Harvey*, 7 Leigh 501.

A valid obligation created by an instrument under seal, and not performed, can only be discharged at common law by a sealed instrument. In certain cases the statutes have allowed sealed obligations to be discharged by other matter, and in these particular cases such matter may be pleaded and proved at law. But it is a sound principle that in an action on an instrument under seal, no parol agreement can be pleaded in bar, unless the statute gives the defense. *Stephoe v. Harvey*, 7 Leigh 501.

Generally, as to the admissibility of parol agreements in actions on bonds, see post, "Parol Evidence," IX, L, 3, a.

Set-Off.—In an action on a penal

bond whose condition recites that if the obligor shall fully recompense a railroad company for any loss incurred by reason of their employment of the defendant as agent for the railroad company, then the said obligation to be void, otherwise, to remain in full force and effect, the defendant may set off his services as agent to reduce the amount of the recovery. *Baltimore, etc., R. Co. v. Jameson*, 13 W. Va. 833.

S. as principal, and H. as his surety, executed their bond to E. E. owes S. & N., partners, an account, and N. assigns it to S. E. becomes bankrupt and S. proves the account before the register in bankruptcy, and he afterwards became bankrupt. The assignee in bankruptcy of E. sues H. on the bond, and H. pleads the account as a set-off. Held, under the Virginia statute of set-off, Code, 1873, ch. 168, § 4, the account is a valid set-off for H. in the action against him on the bond. *Edmunds v. Harper*, 31 Gratt. 637. See the title SET-OFF, RECoupMENT AND COUNTERCLAIM.

2. Form, Sufficiency and Effect of Pleas.

a. Plea of Non Est Factum.

When Proper.—In an action of debt founded on a bond or other deed, the defendant may put in issue the execution of the instrument by pleading non est factum generally and in the common form. But if he wishes to separate the law from the facts, so that the court may pass upon the sufficiency of any special ground why it is not his deed, then he must allege such facts specially, concluding with an "et sic non est factum," "and so is not his act." *American, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

Received Notwithstanding Previous Plea of Payment.—A plea of non est factum ought in general to be received by the court, notwithstanding the defendant has previously pleaded payment, especially if it be offered under circumstances showing it is not in-

tended for the purpose of delay. *Jackson v. Webster*, 6 Munf. 462.

In *Franklin v. Cox*, 4 Rand. 448, an action of debt was brought in the county court of Campbell, by Cox against Franklin and three others, on a paper under seal, purporting to be a penal bill, and to be executed by the defendants. The defendants pleaded payment, and issue was joined. At a subsequent term the defendant, Franklin, offered an additional plea, which was a general plea of non est factum. This plea was rejected by the court, and the defendant excepted. It was held, that the plea of non est factum is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for.

Affidavit.—The affidavit to the plea of non est factum, is not rendered defective by inserting the words, "to the best of the defendant's knowledge and belief." *Jackson v. Webster*, 6 Munf. 462. See the title PLEADING.

The affidavit filed with the plea need not allege that the defendant did not deliver the paper in question, as his deed, after the blank was filled up with the sum without his presence or knowledge. *Franklin v. Cox*, 4 Rand. 448.

Effect of Plea.—The plea of non est factum in an action on bonds always puts in issue the execution and delivery of the bonds. *Harris v. Harris*, 23 Gratt. 739.

Plea Bad for Admission of Execution and Delivery.—A special plea of non est factum which admits the execution and delivery of the bonds sued on, but avers that they were to be redelivered to defendant when he should request it, is not a good plea. *Harris v. Harris*, 23 Gratt. 739.

"This can not be received as a plea of non est factum because the plea in terms admits the execution and delivery of the bonds, the very thing which the plea of non est factum always puts in issue. Nor is the objection one of

form only. The matter averred could not be pleaded in any form, it avers in effect that the bonds were delivered to the obligee to be redelivered to the obligor whenever he demanded them. A deed executed and delivered, subject to the abrogation of the maker at his pleasure, is something unknown to the law." *Harris v. Harris*, 23 Gratt. 739.

Plea Sustained as to One Defendant—Effect on Other Defendants.—The

plea of non est factum to an action on a joint and several bond for the payment of money, when sustained, bars the action only as to the defendant who pleads it, and does not affect the liability of the other defendants. *Rocky Mount, etc., Co. v. Price*, 103 Va. 298, 49 S. E. 73.

b. Plea of Payment.

Effect as Admitting Execution and Dispensing with Production of Instrument.—The plea of release or payment, in an action on a bond, admits the execution of the instrument as set forth in the declaration and concludes the party from denying and the jury from finding against the fact. Such plea is a plea of confession and avoidance, confessing the original cause of action as charged in the declaration, and relying upon affirmative matter in avoidance. *Colley v. Sheppard*, 31 Gratt. 312.

In an action of debt upon a bond by C.'s administrator against S.'s administrator, profert of the bond is excused on the ground that it was lost by accident. S.'s administrator pleads payment, and special pleas in which he avers that the bond was not lost or destroyed by accident, but was destroyed by the obligee in her lifetime, with the intention and for the purpose of releasing S. from the payment of the debt, and this he is ready to verify; and issues were made up on the pleas. On the trial of the cause the defendant insists the plaintiff should first prove to the satisfaction of the court the original existence of the bond and its

loss, and it was agreed that all the evidence in the cause shall be heard, and the defendant may move to exclude it; and on his motion all the evidence was excluded. Held, every pleading is taken to confess such traversable matter on the other side as it does not deny. The pleas, therefore, confess the original existence of the bond as described in the declaration and its destruction. There was, therefore, no necessity on the plaintiff to prove to the satisfaction of the court the original existence and loss of the bond before receiving testimony as to its contents. *Colley v. Sheppard*, 31 Gratt. 312.

Where, in an action on a bond, the only plea is payment, the bond need not be produced in evidence. *State v. McGuire*, 46 W. Va. 328, 33 S. E. 313.

If in a debt on bond, with a profert, the defendant craves oyer, which is given, but the bond shown is a copy, and the defendant pleads payment, he waives the necessity of producing the original, and a copy may be given in evidence at the trial, upon due proof of the loss or destruction of the original. *Taylor v. Peyton*, 1 Wash. 252.

In debt on a bond, if the declaration describes it as a writing obligatory for a sum of money; and the defendant, without praying oyer of the bond, pleads payment, and also several other pleas, alleging performance of a condition, according to which the bond was to be discharged, by the delivery of a certain quantity of iron; and, issue being joined thereupon, the parties go to trial; and it appears, by bills of exceptions, that the evidence before the jury did not apply to the plea of payment, but to the other pleas only; a verdict for the defendant ought to be set aside, and a new trial awarded, with leave to him to take oyer of the condition of the bond, and plead *de novo*; all his pleas, except that of payment, being irrelevant to the claim set out in the declaration, and, therefore, the issues

joined upon them being immaterial. And this is the case, notwithstanding a copy of a bond, corresponding to that described in the plea, be inserted in the transcript of the record, and certified by the clerk to be the bond on which the declaration was filed. *Beatty v. Smith*, 5 Munf. 39. See the title **PROFERT AND OYER**.

Effect of Plea in Action on Bond Payable in Installments.—In debt on a bond, if the defendant, after craving oyer, pleads "payment," and it appears from the condition of the bond that only a part of the debt had become due at the time of institution of the suit, the plea extends to that part only, and not to sums which might become due thereafter. *Thatcher v. Taylor*, 3 Munf. 249.

Effect as Waiving Objection to Variance.—See post, "Waiver," IX, L, 4, c, (2).

c. Plea of Tender.

When Proper.—When a bond falls due at a stated time, a special plea of tender at that time, in discharge of subsequently accrued interest, may be filed. *Shepherd v. Wysong*, 3 W. Va. 46.

Where a declaration demands a particular sum without stating when it fell due or from what time it bore interest, a special plea, alleging that ever since the bond became due and payable the defendant had been and still was ready to pay the said sum and tendered the same in court, etc., is judged to be sufficient plea of tender. *Shepherd v. Wysong*, 3 W. Va. 46.

Right of Plaintiff in Plea of Tender.

—In an action of debt when a plea of tender is filed, it is the right of the plaintiff to have the money paid into court before he takes issue on the plea, but if he fails to accept money so paid, or tendered to be paid into court as part satisfaction of the debt, and takes issue on the plea, he waives his right. *Shepherd v. Wysong*, 3 W. Va. 46. See the title **TENDER**.

d. Plea of Conditions Performed.

Equivalent to Plea of Payment.—A plea of conditions performed, to an action of debt for money, is equivalent to a plea of payment. *Hammitt v. Bullett*, 1 Call 567.

Effect as Putting Plaintiff on Proof of All Essential Facts.—A plea of "conditions performed" in an action on a bond with collateral condition controverts and calls for proof by the plaintiff of all the facts alleged by him essential to sustain his action, except that it admits the bond. *Altizer v. Buskirk*, 44 W. Va. 256, 28 S. E. 789.

"The plea of condition performed answers the whole cause of action in the declaration mentioned, and controverts the plaintiff's right to any recovery at all; in short, puts the plaintiff upon proof of all the facts necessary for his recovery except the execution of the bond. *State v. Hays*, 30 W. Va. 108, 3 S. E. 177; *Archer v. Archer*, 8 Gratt. 539." *Altizer v. Buskirk*, 44 W. Va. 256, 28 S. E. 789.

Title bond executed by S. to W. with condition that S. should convey good title to W., not to him and his assigns, in 200 acres of land; this bond is assigned by W. to M. and by M. to B. and while the bond is held by M. the first assignee, S., and his wife make a conveyance of the title to M. who refuses to accept the same; in action by W. for benefit of B. the last assignee, and upon pleas of conditions performed, and of conveyances to M.; held, that the condition of the bond requires that the title shall be made to W. and, if there was proof of a conveyance of title to M. that would not sustain in the plea of conditions performed, and the second plea of a conveyance to M. is naught. *Wallace v. Shaffer*, 12 Leigh 622.

Effect of Joinder of Issue.—In debt on a bond conditioned that the obligor shall make a title to a tract of land, when thereunto lawfully required; if

the defendant plead covenant performed, and issue be joined thereupon, the plaintiff is not bound to prove on his part any demand of a deed. *Pate v. Spotts*, 6 Munf. 394.

Effect as Waiving Objection to Variance.—See post, "Waiver," IX, L, 4, c, (2).

e. Plea of Non Damnificatus.

When Proper.—The plea of "non damnificatus" is a good plea, only where the condition is to indemnify and save harmless. The plea should go to the right of action, not to the question of damages. *Archer v. Archer*, 8 Gratt. 539.

Effect.—Wherever the plea of "non damnificatus" is a good plea, it is equivalent to the plea of "conditions performed." And if this last mentioned plea has been filed in a cause, it is no error to refuse the application at a subsequent term, to file the former. *Archer v. Archer*, 8 Gratt. 539.

f. Special Plea in Nature of Plea of Set-Off.

In an action on a bond given for the price of a slave, a special plea under the act of 1831 is good, which avers in general terms, that the slave was unsound at the time of the sale, and that the plaintiff knew the fact and fraudulently concealed it from the defendant; and that upon discovering the fact the defendant offered to return the slave and demanded a rescission of the contract, which plaintiff refused; laying the damages to the whole amount of the price, or not laying any damages, and praying for judgment in bar of the action. *Fleming v. Toler*, 7 Gratt. 310.

If such a special plea avers in general terms the unsoundness of the slave, and then adds a specific unsoundness, the defendant may under this plea, prove any unsoundness; and is not confined to the specific unsoundness mentioned in the plea. *Fleming v. Toler*, 7 Gratt. 310.

g. Plea of Inability to Recover Sum Mentioned in Condition.

The condition of a bond being "whereas the obligor did lend to J. W. \$2,500 of the obligee's money, and the said J. W. having failed, but before he failed paid \$509, and whereas the said obligor hath instituted a suit, against said J. W. for the recovery of said money; now, if the said obligor shall pay the whole sum so lent, if it can be recovered from the said J. W. or, in case it can not be wholly recovered, will lose the one-half of that sum which can not be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue;" a plea stating "that he, the said obligor, could not recover of J. W. or his endorser, the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one-half of the sum which could not be so recovered, and the farther sum of five hundred dollars," is a good and sufficient plea in bar to an action upon the bond; without any farther averment that the said obligor had used due diligence in prosecuting the suit against J. W.; and without stating what measure he had taken to recover the money or who the endorser was. *Cooke v. Graham*, 5 Munf. 172.

I. REPLICATION.

Averment of Breaches.—As to the necessity and manner of alleging in a replication a breach of the conditions of a bond where the obligation is declared on without setting forth the conditions, see ante, "Setting Out Conditions and Assigning Breaches," IX, G. 7.

A defendant craves oyer of a conditional bond, and pleads conditions performed; the plaintiff replies, and states the breaches of the condition, concluding the replication with a verification; the record then states that to this replication the defendant pleaded the general issue; and the jury was

sworn to try the issue; and it appears that the evidence submitted to the jury was such evidence as would have been proper, if there had been a formal traverse of the replication and issue joined thereon. This court will interpret the entry on the record book as meaning that the defendant rejoined to the replication generally; and after verdict the issue must be held to have been sufficiently well made to sustain the verdict and the judgment thereon. *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 455.

In debt on a bond, with condition to perform an award to be made by certain arbitrators, the condition being made a part of the record by oyer, and the defendant having pleaded "conditions performed;" the plaintiff may set forth the award and aver a breach of the condition, by a special replication, not having done so in his declaration; but if he neglect to do this, and reply generally, judgment ought to be arrested, after a verdict in his favor. *Green v. Bailey*, 5 Munf. 246.

"After oyer of the condition of the bond had made it a part of the declaration, the plaintiff ought by his replication to have alleged a breach to sustain his declaration. Having failed to do so, by replying generally to the plea of conditions performed, he is in no better situation than if he had recited the condition of the bond in the declaration, and omitted to aver a breach." *Green v. Bailey*, 5 Munf. 246.

Replication Averring Withdrawal of Notice to Sue.—A replication that the defendant, after giving the notice in the plea mentioned, had withdrawn the same, and notified the plaintiff not to sue as required by said notice, whereby the defendant remained bound in said bond, is good. *Gillilan v. Ludington*, 6 W. Va. 128.

Replication Bad for Departure.—In debt on a bond in a penalty, with condition for the payment of a less sum, by installments, upon certain pre-

scribed conditions, the plaintiff in his declaration claimed the penalty, and made no mention of the condition. The defendant pleaded payment. The plaintiff replied, setting forth the condition of the bond, and averring non-payment of the sum mentioned in the condition at the time therein specified. Held, on general demurrer, that the replication was bad, and the cause was remanded with leave to the plaintiff to file a new replication. *Mitchell v. Thompson*, 2 Pat. & H. 424. See the title PLEADING.

J. REJOINDER—PLEA OF GENERAL ISSUE TO REPLICATION.

A defendant craves oyer of a conditional bond, and pleads conditions performed; the plaintiff replies, and states the breaches of the condition, concluding the replication with a verification; the record then states that to this replication the defendant pleaded the general issue; and the jury was sworn to try the issue; and it appears that the evidence submitted to the jury was such evidence as would have been proper, if there had been a formal traverse of the replication and issue joined thereon. The supreme court will interpret the entry on the record book as meaning that the defendant rejoined to the replication generally; and after verdict the issue must be held to have been sufficiently well made to sustain the verdict and judgment thereon. *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 455.

K. PROFERT AND OYER.

See the title PROFERT AND OYER.

L. PROOF.

1. Competency of Parties as Witnesses.

See generally, the title WITNESSES.

2. Proof as to Execution.

Burden of Proof as to Execution.—The burden of proof of the formal

execution of a bond, when put in issue under the plea of non est factum, rests upon the party claiming under such bond. *Newlin v. Beard*, 6 W. Va. 110.

Proof of Execution Authorizing Submission to Jury.—On the plea of non est factum, proof of the handwriting of the subscribing witnesses, and that they are dead, will be sufficient to submit the case to the jury. *Bogle v. Sullivan*, 1 Call 561.

On a plea of non est factum, by several defendants, to a joint and several obligation, where the signature of one of the defendants is proven, it is proper to let such proof go to the jury as against such defendant, but not as to the others. *Kuykendall v. Ruckman*, 2 W. Va. 332.

"The bond was a joint and several obligation, and had the obligor Ruckman, whose signature had been proved, been sued alone, a recovery might have been had against him on the evidence adduced, and since by the statute, W. Va. Code, 1860, ch. 177, § 19, a like recovery might have been had against the same obligor in this action, upon the same evidence, it was proper to permit the evidence to go to the jury for that purpose, and would have been error in the court to have excluded it from the jury as required by the defendants in the court below." *Kuykendall v. Ruckman*, 1 W. Va. 332.

3. Admissibility of Evidence.

a. Parol Evidence.

Generally, as to the admissibility of parol evidence, see the title PAROL EVIDENCE.

Parol Evidence in Explanation of Clerical Error.—When, on account of the misspelling or illegibility of the name of the obligee or obligor of a bond, or of the maker or payee of a note, it is doubtful who the person intended is, parol evidence of the surrounding circumstances is admissible; so that the court may be placed as nearly as possible in the situation of

the person who wrote the deed or note, and thus ascertain the person intended by the name employed. *Am-bach v. Armstrong*, 29 W. Va. 744, 3 S. E. 44.

Parol Evidence as to Construction and Character of Contract.—By bond dated July 7, 1863, B. promises to pay to W., three years after date, \$2,000 without interest, in funds current in the state of Virginia, being money borrowed. It was held, that parol evidence is admissible to prove the consideration of the bond and the character of the contract. *Wrightsmen v. Bowyer*, 24 Gratt. 433.

Parol Evidence as to Medium of Payment.—It is only in a case where the parties to a bond have not stipulated plainly and unmistakably as to the kind of currency in which the obligation is solvable that parol evidence can be heard under § 2 of the adjustment act of March, 1866, to prove the kind of currency in which the bond was to be paid, or with reference to which, as a standard of value, it was made and entered into. *Hilb v. Peyton*, 21 Gratt. 386; *Calbreath v. Virginia Porcelain, etc., Co.*, 22 Gratt. 697; *Sexton v. Windell*, 23 Gratt. 534. See ante, "Interpretation of Provisions as to Payment," V, C. And see the title PAYMENT.

"The act of 1867 declares, § 1, 'that in any action or suit or other proceeding, for the enforcement of any contract, express or implied, made or entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show by parol or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed,' etc." *Walker v. Pierce*, 21 Gratt. 722.

"The obvious design and operation of the act of 1867, is to ascertain and

enforce the actual contract between the parties; to do which it in effect annuls the presumption of law as to the kind of currency in which the contract is to be solved, whether common law or statutory." *Walker v. Pierce*, 21 Gratt. 722.

Parol evidence is admissible to show that the money in which a bond is payable is Confederate currency; and this is true of a bond given as a mere renewal of the old bond, without any additional consideration. *Jarrett v. Nickell*, 9 W. Va. 345; *Caldwell v. Craig*, 22 Gratt. 340; *Bowman v. McChesney*, 22 Gratt. 609; *Omohundro v. Omohundro*, 21 Gratt. 626.

M. sues the administrator of W. upon a bond dated July 18, 1863, and payable with interest two years after date, "in current funds." The bond states on its face it was given in part of the price of land. Parol evidence is admissible to show that the parties had reference to Confederate currency. *Sexton v. Windell*, 23 Gratt. 534; *Liams v. Brannaman*, 23 Gratt. 809.

Though in a sale of real estate in October, 1862, the price is fixed with reference to Confederate States treasury notes, it may be shown by parol evidence that the deferred payments were not to be discharged in that currency. *Stearns v. Mason*, 24 Gratt. 484.

Though the bond provides on its face, that it "is to be paid in current funds," S. may prove, by parol evidence, that by agreement with F. at the time the bonds were executed, he had a right to pay them at any time before they were due in Confederate currency; and that he had so paid the other four bonds to the holders thereof, and in January, 1865, offered to pay this bond. *Meredith v. Salmon*, 21 Gratt. 762.

Parol Evidence as Showing Obligee's Notice of Conditions.—A bond signed by a principal obligor and sureties, apparently perfect and complete, may be

avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory. *Nash v. Fugate*, 32 Gratt. 595.

Parol Evidence to Show Suretyship.

—One or more of a number of obligors has a right to show that he or they stand in the relation of surety on the bond, by parol testimony. *Creigh v. Hedrick*, 5 W. Va. 140.

Parol evidence is admissible to show the fact that one of two joint obligors in a bond was the surety of the other. To allow such evidence is not inconsistent with either the terms or legal effect of the obligation. The binding force of the bond remains unaltered as to both of the obligors, and they are still jointly and severally bound for its payment. *Williams v. Macatee*, 86 Va. 681, 10 S. E. 1061.

Parol Evidence as to Contemporaneous Agreements.—In the absence of fraud, parol evidence is not admissible to show that the obligee contemporaneously with the execution of a bond promised not to enforce it as against one of the parties who executed it. *Barnett v. Barnett*, 83 Va. 508, 2 S. E. 733; *Watson v. Hurt*, 6 Gratt. 633; *Towner v. Lucas*, 13 Gratt. 705.

Parol evidence is not admissible to prove, in behalf of one of three sureties in a bond, that he was induced to sign the bond upon the express promise of the obligee that he should not be required to pay any part of it, and that said obligee would give the said surety a written indemnity to save him harmless. *Towner v. Lucas*, 13 Gratt. 705.

Parol evidence is not admissible to prove that bonds and a deed of trust were not to be paid and executed according to their terms, but were only

to be paid out of the profits of the property for the price of which they were given. *Sangston v. Gordon*, 23 Gratt. 755; *Peyton v. Stuart*, 88 Va. 76, 16 S. E. 160. See also, *Colhoun v. Wilson*, 27 Gratt. 639.

b. Depositions as Evidence.

In an action of debt on a joint and several bond against two defendants if proper notice to take depositions is served on only one of them, the depositions should be admitted in evidence only against the one duly served. *Bowyer v. Knapp*, 15 W. Va. 277. See the title DEPOSITIONS.

c. Evidence of Plaintiff's Absence in Foreign Parts.

Evidence may be given to the jury on the plea of payment to a bond, that the plaintiff was absent in foreign parts beyond seas [and had not any known agent or attorney within the commonwealth], in order to extinguish the interest. *M'Call v. Turner*, 1 Call 133.

d. Declarations of Obligors.

The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties on the bond, though he is dead, and therefore not a party to the suit. *Walker v. Pierce*, 21 Gratt. 722.

e. Evidence as to Plaintiff's Ability to Loan.

In an action of debt upon a bond for two thousand dollars, purporting to be for money loaned by the plaintiff to defendant deceased, evidence tending to show that the plaintiff had not the pecuniary ability to make the loan of the amount and character evidenced by the bond in controversy is competent and relevant and should have been admitted. *McDowell v. Crawford*, 11 Gratt. 377.

f. Admissions of Plaintiff as to Partial Payment.

In an action of debt, under the plea of payment the defendant may give in

evidence parol admissions of the plaintiff that but a portion of the debt claimed is really due. *Rice v. Annatt*, 8 Gratt. 557.

The bond was subscribed J. Clack, S. Stegar; and the declaration was in conformity to it. Upon the plea of payment, Stegar had a right to prove that the obligee had acknowledged payment of part of the money by J. Clarke. *Stegar v. Eggleston*, 5 Call 449.

g. Receipts, Deeds, etc., to Sustain Presumption of Payment.

Plaintiff's intestate applied to defendant's intestate for a draft on P. in part payment of the bond sued on, who promised to come the next morning and give it to him. A receipt from the brother dated the next day, for the draft which was paid at maturity by the acceptor, is competent evidence to sustain the payment; the plaintiff's intestate never having objected to it during his life. *Perkins v. Hawkins*, 9 Gratt. 649.

The bond sued upon was executed in 1813; and the intestate of the plaintiff having died in 1816 his brother qualified as one of his administrators. In order to sustain the presumption of payment from lapse of time and other circumstances, the defendant offered in evidence a deed by which he conveyed to the brother whilst he acted as administrator, a lot of ground for the price of \$3,205. Held, that it was competent evidence. *Perkins v. Hawkins*, 9 Gratt. 649.

h. Endorsement of Credit as Repelling Presumption of Payment.

An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption. *Dabney v. Dabney*, 2 Rob. 622.

"An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the

purpose of repelling that presumption. This exception from the general rule that a man's declarations shall not be evidence in his own behalf is justified by peculiar considerations. The evidence is used not to establish an original demand, but merely to rebut a presumption. The presumption thus met arises out of the imputed conduct of the obligee; to wit, his forbearing to assert his demand for many years; and the fact that he obtained a partial payment during the time goes to show that the imputation is unfounded. The evidence of the fact, it is true, is furnished by the party himself; but it proceeded from him at a time when the disclosure was against his own interest. It is evidence, too, which he had authority at the time to establish, and which it was his duty to establish, for the protection of the obligor; and after a considerable lapse of time, it is usually the only available means of showing the negative of nonpayment, by the affirmative of partial payment. Upon the whole, therefore, such evidence is just, reasonable and expedient, unless attended with too much danger of fraud; and that is sufficiently guarded against by requiring proof that the endorsement was made within the period of presumption, and consequently when it was against the interest of the obligee to make it. Ingenuity, it is true, may still suggest a complexity of circumstances rendering such a fraud advantageous to the obligee; but that is a mere possibility, and the rules of evidence must deal with probabilities." *Dabney v. Dabney*, 2 Rob. 622.

An endorsement on a bond for payment on account of the principal or interest, written by the obligee, without the privity of the debtor, will not be sufficient evidence of an acknowledgment that the bond was then due, so as to repel the presumption of payment, unless it be proved by other evidence than the endorsement itself, that the

same was written at a time, when its operation was against the interest of the party making it; that is to say, before the presumption of payment attached. *Sadler v. Kennedy*, 11 W. Va. 187.

i. Evidence to Show Fraud.

Evidence of acts and conversations of third parties is irrelevant and inadmissible to show that defendant was fraudulently induced by them to execute the bond sued on, unless plaintiff is shown to have participated in the fraud. Relevancy must always be shown by him offering the evidence. *Triplett v. Goff*, 83 Va. 784, 3 S. E. 525.

Quære, whether the evidence of a person employed, by both parties, as an attorney, or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud? *Clay v. Williams*, 2 Munf. 105.

4. Variance between Declaration and Bond Offered in Evidence.

a. Effect of Material Variance between Declaration and Bond.

Where there is a plain variance between a declaration and the bond offered in evidence thereunder, the bond should be rejected. *Harris v. Lewis*, 5 W. Va. 575.

If a declaration in debt be based on one single bill, and the defendant appears and craves oyer of the single bill, and it is granted, and there is a substantial variance between the single bill described and the one produced upon demurrer to the declaration, the demurrer will be sustained, because of such variance. *Sterrett v. Teaford*, 4 Gratt. 84. *Thompson v. Boggs*, 8 W. Va. 63.

It is a fatal variance to offer in evidence a bond executed to A. surviving partner of A. B. & Co., on a declaration making profert of a bond to A. *Moore v. Fenwick*, Gilmer 214.

Plaintiff counts on a bond dated in 1811; upon oyer craved, a bond is shown dated in 1810; and afterwards

plaintiff demurs to a plea of defendant: Held, the variance between the bond alleged in the declaration, and the bond shown on oyer, is fatal. *Bennett v. Giles*, 6 Leigh 316.

If the bond be described in the declaration as bearing date on the 4th of January, 1773, and the date of the bond produced to the jury be the 4th of January, 1775, a general verdict for the defendant ought to be sustained. *Gordon v. Brown*, 3 Hen. & M. 219.

A writing beginning, "Know all men, etc., that I, H. R., of the county, etc., am held and firmly bound," etc., and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration against H. R. and H. B., charging that they both acknowledged themselves to be indebted, etc., notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of non est factum, or nil debet, but of "Payment by H. B." *Bell v. Allen*, 3 Munf. 118. See *Atwell v. Towles*, 1 Munf. 175.

An action of debt is brought upon a bond for 188 dollars; the bond is declared on as a bond for 108 dollars, but is in fact for 188 dollars; the defendant confesses judgment for the debt in the declaration mentioned, and the judgment is entered for 108 dollars. At a subsequent term of the court the plaintiff, upon notice to the defendant, moves the court to correct the judgment by the bond. Held, this is not a clerical error which may be amended under the 108th section of the statute of jeofails, 1 Rev. Va. Code, 1873, ch. 128, p. 512. *Compton v. Cline*, 5 Gratt. 137.

b. Variances Held Immaterial.

It is not a material variance to omit to state in the declaration the words "of the county of Essex," the place of the obligor's residence, which is stated in the bond. *Evans v. Smith*, 1 Wash. 72.

Declaration upon a bond given to

the plaintiff of the county of S., on account of Messrs. P. & G., merchants in Glasgow. The omission in the declaration to state the county, or for whose use the debt was contracted, is not a material variance. *Peter v. Cocke*, 1 Wash. 257.

If a bond be payable to James Whitlow, jun., and the declaration describe it as payable to the plaintiff, after naming him as "James Whitlow, jun., alias James Whitlock;" this is not such a variance as should prevent it from being received as evidence, in support of the declaration, on the plea of payment. *Whitlock v. Ramsey*, 2 Munf. 510.

Bond, with condition, that the defendant would faithfully collect certain debts due to the obligee, and would pay the amount so collected, and return an account of his collection, and surrender all bonds not fully paid, when required, except such as might be lodged with clerks, or lawyers, to bring suit on, the obligor agreeing to perform the duty of a collector, and, in all things relative to the business, to act for the benefit of the obligee, to the best of his skill. The declaration on this bond lays the breach on the defendant's neglecting to bring suits for the recovery of the debts, etc. The variance is not material, particularly after verdict; if it was material, the defendant might have demurred. *Hawkins v. Berkley*, 1 Wash. 204.

c. Raising and Waiving Objections.

(1) Manner of Raising.

To take advantage by demurrer, of a variance between the declaration and the bond declared on, the defendant must crave oyer of the bond. *Sterrett v. Teaford*, 4 Gratt. 84; *Duval v. Malone*, 14 Gratt. 24. See the titles DEMURRERS; PROFERT AND OYER.

(2) Waiver.

By Craving Oyer and Then Pleading "Conditions Performed."—In debt on a bond, if the defendant crave oyer, and then plead "conditions performed," he

can not take advantage of a variance between the declaration and bond; and though the plaintiff declare against one of several obligors, without stating that they were severally bound; yet if the bond appear to be joint and several, it is sufficient. *Meredith v. Duval*, 1 Munf. 76.

By Plea of Payment.—In debt upon a bond payable upon a future day if the declaration describes the penalty as payable on that day, and the defendant pleads payment, he cannot object to the variance at the trial of the cause. *Browne v. Ross*, 4 Call 221.

"The declaration is, indeed, new, and the court does not recollect to have seen one like it before. But, yet they can not, when all the circumstances are considered, decide that it excludes the evidence. For, in the first place, if the defendant had, in fact, paid the debt, and wished to avail himself of it, he ought, according to the strictness of pleading, to have craved oyer of the bond, and pleaded payment of the sum in the condition; which would have made the bond part of the declaration, and shown the day when it became payable. But the effect is similar as the case stands; for the object of oyer is only to identify the instrument; and, when the defendant pleads to the bond referred to in the profert, he admits it to be the same with that described in the declaration; which answers the purpose of identity full as well as oyer, and precludes exception upon the ground of variance, at the trial." *Browne v. Ross*, 4 Call 221.

M. VERDICT.

Where a suit is brought against two persons on a bond executed by both, and it abates as to one by his death, a verdict finding only that the surviving defendant hath not paid the debt, is bad, and a new trial must be awarded. Such verdict does not negative the payment of the money by the deceased defendant, which, upon the plea, was within the issue. *Triplett v. Micou*, 1

Rand. 269. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Issue being joined on a plea that a bond was obtained by fraud, a verdict, "for the defendant, because the jury believed the bond was obtained by fraudulent means," is sufficiently positive and certain. *Chew v. Moffett*, 6 Munf. 120.

N. JUDGMENT.

1. Recovery against Some Defendants. a. Common-Law Rule.

At common law the general rule that upon a joint contract the action must be against all the joint contractors, and, the judgment with certain exceptions must be against all or none of them, was as applicable to a joint action upon a joint and several bond, as to any other action. The judgment in such cases must also be joint, and a failure as to one of the defendants, was a failure as to all of them except where a verdict was found for one defendant upon a plea of infancy, or other matter going to the personal discharge of such defendant without affecting the liability of the others. *Moffett v. Bickle*, 21 Gratt. 280; *Baker v. Cook*, 11 Leigh 606; *Bush v. Campbell*, 26 Gratt. 403; *Beazley v. Sims*, 81 Va. 644; *Muse v. Bank*, 27 Gratt. 252.

"If the contract be several as well as joint, the action must be against all the obligees jointly or against one of them singly, and not against any intermediate number. If the plaintiff elects to proceed against all, the same consequences ensue as in an action on a joint contract; he must have judgment against all or none." *Bush v. Campbell*, 26 Gratt. 403, citing *Taylor v. Beck*, 3 Rand. 316; *Baber v. Cook*, 11 Leigh 606.

In a joint action against several joint obligors, when all have been served with process and all are before the court, and § 50, ch. 167, Va. Code, 1887, is inapplicable, the plaintiff must

recover against all or none, as at the common law, unless the defense upon which some are discharged is merely personal to them that plead it, and does not touch the liability of the other defendants; as, for example, the plea of infancy, bankruptcy, non est factum, nonassumpsit, and the like, which will not prevent the action from proceeding to judgment against the others so as to recover against them only. *Beazley v. Sims*, 81 Va. 644.

b. Statutory Provisions.

Recovery against Part though Plaintiff Barred as to Others.—By statute, however, this rule of the common law has been modified so that in an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only. Va. Code, 1904, § 3395 (Code, 1849, p. 674, ch. 177, § 19); *Moffett v. Bickle*, 21 Gratt. 280; *Bush v. Campbell*, 26 Gratt. 403; *Muse v. Bank*, 27 Gratt. 252; *Beazley v. Sims*, 81 Va. 644.

Successive Recoveries.—Under the common law in an action ex contractu, the rule was that all should be summoned actually or constructively by prosecution to outlawry, before judgment could be had against any. Section 50, ch. 167, Va. Code, 1873, changed this for another rule, whereby judgment might be had against one defendant served with process, and a discontinuance as to the others, or, at the plaintiff's election subsequent service of process and judgment in the same suit, against the other defendants. *Beazley v. Sims*, 81 Va. 644, applying such provision of the Code in an action of debt on a joint bond. See also, *Bush v. Campbell*, 26 Gratt. 403.

"Mr. Minor gives a brief history of this subject in his fourth volume, p. 569. The common-law rule was, that,

where there are several defendants in an action, *ex contractu*, all should be summoned either actually or constructively by prosecution to outlawry, before the declaration could be filed or judgment had against any. *Min. Inst.*, vol. IV, 569-570; 1 *Tidd's Prac.* 420; *Sheppard v. Bailler*, 6 T. R. 328; *Bovill v. Wood*, 2 M. & S. 23; *Saunderson v. Hudson*, 3 East. 144; *Barton v. Pettit*, 7 Cr. 194. And this rule, long disused in Virginia (see *Moss v. Moss*, 4 Hen. & M. 293; 1 Rob. Pr. 1st Ed. 258-259), in *Early v. Clarkson*, 7 Leigh 83, was asserted as that which must regulate proceedings with us. Whereupon the legislature enacted the said fiftieth section (see *Bush v. Campbell*, 26 Gratt. 439), by which successive judgments may be obtained in the same suit, and, upon the judgments as they are severally obtained, execution issues just as if each party were the only defendant in the case." *Beazley v. Sims*, 81 Va. 644.

In an action of debt upon a bond against five persons, upon one of whom the process is not served by direction of the plaintiff, the four plead usury in the bond, and three of them plead severally *non est factum*. On the trial the jury find in favor of the three defendants, on the plea of *non est factum*; but can not agree on the plea of usury. There is a judgment in favor of the three, and the case is continued as to the fourth. Afterwards there is a verdict against the fourth, and he moves in arrest of judgment. Held, under the statute, Va. Code, 1849, ch. 177, § 19, there may be judgment in favor of the three at one time, and a judgment in favor of the plaintiff against the fourth defendant at another time. *Bush v. Campbell*, 26 Gratt. 403.

It is not erroneous to take separate judgments, during the same term, upon a joint bond. *White v. Talley*, 5 Call 98.

"The declaration, in this case, was

upon a joint bond; but there were separate judgments, arising from the different times of serving the writ upon the respective defendants." *White v. Talley*, 5 Call 98.

Where there was an action on a joint and several bond, against six obligors, and the *capias* (which was against them all) was executed, on two only, it was held, that the plaintiff was not bound to sue out further process against the rest, but might take judgment against these two. In such case, it seems indifferent whether the declaration be against those two only or against all named in the writ, provided the bond be properly described. *Moss v. Moss*, 4 Hen. & M. 293.

Generally, as to actions on joint and joint and several contracts, the parties thereto, form of judgment therein, etc., see the titles CONTRACTS; JUDGMENTS AND DECREES; PARTIES.

2. Amount of Recovery.

a. Common-Law Rule as to Recovery.

At common law the penalty of a bond was forfeited by the breach of the condition, and then became a debt, and as such was recoverable by an action of debt, the relief to the obligor being in a court of equity alone, which was accustomed to enjoin the obligee from compelling the obligor to pay the penalty, provided the latter would pay the actual damages sustained in consequence of the breach of the stipulation. *Reynolds v. Hurst*, 18 W. Va. 648.

Before the enactment of statutes on the subject, only one breach could be assigned on an action of debt on a bond with collateral condition. The assignment of more was duplicity. However small the breach shown, the whole penalty was recoverable, and the party was driven into a court of equity to be relieved against the penalty. *Reynolds v. Hurst*, 18 W. Va. 648; *Alison v. Bank*, 6 Rand. 227.

b. Under Statutory Provisions.

(1) Origin of Provisions.

By stat. 8, 9, Wm. III, ch. 11, § 8, instead of having to resort to a court of equity the obligee could assign as many breaches of the condition, as he chose, and the jury ascertained the actual damages sustained by reason of the breaches; and upon this verdict, judgment was entered for the penalty of the bond, to be discharged by the payment of the damages assessed by the jury. This statute was adopted in 1 Rev. Code, 1819, p. 509, § 82, and was continued in the Codes of 1849, 1860. *Reynolds v. Hurst*, 18 W. Va. 648; *Allison v. Bank*, 6 Rand. 227; *Sangster v. Com.*, 17 Gratt. 124.

The clause in the Va. act of assembly (Rev. Code, 1819, ch. 128, § 83, p. 509) which prescribes the sum for which judgment is to be rendered on a bond, meant that, in cases of penalties by way of security, the final justice of the case should be attained in the courts of law, in effectuating which object, those courts are to be governed by the same consideration which influence the court of equity. *Waller v. Long*, 6 Munf. 71.

"By the act of 1748, re-enacted in 1792, Rev. Va. Code, 118, it is enacted that in actions which shall be brought on a bond or bonds for the payment of money, judgment is to be entered for the principal sum due thereon and interest. * * * by the same clause of the act of 1792, in actions on bonds for performance of covenants, particular breaches must be assigned; and a jury are to assess, and the court to give judgment, for damages, instead of any lesser ascertained sum in the condition." Per Roane, J., in *Henderson v. Hepburn*, 2 Call 232.

(2) Provisions of Virginia Code.

Bonds Conditioned for Payment of Money.—By § 3393 of the Va. Code, 1904, when there is a recovery on a bond, with condition for the payment of money, the judgment shall be for

the penalty of the bond to be discharged by the payment of the bond and the interest due thereon. *Moore v. Fenwick*, Gilmer 214; *Mitchell v. Thompson*, 2 Pat. & H. 424; *Fleming v. Toler*, 7 Gratt. 310; *Overstreet v. Marshall*, 1 Hen. & M. 381; *Collier v. Southern Express Co.*, 32 Gratt. 718. See also, *Atwell v. Towles*, 1 Munf. 175; *Bibb v. Cauthorne*, 1 Wash. 91; *Call v. Ruffin*, 1 Call 333; *Tennant v. Gray*, 5 Munf. 494.

In an action upon a bond, with a penalty, for the payment of money, the jury may make their verdict of the aggregate of principal and interest, and the defendant can not appeal for that cause, since the mode of finding the verdict is for his benefit. *Smith v. Harmanson*, 1 Wash. 6.

Where the penalty and condition of a bond for the payment of money, is in the same sum, it is proper to treat it as a single bill, though it purports to be a penal bill, and to give judgment for the amount of the bond with interest from the time of payment. *Fleming v. Toler*, 7 Gratt. 310.

Debt upon a bond, the penalty of which was in current money, with condition to pay so much sterling money. After verdict for the plaintiff, the judgment should be for the current money mentioned in the penal part of the bond, to be discharged by the sterling money in the condition; and the court ought to settle the rate of exchange, which on an appeal should appear in the record. *Terrel v. Ladd*, 2 Wash. 150.

A. executes a writing obligatory to B. for the payment of tobacco, under a pecuniary penalty, with a condition annexed, that it shall be void if C. shall pay the tobacco, or its value to A. In an action brought on this writing the declaration assigns a breach of the condition, and the defendant pleads payment. The verdict and judgment ought to be for the penalty, to be discharged by payment, not of the to-

bacco with interest thereupon, but of damages, for breach of the condition. *Overstreet v. Marshall*, 1 Hen. & M. 381.

In debt on a bond with collateral condition, the jury who try the issues find the same for the plaintiff, and assess his damages, and allow interest thereon; and then judgment is entered for the damages so assessed, with interest and costs, instead of being entered for the penalty of the bond and costs, to be discharged by the damages, interests and costs. Held, though the judgment is not entered in proper form, yet the error in the form producing no injury to the defendant, the payment will not be reversed therefor. *Pate v. Spotts*, 6 Munf. 394.

In debt on a bill penal, a judgment, entered upon nil dicit or non sum informatum, ought not to be reversed on the ground that the declaration, though describing the bill penal correctly as to the principal, penalty, and date, omits to mention that the debt is payable "with interest from a day prior to the date;" and that the judgment, in conformity with the bill penal, is entered, for the penalty, to be discharged by the principal, with such interest, and costs. *Harper v. Smith*, 6 Munf. 389.

Judgment Where Credits Indorsed in Bond.—If the jury find a verdict for the debt in the declaration mentioned, and the plaintiff, in court, release so much thereof as is equal to the credits endorsed on the bond; judgment ought not to be rendered, to be discharged by the payment of the sum stated in the condition of the bond, subject to a deduction of the credits endorsed; but such deduction ought to be made, and judgment rendered for the real balance due. *Grays v. Hines*, 4 Munf. 437.

A judgment ought not to be entered on a bond for a sum of money, "subject to a credit for a hogshead of tobacco," without ascertaining its value;

but the amount of such credit should, in the first place, be ascertained by a writ of inquiry, and judgment should be rendered for the balance. *Early v. Moore*, 4 Munf. 262.

Test Whether Bond for Payment of Money or Performance of Covenants.—

In *Henderson v. Hepburn*, 2 Call 232, Roane, J., in holding that the distinguishing criterion between bonds for the payment of money and bonds for performance of covenants was plainly marked out by the act of 1792, said: "By that criterion, whenever a bond appears, with a smaller specific sum, mentioned in the defeasance, or the bond shall be single; whenever judgment is to be given for that sum with interest, and not for damages to be ascertained by a jury; and whenever particular breaches are not necessary to be assigned, a bond of this description is a bond for the payment of money, within the meaning of the clause in question. But if there be no ascertained principal sum, for which judgment can be rendered; if the intervention of a jury be necessary to ascertain what is due by way of damages; and if the defendant must be notified, by a particular assignment of breaches, wherefore the action is brought against him, such a bond is not to be considered as a bond for the payment of money, under the act in question."

In Actions on Annuity Bonds, Bonds for Money Payable in Installments, etc.—

"In an action on an annuity bond, or on a bond for money payable by installments, where there are further payments of the annuity, or further installments to become due after the commencement of the action, or in any other action for a penalty for the nonperformance of any condition, covenant or agreement, the plaintiff may assign as many breaches as he may think fit, and shall, in his declaration or scire facias, assign the specific breaches for which the action is brought or the scire facias is sued out.

The jury impaneled in any such action shall ascertain the damages sustained, or the sum due, by reason of the breaches assigned, and judgment shall be entered for the penalty, to be discharged by the payment of what is so ascertained, and such further sums as may be afterwards assessed, or be found due upon a scire facias assigning a further breach. Such scire facias may be sued out from time to time, by any person injured, against the defendant or his personal representative, and for what may be assessed or found due upon the new breach or breaches assigned, execution may be awarded." Va. Code, 1904, § 3394. *Sangster v. Com.*, 17 Gratt. 124.

A judgment on a bond, for payment of a debt by intallments, should be "for the debt in the declaration mentioned, to be discharged by the sum due at the time of the institution of the suit; reserving liberty of the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under the condition of the bond." *Thatcher v. Taylor*, 3 Munf. 249.

(3) Provisions of West Virginia Code.

Bonds Conditioned for Payment of Money, etc.—By W. Va. Code, 1899, ch. 131, § 16, when there is a recovery on a bond conditioned for the payment of money, as well as in all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the verdict if there be one, otherwise at the date of the judgment or decree, with interest thereon from such date, except in cases where it is otherwise provided. *Pickens v. McCoy*, 24 W. Va. 344; *Cranmer v. McSwords*, 26 W. Va. 412; *Douglass v. McCoy*, 24 W. Va. 722; *Tiernan v. Minghini*, 28 W. Va. 314. See also, *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Fleming v. Holt*, 12 W. Va. 143.

Actions on Annuity Bonds, Bonds

for Payment of Money in Installments, etc.—"In an action on an annuity bond, or a bond for money payable by installments, where there are further payments of the annuity, or further installments to become due after the commencement of the action, or in any other action for a penalty for the non-performance of any condition, covenant or agreement, the plaintiff may assign as many breaches as he thinks fit. If there be judgment for the plaintiff, on a demurrer, or by confession or by default or nil dicit, he may so assign after such judgment. The jury impaneled in any such action shall ascertain the damages sustained, or the sum due by reason of the breaches assigned, including interest thereon to the date of the verdict, and judgment shall be entered for what is so ascertained. Provided, that if the action be on such annuity bond, or a bond for money, payable by installments, such judgment shall also be for such further sums as may be afterwards assessed, or be found due upon a scire facias, assigning a further breach. Such scire facias may be sued out from time to time by any person injured, against the defendant or his personal representative, and for what may be assessed or found due upon the new breach or breaches assigned, execution may be awarded." W. Va. Code, 1899, ch. 131, § 17. *Reynolds v. Hurst*, 18 W. Va. 654; *Supervisors of Jackson Co. v. Leonard*, 16 W. Va. 470; *Northwestern Bank v. Fleshman*, 22 W. Va. 317.

The W. Va. Stat. differs from the provisions of 8, 9, Wm. III, ch. 11, § 8, and 1 Va. Rev. Code, 1819, p. 509, § 82, continued in the Codes of 1849, 1860, in that it provides that "in actions for penalty for the nonperformance of any condition, covenant of agreement, the plaintiff may assign as many breaches, as he thinks fit * * *; the jury impaneled in any such action can ascertain the damages sustained or the sum due by reason of the breaches assigned,

including interest thereon to the date of the verdict, and judgment shall be entered for what is so ascertained," not for the penalty to be discharged by what is actually due, but for what is actually due. *Reynolds v. Hurst*, 18 W. Va. 648; *Northwestern Bank v. Fleshman*, 22 W. Va. 317.

c. Damages beyond Those Laid in Declaration.

In General.—It has been long well settled, that in debt upon a bond, with collateral condition, damages may be assessed beyond those laid in the declaration, if the penalty is sufficient to cover them. *Payne v. Ellzy*, 2 Wash. 143; *Johnson v. Meriwether*, 3 Call 523; *Peerce v. Athey*, 4 W. Va. 22; *Winslow v. Com*, 2 Hen. & M. 459.

See, however, *Woodson v. Johns*, a Munf. 230, to the effect that in debt on a bond with collateral condition the plaintiff can not recover any damages not demanded in the declaration, or in the assignment of breaches.

"By the act of 1748 (body of laws, p. 181), the judgment in cases like the present is to be for the penalty, though it may be discharged by the sum assessed by the jury. If this construction of the act wants any support, it may be derived from the case of *Collins v. Collins*, 2 Burr. 824, upon the construction of the stat. 8, 9, W. 3, ch. 11, which is precisely similar to our act as to the point in question. The penalty therefore, is that for which the plaintiff sues, and any sum below it is within the sum declared for. One reason why a judgment is erroneous, which is entered for more damages than the plaintiff has declared for, is, that he best knows the extent of the injury of which he complains, and consequently can best estimate the measure of the compensation. This reason does not hold in the present case, because the sum recovered is less than the penalty of the bond." *Payne v. Ellzey*, 2 Wash. 143.

d. Recovery in Excess of Penalty.

General Rule.—"The American rule to be deduced from all the cases seems to be, that against a surety in debt on bond, nothing shall be recovered beyond the penalty; that against the principal in that form of action, interest may be recovered beyond the penalty, while in England the penalty appears in all cases, except perhaps in equity, to be the absolute limit. But in neither country can damages in gross be recovered, against either principal or surety, beyond the penalty. If, on the other hand, the action of covenant be brought on an absolute and not a conditional undertaking, then the penalty is merely a security and the party, principal or surety, may be sued as often as damage is sustained." *Supervisors of Jackson Co. v. Leonard*, 16 W. Va. 470, quoting *Sedgwick on Measure of Damages*, p. 424.

Section 3393, Va. Code, 1904, provides that when the judgment is against a surety of limited liability in the bond, the sum to be paid by such surety in discharge thereof shall not exceed the amount to which he has limited his liability on such bond.

Interest Beyond Penalty.—The recovery against a principal and surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. *Perry v. Horn*, 22 W. Va. 381.

"In this state, *Tennant v. Gray*, 5 Munf. 494, is admitted to be an express authority in favor of the right at law to recover interest beyond the penalty in the shape of damages. That was a unanimous decision of the courts, and it is believed has ever since been regarded as having settled the law of this state; which is an answer to the objection that it stands as a solitary case. If solitary, it is because it has never been questioned. But it has been incidentally recognized by this court in several cases; and never has,

I believe, been questioned in any case." *Tazewell v. Saunders*, 13 Gratt. 354.

Where the principal and interest, due on a bond, amount to more than the penalty, and damages are found by a verdict, judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the costs; but for the penalty and damages, if not exceeding those laid in the writ. *Tennant v. Gray*, 5 Munf. 494.

But if the damages found by the jury exceed those in the writ, a new trial ought to be granted, unless the plaintiff will release the excess of damages; if which be done, damages may be entered for the penalty, with the residue of the damages so found, and costs. *Tennant v. Gray*, 5 Munf. 494.

"In *Baker v. Morris*, 10 Leigh 284, the last point of the syllabus is: 'It seems that in an action of debt on a bond at law the surplus interest beyond the penalty may be given in the form of damage.' In *Tazewell v. Saunders*, 13 Gratt. 354, it was held, that courts of equity will decree interest on a bond or judgment, beyond the penalty against the principal debtor. In this case, Moncure, J., reviews many authorities including a number of English authorities here cited and relied on by counsel for plaintiffs in error, and comes to the conclusion, that the English authorities are against the proposition, that anything can be recovered beyond the penalty in an action upon the bond, but that the rule, at least as to the principal debtor, is different in this country. He says, p. 368: 'I think therefore the true doctrine with us is, that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity, though the principal and interest exceed the penalty, the only difference between the two forms being, that according to the strict rules

of law, the penalty must still be regarded in form as the debt, and the excess of interest can only be recovered, indirectly in the shape of damages, while equity takes no notice of the penalty, but gives a direct decree for the principal and running interest, as in other cases. Full interest should always be given, though there be a penalty, and the principal and interest exceed it, whenever full interest would be given if there were no penalty. In other words, the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond. What I have said upon this subject has reference only to the case of a principal debtor. I express no opinion in regard to the liability of a surety beyond the penalty, it being unnecessary to do so.'" *Perry v. Horn*, 22 W. Va. 381.

Back Interest Considered as Additional Penalty.—If a bond be given in the usual form with a penalty, conditioned to be discharged by payment of the principal at a future day, "with interest from the date if not punctually paid," such back interest is to be considered an additional penalty, and not recoverable. *Waller v. Long*, 6 Munf. 71.

X. Proceedings in Equity for Enforcement of or Relief against Bonds.

A. PROCEEDINGS TO ENFORCE.

1. As to Jurisdiction.

See generally, the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; JURISDICTION.

Actions By Beneficiaries, Assignees, etc.—It has been held, that notwithstanding the statutes in Virginia and West Virginia give a remedy at law to beneficiaries in bonds, equity still has jurisdiction in such cases where it affords a more complete and perfect remedy. *Ralphsnyder v. Ralphsnyder*,

17 W. Va. 37; *Ross v. Milne*, 12 Leigh 204; *Rodes v. Rodes*, 24 Gratt. 256; *Booth v. Kinsey*, 8 Gratt. 560.

Generally, as to the effect of statutes allowing the assignee of any bond, etc., not negotiable, to sue thereon in his own name, upon the jurisdiction of courts of equity, see the title **ASSIGNMENTS**, vol. 1, p. 791.

Right to Resort to Action at Law after Chancery Jurisdiction Acquired.

—B. agreed to convey to H. and N. certain land, they to give for half the price three bonds, with sureties. J. and three others promised to become the sureties, provided vendees secured them by a trust deed. The bonds were executed and left with a third party until the conveyance and trust deed were given. B. gave possession to vendees but no conveyance, and they gave no trust deed. The bonds remained with third party. H. acquired the rights of his covendee, and died indebted. B. filed a bill against N. and J. and his associates, calling on the latter to answer whether the bonds had been delivered, and on N. whether he was willing to complete the purchase, and if not, then B. asked for a rescission. Defendants answered, denying the delivery and took depositions sustaining the denial. B. filed amended bill, alleging that the allegations in the original bill were mistaken. He then brought an action at law on the bonds, which was enjoined. Held, B. could not maintain the action at law, and much less both that action and the suit in equity. *Jones v. Bond*, 86 Va. 81, 9 S. E. 503.

2. Proceedings on Lost Bonds.

A court of equity has jurisdiction to grant relief on a lost bond, but it generally requires an affidavit of the loss of the bond to accompany the bill. If the plaintiff fails to file such an affidavit, it may be supplied by filing it at any time before the hearing; and if this be done, the relief will be granted, if the proofs in the case establish the loss

of the bond. *Lyttle v. Cozad*, 21 W. Va. 183.

The relief will be granted in such a case, though it be proven, that after the institution of the suit, but before the hearing of the case, the lost bond was found, provided the plaintiff had used diligence to find it before the suit was brought; and especially when the loss of it arose from its having been improperly in the possession of one of the obligors. *Lyttle v. Cozad*, 21 W. Va. 183.

When a court of equity has jurisdiction of the case independently of the loss of the bond, no affidavit need be filed of its loss. *Lyttle v. Cozad*, 21 W. Va. 183. See the title **LOST INSTRUMENTS AND RECORDS**.

3. Proceedings to Charge Heirs or Devisees.

Necessity for Exhausting Personal Estate.—In equity whether the lands be charged by the will or the bond of the ancestor, creditors must exhaust the personal estate before they can resort to the lands. *Garnett v. Macon*, 6 Call 308.

Lands devised (without any specific charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisor, until the personal estate is exhausted. *Foster v. Crenshaw*, 3 Munf. 514.

Parties.—A judgment at law being obtained against one of two obligors, in a joint and several bond, and no proceedings to enforce it appearing, a court of equity ought not to charge the lands of the other obligor, in possession of his devisees, without having made the obligor, against whom the judgment was rendered, or his representatives, parties to the suit. *Foster v. Crenshaw*, 3 Munf. 514.

Bill.—A party seeking to subject heirs to the payment of the bond of their ancestor, must show that the heirs were bound by the bond. *Piper v. Douglas*, 3 Gratt. 371. See the title **HEIRS AND DEVISEES**.

Bill filed to subject heirs to the payment of the bond of their ancestor, does not allege that the heirs are bound in the bond; but makes the bond an exhibit with the bill. The answer does not admit or deny that the heirs are bound in the bond; and before the cause is heard the bond is lost out of the papers in the cause. There is proof of the existence of the bond, but no proofs on the question whether the heirs were bound by it; nor is that question made in the court below, but a decree is made against the heir. Held, that although this court will reverse the decree for want of the proof that the heir is bound, the cause will be sent back to give the plaintiff an opportunity to amend his bill, and show that the heir was bound in the bond. *Piper v. Douglas*, 3 Gratt. 371.

Decree.—When lands held by several devisees in the same will are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees (or the money received or claimed, in lieu thereof) in rateable proportions, and not against the land of one only, with liberty to that one to sue the others for contribution. *Foster v. Crenshaw*, 3 Munf. 514.

4. Proceedings against Personal Representatives.

Where two of three obligors in a joint and several bond are dead insolvent, and there is no personal representative of either of them, the obligee coming into equity to enforce the payment of the debt against the personal representative of the other obligor, is not bound to have personal representatives of the deceased insolvent obligor appointed, and make them parties. And this especially where the defendant has not, by his answer or by any other mode of pleading, objected to the failure to make them parties. *Montague v. Turpin*, 8 Gratt. 453.

Generally, as to enforcement of judgment and decrees, see the title **JUDGMENTS AND DECREES**.

Where a bill seeks a personal decree against two surviving obligors in a bond, it is not necessary to make the personal representative of a deceased obligor a party to the bill, as no personal decree could be had against him. *Hunter v. Robinson*, 5 W. Va. 272.

5. Charging Separate Estate of Married Woman with Payment of Her Bonds.

In *Garland v. Pamplin*, 32 Gratt. 305, it was held, that a married woman, by executing certain bonds, must be presumed to have intended thereby to charge her separate estate with their payment, and the separate estate is therefore liable in equity for such payment. See the title **SEPARATE ESTATE OF MARRIED WOMEN**.

6. Decree for Interest beyond Penalty.

Courts of equity will decree interest upon a bond or judgment beyond the penalty, against the principal debtor. *Tazewell v. Saunders*, 13 Gratt. 354. See ante, "Recovery in Excess of Penalty," IX, N, 2, d.

7. Enforcement Refused Where Object for Which Given Otherwise Attained.

A. executes a bond, by which he binds himself to pay a sum certain for the purpose of discharging the debts of C. college upon condition that like pledges shall be obtained to the whole amount of the college debts; and that this fact shall be announced by a committee constituted of persons named, of whom he was one. A. dies before the announcement that the pledges have been obtained; but they are obtained, and the announcement is made by the other members of the committee and another person appointed in his place; and the whole of the college debt is afterwards discharged. Held, the bond having been given for the purpose of paying the debts of the college, and they having been paid, a court

of equity will not enforce the payment of the bond against A.'s estate. *Columbian College v. Clopton*, 7 Gratt. 168.

B. PROCEEDINGS FOR RELIEF.

1. When Proper.

a. Fraud, Mistake, etc.

Generally, as to fraud and mistake as ground for equitable relief, see the titles **FRAUD AND DECEIT**; **JURISDICTION**; **MISTAKE AND ACCIDENT**.

Misrepresentations made to obligor on former occasions and for different purposes, are not to be relied on for rescinding the contract, not being part of the same transaction. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733. See the title **RESCISSION, CANCELLATION AND REFORMATION**.

Effect Where Parties in Pari Delicto.

—Where a party executes his bond to another for the purpose of aiding fraudulent sales he can obtain no relief against the bond in a court of equity, he being in *pari delicto* with the defendant. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

Direction of Issue upon Question of Fraud or Misrepresentation.—Upon the question whether the bond of M. was obtained by the misrepresentations of O., the evidence being conflicting, an issue should be directed. *Magill v. Manson*, 20 Gratt. 527. See the title **ISSUE OUT OF CHANCERY**.

Under circumstances, inducing suspicions that a bond (on which a judgment at law had been obtained against an executor), was counterfeit or fraudulent; upon a bill filed by the executor, relief was given in equity, by directing an issue to try whether the bond in question was the deed of the testator, or not; and, if so, what was the consideration on which it was founded; and this, notwithstanding the trial at law was upon the plea of payment put in by counsel, and a new trial moved for by the complainant was refused by the court; it being alleged in the bill

that the complainant's suspicions of fraud were for the first time, excited on the trial at law, and then, on a minute examination of the paper, he was convinced that the signature of his testator's name thereto was not genuine; which conviction was strengthened by other circumstances, some of which were known to him before the trial, and some afterwards. *West v. Logwood*, 6 Munf. 491. See the titles **INJUNCTIONS**; **JUDGMENTS AND DECREES**.

b. Matters Involving Consideration of Bond.

As to the former rule as to pleading want, illegality, or failure of the consideration for which a bond was given and the effect of the statute allowing equitable defenses at law, see the title **ACTIONS**, vol. 1, p. 142 et seq. And see ante, "Consideration," III, C. As to the effect of such matters as ground for relief against contracts generally, see the title **CONTRACTS**.

Where it is proved that part of a bond is on gaming consideration, and other part on lawful consideration, a court of equity will relieve against the part which is vicious, and sustain that which is good, the obligor being plaintiff in equity. *Skipwith v. Strother*, 3 Rand. 214.

c. Relief against Penalty.

In General.—A court of equity will always relieve against a penalty, where compensation can be made. *Hackett v. Alcock*, 1 Call 533, in which case relief was given against a bond, given to secure a title to lands although the consideration was not expressed in the bond. See the titles **FORFEITURES**; **PENALTIES**.

Illustrations.—A court of equity will relieve against back interest secured by way of penalty. *Mosby v. Taylor*, Gilmer 172.

D., owing only £100, was induced to give his bond for £150, the £50 being regarded as a penalty. Equity will relieve against said penalty,

not only upon the general principal of making compensation, but because in this case the plaintiff was prevented by defendant (who was also guilty of fraud) from performing one of the alternatives agreed upon. *Dawson v. Winslow*, Wythe 114.

2. Manner of Granting Relief.

Injunction.—Generally, as to injunctions against the enforcement of judgments on bonds, etc., see the title INJUNCTIONS.

Rescission, Cancellation and Reformation.—As to the right to resort to equity to obtain the cancellation, rescission or reformation of bonds, see the title RESCISSION, CANCELLATION AND REFORMATION.

3. Laches as Bar to Relief.

Where the bond averred to have been fraudulently procured was executed in 1879, and the suit for relief against it was not instituted until 1885, whilst the bill gives no excuse for the delay, the plaintiff is precluded from relief by his laches. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733. See the titles INJUNCTIONS; LACHES.

4. Right as Affected by Existence of Legal Defense.

In suit in equity obligor can not set up that he had discharged the bond wherein the judgment sought to be relieved against was founded, that being a defense he ought to have set up in the action at law. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

In an action of debt upon two bonds

executed on the 29th of December, 1862, and payable twelve months after date, the defendants appeared and defended the action; and the jury scaled the debt, reducing it from \$5,193 to \$3,000, with interest from the day the bonds fell due; and the judgment was accordingly. About a year after the judgment was rendered the defendants in the action filed their bill for an injunction to the judgment, on the ground that the debt was scaled as of its date, instead of the day of its payment. Held, the defendants having defended themselves at law, can not afterwards come into equity for relief. *Penn v. Reynolds*, 23 Gratt. 518. See the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; INJUNCTIONS.

XI. Review.

The court of appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 1 Munf. 555. See the title APPEAL AND ERROR, vol. 1, p. 418.

A joint judgment can not be reversed as to one defendant, and affirmed as to the other. *Jones v. Raine*, 4 Rand. 386.

Where the principal and sureties are sued jointly, and the judgment is erroneous as to the sureties, it must be reversed as to all; although the judgment would have been good against the principal, if he had not sued alone. *Munford v. Overseers*, 2 Rand. 313.

Book Accounts.

See the title DOCUMENTARY EVIDENCE.

Books as Evidence.

See the title DOCUMENTARY EVIDENCE.

Books of Account.

See the title DOCUMENTARY EVIDENCE.

Booms and Boom Companies.

See the title LOGS AND LOGGING.

BORDER SOCIETY.—See *Boxwell v. Affleck*, 79 Va. 406; *Brooke v. Shacklett*, 13 Gratt. 301. And see the title **RELIGIOUS SOCIETIES**.

BORROWER.—Where money is advanced to one on the credit of another, the person upon whose credit the money is advanced may be denominated the **borrower**. *Field v. Harrison*, Wythe 280. See generally, the titles **GUARANTY**; **LETTERS OF CREDIT**.

BOTH.—Two persons unite in a joint deed, giving to a third person all their personal property "that they may have at the time of their death," and reserving the "use and control" thereof "so long as they **both** shall live;" they thereby create a joint tenancy survivorship in such personal property, the manifest intention of which is that, on the death of one, the residue vests in the survivor, and such third person is not entitled to any of their property until the death of **both** the grantors. The court said: "They further provide that they are 'to have full use and control of all their personal property so long as they **both** shall live'; that is, during the lives of **both** of them. This is equivalent to saying that the grantee shall have such personal property as they may leave at the death of the survivor, and that he is not to interfere with the use and control thereof until such event, when what may be left at that time is to be his; thus making it a testamentary devise on the happening of the deaths of **both** the grantors. *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986." *Bank of Greenbrier v. Effingham*, 61 W. Va. 267, 41 S. E. 143. See generally, the titles **DEEDS**; **REMAINDERS**, **REVERSIONS AND EXECUTORY INTERESTS**.

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I. Manner of Indicating and Ascertaining.

See post, "Construction of Descriptions in Deeds," III.

A. IN GENERAL.

Order of Importance and Weight.—"In locating lands, the following are some of the rules resorted to, and generally in the order stated: (1) natural boundaries; (2) artificial marks; (3) adjacent boundaries; (4) course and distance, course controlling distance, or distance, course, according to circumstances. Neither rule, however, occupies an inflexible position, for when it is plain that there is a mistake an inferior means of location may control a higher." *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 406.

Sufficiency of Description by Name.—See generally, the title **DEEDS**.

A description by metes and bounds is not necessary, where the premises are well known by name. *Lennig v. White*, 1 Va. Dec. 873. See *Adams v.*

Alkire, 20 W. Va. 480. See also, post, "Courses and Distances," I, E.

Where, in a distribution of land by means of a lottery, in the year 1767, one of the prizes was designated as "McKeand's tenement," the adventures in the lottery had a right to expect, under such designation, all the ground that had been occupied as part thereof, and his occupation, ought, it was held, to be gathered from that of former tenants, who kept a public tavern thereon, rather than from that of McKeand, a private single man, who did not occupy the whole; the survey had at the instance of the owner after the publication of the scheme, narrowing the bounds of the tenement, ought not to affect the drawer of the prize, neither he nor McKeand having been present. *Southall v. McKeand*, Wythe 96.

And assent to such survey was not to be inferred from the exposure of the plan in the room where the lottery was drawn, even if it was read, since

the description therein of the tenement was not clear as to which it meant. *Southall v. McKeand*, Wythe 96.

Particular boundaries govern general description of land, and a false description is rejected and the instrument takes effect if a sufficient description remains to ascertain its application. *Hunter v. Hume*, 88 Va. 24, 13 S. E. 305.

Necessity of Survey to Identify Grant.—"It is now well settled that a grant may be valid if the land granted can be identified though no actual survey had ever been made." *Smith v. Chapman*, 10 Gratt. 445, 474.

Horizontal Measurement the Rule in Surveys.—The accurate and legal mode of surveying land is by horizontal measurement, and, in the absence of an express agreement to the contrary, it should be so measured. Local custom or usage can not be relied on where it is in conflict with the written agreement of parties, or with well settled rules of law. But, in the case in judgment, no such usage or custom has been established in the manner required by law, even if it were admissible. *Southwest Va. Mineral Co. v. Chase*, 95 Va. 50, 27 S. E. 826. See post, "Surveys, Entries and Maps," IV, B.

Boundaries Fixed as of Date of Deed.—Boundary lines of lands conveyed to a railroad company should stand as fixed by the deeds, and not be shifted to meet any change of the track found necessary or desirable. *King v. Norfolk & Western R. Co.*, 90 Va. 210, 17 S. E. 868.

Special Legislation Prohibited.—By the constitution of 1902, art. 4, § 63, cl. 16, special legislation "affecting or regulating the boundaries or land," is prohibited.

See, as to survey and plan of cities and towns, and effect thereof as evidence of boundary, Va. Code, 1904, § 1014.

B. MONUMENTS.

1. Natural and Artificial Compared.

Natural boundaries are generally superior to artificial monuments upon a question of locating lands. *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400. For artificial monuments are liable to destruction. *French v. Bankhead*, 11 Gratt. 136, 158.

Natural boundaries are, perhaps, universally invariable; and marked lines and trees, so long as they remain without willful destruction, or alteration, in general furnish a safer guide than any other, except notorious natural landmarks. *Dogan v. Seekright*, 4 Hen. & M. 125, 130.

2. Monuments as Controlling Course and Distance.

a. General Rule.

Upon questions of boundary, where the particulars of description in the deed are conflicting, it becomes necessary to select those most worthy of confidence; and it is well settled that courses and distances must yield to the natural and marked monuments called for in the instrument. *Pasley v. English*, 5 Gratt. 141, 150; *Marlow v. Bell*, 13 Gratt. 527; *Clarkston v. Va. Coal & Iron Co.*, 93 Va. 258, 24 S. E. 937; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

"Natural and artificial boundaries, which are the objects of the senses, must control the call for ideal boundaries, or for lines which are often matters of conjecture and always liable to be mistaken." *Harriman v. Brown*, 8 Leigh 697, 704.

Although neither courses, distances, nor reputed contents correspond. *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 406.

And in the description of lands, as to questions of boundaries, the rule is settled in Virginia and West Virginia that natural landmarks, marked lines, and reputed boundaries will control mere courses and distances, or mis-

taken descriptions in surveys and conveyances. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *Dogan v. Seekright*, 4 Hen. & M. 125; *Coles v. Wooding*, 2 Pat. & H. 189; *Baker v. Seekright*, 1 Hen. & M. 177; *Adams v. Alkire*, 20 W. Va. 486.

In a Kentucky case they say that even if the lines and courses had been marked, and the patent had called for the river as a line of the boundary, this call would control the marked line, it being a universal rule that the actual boundary, whether natural or artificial, shall control repugnant course and distance. In that case, the original survey was exhibited, and showed the river as a boundary: "This, the court said, was decisive. The survey was the foundation of the patent. It is of record, and in that respect equal in dignity to the patent. It does not contradict but only renders fixed and certain some of the calls of the patent; and it may be used to aid in supplying omissions, or in correcting mistakes in the patent." *French v. Bankhead*, 11 Gratt. 136, 156.

Where Uncontradicted.—If a monument called for by the deed is established by uncontradicted evidence, it becomes binding upon the parties. *Summerfield v. White*, 54 W. Va. 311, 315, 46 S. E. 154.

Natural Boundaries Govern.—It is well settled that where the courses and distances vary from the natural boundaries set forth in the deed, the latter prevail over the former. *Norfolk Trust Co. v. Foster*, 78 Va. 413.

Reputed Boundaries.—As was said by Judge Pendleton, in *Shaw v. Clements*, 1 Call 438, "Our juries generally, and wisely, establish reputed boundaries, disregarding mistaken descriptions." And in *Herbert v. Wise*, 3 Call 242, "To pursue the proper descriptions of our land boundaries would render men's title very precarious, not only from the variations of the compass, but that old surveys were often

inaccurate, * * * whereas the marked trees upon the land remain invariable, according to which neighbors hold their distinct lands." *Norfolk Trust Co. v. Foster*, 78 Va. 417. See *Dogan v. Seekright*, 4 Hen. & M. 125; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400.

Call to Follow a Ridge.—In a call in a patent which fixes a starting point at a stake on the top of a designated ridge, and continues "thence with the same" a given course and distance, the words "with the same" mean with the top of the ridge, or at the least the line must keep with the ridge. If the course and distance given fails to do this, and in great part leaves the ridge altogether, and it is impossible to give effect to both, the course and distance must yield to the permanent natural boundary, and the line be run with the top of the ridge, in accordance with the general rule, which prefers natural or permanent objects or monuments to courses and distances, when there is repugnancy between the two. *Clarkston v. Va. Coal & Iron Co.*, 93 Va. 258, 24 S. E. 937.

Ascertained Corners Govern Course and Distance.—"If a patent or deed refer to any notorious landmarks, or natural boundaries, which can not be mistaken, and are not liable to change or decay, as the corners or angles of a plat, such notorious landmarks are to be regarded as termini, from whence straight lines are to be run from one to the other, without regard to the correspondence of either course or distance, which may in such cases be mistaken in the deed." *Dogan v. Seekright*, 4 Hen. & M. 125, 130.

"The case of *Smith v. Davis*, 4 Gratt. 50, recognizes this as a general rule." *Marlow v. Bell*, 13 Gratt. 527, 530.

Thus, where three or four corners of a large survey are ascertained, but between these ascertained corners the patent calls for several lines and courses, in fixing the boundaries of

the land, the lines calling for these ascertained corners must be run thereto, though this may require a variation of both course and distance. *Clements v. Kyles*, 13 Gratt. 468, 469.

As to where corner is called for but not found, see post, "Courses and Distances," I, E.

Where owners of a large tract of land convey a part of it, the call of the deed is, beginning on the line of a survey made for S., about six hundred and ninety poles from its northerly corner, running thence with S.'s line a given course and distance to two white oaks, etc. Though there is an obvious mistake in some one or other of the calls of the survey, yet the beginning corner must be made at the point on the line of S., six hundred and ninety poles from his northerly corner. *Smith v. Chapman*, 10 Gratt. 445.

"The term 'about' must be disregarded, no corner having been in fact made, and the call being not for any object, but for a mathematical point only." *Smith v. Chapman*, 10 Gratt. 445, 459.

In such case the action of the court or the commissioner of delinquent lands, in a proceeding for the sale of the land, could not alter the beginning corner called for by the deed. *Smith v. Chapman*, 10 Gratt. 445.

b. Description of Monument Uncertain.

Where a monument is not so described that it can be found with absolute certainty, the courses and distances mentioned in the deeds control, if they can be reconciled, and, if not, either course or distance may be preferred, as shall best comport with the manifest intention of the parties and with the circumstances of the case. *Summerfield v. White*, 54 W. Va. 311, 316, 46 S. E. 154; *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13.

c. Supplying or Modifying Calls.

Where necessary to conform course

and distance to a natural monument, such as a mountain ridge, it is allowable to assume that one or more calls may have been omitted, or that the call for a straight line may have been a mistake arising from imperfect knowledge of the topography, and to supply such omitted calls or disregard or modify such repugnant calls, in accordance with the natural boundaries. *Hamilton v. McNeil*, 13 Gratt. 389, 402.

d. Omission of Incongruous Calls.

A call which is incongruous and irreconcilable with the other calls of the grant, by which the survey may be located, and which call appears to have been inserted by mistake, may be rejected. *Smith v. Chapman*, 10 Gratt. 445, 474; *Hamilton v. McNeil*, 13 Gratt. 389, 402. See post, "Conflicting Calls and False Description," III, C.

e. Reversing Course to Locate Beginning Point.

Where the beginning point of a survey is in doubt, but the course and distance from that point are along one natural monument and to another, such point should be ascertained by beginning at the natural monument mentioned as at the end of the distance and reversing the course and measuring the same distance along the other natural monument given. *Reusens v. Lawson*, 96 Va. 285, 31 S. E. 528.

f. Misleading Instruction as to Location of Corner.

Where it is a question for the jury which of the two corners is the one called for in the title papers as "on the bank of the creek," an instruction telling the jury that a well-known stream or watercourse, called for in a title paper, controls mere course and distance, may be misleading, one of the corners being some little distance from the creek. *Robinson v. Lowe*, 50 W. Va. 75, 81, 40 S. E. 454.

3. Identification of Ancient Corner Trees.

In locating a survey made as far back as the year 1790, it is not necessary that all or any of the corner trees should be proved to be still standing, or be accounted for; the survey can be successfully established by the local description contained in the grant, if it be so given as to separate the land described in the grant from that adjacent. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335, 351.

C. ORIGINAL LINES AS ACTUALLY RUN.

Generally, when, in a deed, actual lines and corners are described, or when from the statement of courses and distances or other descriptions, in connection with circumstances existing and manifest, or ascertainable, at the time of the execution of the deed, it is presumable that such lines and corners are those referred to in the deed, the statement of courses and distances is, in construction, controlled by the actual lines and corners referred to. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406. See *Marlow v. Bell*, 13 Gratt. 527, 530.

But the mere circumstance that lines and corners are known to have been run and marked, or are found marked near where the courses and distances mentioned in the deed run, is not conclusive that they are the lines and corners of the land referred to in the deed. And where there is no such approximation in the courses or lengths of the lines, or the marks on the corners, to the description in the deed, as to warrant the presumption that they are the boundaries of the land to which the deed relates, such marked lines should be disregarded. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

Lines and corners may be marked with the purpose to adopt them in a contemplated deed, but afterwards the marked lines and corners may be aban-

doned, and mere courses and distances from certain objects or points may be substituted. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

"Where courses and distances, with marked lines and corners, are referred to in a deed, in such case lines and corners corresponding most nearly with the courses and distances, lines and corners mentioned in the deed, are to be regarded as the true courses, etc." *Dogan v. Seekright*, 4 Hen. & M. 125, 131.

Marked Lines Found on Ground.—

The Virginia cases have given much weight to marked lines, corresponding in age as near as may be with the date of the deed, and in the main agreeing with courses and distances, found on the ground, though corner trees, not to be found or ascertained by evidence, are called for in the instrument, or though inconsistent with points in a plat referred to, especially if comporting with natural objects mentioned. See *Shaw v. Clements*, 1 Call 429; *Herbert v. Wise*, 3 Call 239; *Baker v. Seekright*, 1 Hen. & M. 177; *Dogan v. Seekright*, 4 Hen. & M. 125; *Pasley v. English*, 5 Gratt. 141, 151.

Competency of Parol Evidence.—

When a deed mentions the course and distance of a line, without any other description thereof, parol evidence is admissible to prove marked trees, not in the course or termination of that line, to be the true line intended. *Baker v. Seekright*, 1 Hen. & M. 177, cited with approval in *Elliott v. Horton*, 28 Gratt. 772, 773; *Dogan v. Seekright*, 4 Hen. & M. 136.

In *Pasley v. English*, 5 Gratt. 141, 152, the court said: "But there are no cases decided by this court to countenance the idea, that a claimant to the legal title to land under a deed of conveyance, can disregard the calls of his deed, and rely merely upon parol evidence, that at or about the time of his purchase, a division line was run by and between him and his vendor,

without any evidence to prove that the marks are found upon the ground and correspond reasonably with the date of the deed, survey or division, or that they were once so found, and have been lost by decay or destruction. I do not mean that such evidence is inadmissible, or merely secondary, (for considerable latitude must be allowed to the evidence adduced in such controversies), but that it is insufficient in point of law to establish the title claimed."

Marked Lines Preferred to Magnetic Lines.—In questions of boundary, natural landmarks, marked lines and reputed boundaries, especially if known to and acquiesced in by the parties interested, should be preferred to mere magnetic lines, which may be described by mistake in deeds and surveys, unless it shall clearly appear that the marked line was made by mistake, unknown to, and therefore not acquiesced in by, the parties in interest. *Coles v. Wooding*, 2 Pat. & H. 189. See ante, "Monuments as Controlling Course and Distance," I, B, 2.

Marked Line Should Prevail Over Unmarked.—It seems to be matter of law, on which the court, if either party require it, should instruct the jury, that a marked line shall prevail over one which was never marked. *Dogan v. Seekright*, 4 Hen. & M. 125.

Mistake in Running Line.—See post, "Establishment by Agreement," II, B.

Where commissioners, appointed to divide a tract of land, fixed the corners of the dividing line and intended to join them by straight line, so describing the line in their report and plat returned to court, but, owing to the fact that the land was thickly wooded, the line was not run straight, but in a curve, it was held, that the line as it was intended to be run, and not the marked line, was the true division line. *Smith v. Davis*, 4 Gratt. 50.

And where a commissioner of delinquent and forfeited lands divides

a large tract into lots for sale, and at one end of the tract marks a line part of the way through, and at the other end marks another line part of the way through, and these two lines extended will not meet and form a continuous line, but are distant from each other, the plat of the commissioner showing a straight continuous line from outside to outside, it is not allowable to adopt these marked lines, and, going to the end of one to deflect from its straight course and run a line to the end of the other, but a straight continuous line, conforming to the plat, is the true line. *Jackson v. Land Ass'n*, 51 W. Va. 483, 41 S. E. 920.

"It is true that we generally do allow marked lines to control. That would be the case, if we were finding the lines of only one tract. Under ordinary circumstances the law would say that wherever the commissioner of delinquent and forfeited lands marks lines and corners, and then sells by them, the purchaser gets and takes and holds by those lines and corners, mistake or no mistake; but that will not do in this case, because we would have one line going part of the way, and another going part of the way, and never meeting to form one line, but if extended through the ground to be covered would make two separate lines, distant from each other, when he intended one unbroken line, as his plat and the commissioner's deeds for the different lots show." *Jackson v. Land Ass'n*, 51 W. Va. 482, 491, 41 S. E. 920.

D. LINES AND CORNERS OF ADJOINING TRACTS.

See post, "Calls of Other Deeds," III, G.

When Preferred to Course and Distance.—The call for the line of another tract of land, which is proved, is more certain than and shall be followed in preference to, one for mere course and

distance. *Miller v. Holt*, 47 W. Va. 7, 34 S. E. 956. See *Warren v. Syme*, 7 W. Va. 474; *Byrd v. Ludlow*, 77 Va. 483.

Thus a patent of S. calls to commence at a certain point admitted to be a corner of M.'s survey, and to run with his line a certain course and distance to a white oak corner of C.; and thence with C.'s line a certain course and distance to another corner of C. Following the first call, it comes to a white oak corner of M., but not the corner of C., but to get to C.'s corner, the line must leave the second corner of M. at nearly right angles and run seventy-nine poles, not running on the line of either M. or C. for this distance. The call for the line of M. will, under the circumstances, be considered the correct call, and S.'s patent will be held to include all the land up to the line of M. *Marlow v. Bell*, 13 Gratt. 527.

But where the patent under which the demandant in a writ of right claims, is for a tract of land beginning "adjoining the upper end of G. W.'s land, at a large black walnut," and at the trial the demandant offers in evidence the entry, which is merely for 200 acres at the upper end of G. W.'s survey, to "join the line, and to extend up for quantity," the reference in the patent to the walnut as a boundary, controls the call for G. W.'s survey, and the entry can not be permitted to counteract this construction of the patent. *Harriman v. Brown*, 8 Leigh 697.

"That the entry of a party may sometimes be admitted in evidence before the jury to identify the calls of the patent, is acknowledged to have been decided by this court in *Camden v. Haskill*, 3 Rand. 462. In this case the entry was rejected by the same judge who had, upon the trial, admitted it in the case just cited. I think there is much reason for distinction between the two cases. In *Camden v. Haskill*, the patent called for 'a white oak and

beech, corner to a survey of 40,000 acres made for David Lockwood,' without any further description. The white oak and beech claimed by the plaintiff were proved to be '80 poles below the falls of Little Kanawha, on the north side thereof.' The plaintiff introduced a copy of the entry on which his patent was founded, which called to begin at 'a white oak and beech on the north bank of the Little Kanawha, 80 poles below the falls thereof.' Now this entry did not control or contradict the patent. It only explained it, and identified the call, which in the patent itself was left indefinite. But in this case the patent call 'to adjoin the upper end of Washington's survey, at a large black walnut,' and thus refers to a certain, visible, actual boundary, which controls the call for the Washington survey, the location of which was mere matter of conjecture, and might easily have been mistaken, and in point of fact was mistaken." *Harriman v. Brown*, 8 Leigh 697, 714.

Yield to Corners and Locative Calls.

—The descriptive calls in a survey, such as near the land of a named person, must yield, in locating a survey, to established corners, as well as to locative calls. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335.

Adoption of Existing Corner without Describing It as Such.—A survey in adopting the corner of another survey, may omit by mistake to describe it as such, and so the fact that the corner so called for is not marked except as a corner to the old survey, will not disprove its identity as such corner. *Smith v. Chapman*, 10 Gratt. 445, 475.

Immaterial Mistake.—The fact that a survey and patent, in adopting two consecutive lines of an adjoining patent, referred to a "line" of such patent instead of "lines," would not affect the validity and force of such boundaries. *Stever v. Gillis*, 3 Call 417.

E. COURSES AND DISTANCES.

Weight and Importance.—See ante,

"Description of Monument Uncertain," I, B, 2, b.

The beginning corner of a survey, or of several dependent surveys, being fixed, in the absence of proof of any other corners or boundaries, and of any calls for natural objects conflicting with the calls for courses and distances in the patents issued on said surveys, the identity of the land embraced therein is to be ascertained by the courses and distances of the patents, beginning at the fixed corner. *Overton v. Davisson*, 1 Gratt. 211, 213.

"Where, in a grant or deed, courses and distances only are mentioned, beginning from a certain point, but not referring to any certain point for the termination, otherwise than by reference to the distance, according to the course prescribed, in such case, courses and distances, as expressed in the deed, are only to be regarded, unless an actual survey, duly authorized, be proved to have been subsequently made, according to the courses and distances prescribed by the deed." *Dogan v. Seekright*, 4 Hen. & M. 125, 131.

And where a corner is called for which is not found, the course and distance called for in the patent must govern. *Clements v. Kyles*, 13 Gratt. 468, 469.

Choice Depends on Intention and Circumstances.—"To say that distance shall yield to course or vice versa, where there is a conflict between the distance of one line and the course of another, would be entirely arbitrary; and the true rule seems to be that the one or the other shall be preferred according to the manifest intent of the parties and the circumstances of the case." *Smith v. Chapman*, 10 Gratt. 445, 459.

"Where the boundaries of land described in a survey can not be established by reference to known monuments, and the courses and distances can not be reconciled, there is no uni-

versal rule which requires that one of these should yield to the other; but either may be preferred, as shall best comport with the manifest intention of the parties, and with the circumstances of the case. *Ruffner v. Hill*, 31 W. Va. 428-436, 7 S. E. 13." *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 406. See *Clements v. Kyles*, 13 Gratt. 468, 480; *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406; *Summerfield v. White*, 54 W. Va. 311, 316, 46 S. E. 154.

"The cases seem to establish these propositions: (1) That where there is a conflict between the distance of one line and the course of another, either the course or the distance shall control, according to the manifest intent of the parties and the circumstances of the case; (2) where it can be ascertained from the lines and courses extant that the mistake is produced by an error in one of the courses, then the correction ought to be made with reference to that mistake, so as to make the survey conform as near as may be, without violating established principles of law, to the manifest intent of the parties, and, on the other hand, where it is shown by the extant and identified lines and corners of the survey that the mistake is produced by an error in the distance of one of the extant lines, then the correction ought to be made with reference to that mistake, so as to give effect as far as possible to the manifest intent of the parties; (3) and, in applying these rules, the shape of the survey as originally platted, and the quantity of the land called for, may be considered, though the weight to be given to these is generally very inconsiderable." *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13, 19.

Thus, where all the corners of a survey are known and identified except one, and it is shown that the lines to and from that corner were never run; that to establish said corner by the courses alone will locate it 200 poles

from the terminus of the distance called for in the line approaching it, and, if located by allowing the full distance of this line in order to close the survey, both course and distance of the line running from this corner must be violated to reach the next corner, which is fully identified; and it is also shown that there is a mistake of about 200 poles in the length of the line directly opposite the line approaching said corner, and that, to establish the corner by running the full distance of said line, the area of the tracts of land dependent on the location of said corner for fixing the dividing line between them, will much more nearly approximate the areas ascribed to them by the original survey and subsequent conveyances than if the said corner is located by the courses alone; the proper manner of locating said corner, under these circumstances, is to follow the course, and run the full distance of the line approaching it, and then close the survey by running a straight line from that point to the known corner. *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13.

May Yield to General Description.—Where a deed contains a general description of the land conveyed which can be made certain by proof of the surrounding circumstances, or identified by reference to the land itself or other objects that more or less distinctly indicate or determine it, and such deed also contains courses and distances of the land; such general description, if it satisfactorily appears from the deed itself or any recital, or writing referred to therein, that it was the intention of the grantor to convey the land so generally described, will control, and the courses and distances, in so far as they limit or differ from such general description, will be disregarded. *Adams v. Alkire*, 20 W. Va. 480. See *Lennig v. White*, 1 Va. Dec. 873.

Thus, where the facts clearly war-

rant the conclusion that the parties to the deeds under consideration intended thereby to convey to two persons the particular parts of a lot that they were occupying, respectively, at the time when the deeds were executed, that is to say, to the former the western fifteen feet and to the latter the eastern forty-five feet thereof, and this intention can be effectuated without violating any rule of law, by rejecting all of the descriptive clauses contained in each deed, except the first, which designates the property conveyed, as that 'now occupied' by the grantee, it will be carried out without regard to the metes and bounds named, which would fix a different line. *Gibney v. Fitzsimmons*, 45 W. Va. 334, 32 S. E. 189, 193.

Variation of Distance.—In the absence of proof fixing a corner elsewhere, it must be placed at the end of the distance called for, but if the evidence requires it the distance may be lengthened or shortened to conform thereto. *Smith v. Chapman*, 10 Gratt. 445, 475.

Rule as to Averaging Variation.—Where variations of course and distance are found necessary, it is not proper to establish something in the nature of an average by assigning to each line a just proportion of such variation, and an instruction to that effect, "that in making such variation there should be a fair allowance made in each line and course, if necessary," is erroneous. *Clements v. Kyles*, 13 Gratt. 468, 480.

"The true principal is that the course and distance called for in the grant must govern in respect of each line except so far as they may be controlled by calls for natural objects or artificial monuments proven to have been made or adopted for the survey itself, and in fixing those of any one line no reference can legitimately be had to the variation from the patent calls that may be found necessary in

determining the course and distance of any other line according to natural or controlling objects found upon the ground." *Clements v. Kyles*, 13 Gratt. 468, 481.

Lines Should Be Straight.—A line should not be deflected except in order to conform to the intention of the parties. And, if possible, a line should be construed to mean a continuous line. *Jackson v. Land Ass'n*, 51 W. Va. 482, 41 S. E. 920, citing *Smith v. Davis*, 4 Gratt. 50. See *Tompkins v. Vintroux*, 3 W. Va. 148. See also, ante, "Original Lines as Actually Run," I, C.

"But though this be the true rule where no other call is found in the grant but the call to run from one terminus to another, there certainly may be other calls which show the line was not intended to be a straight line; as where a call is to run with a river or a public road from one terminus to another, the stream or road, if it leads to the other terminus, must be followed, though it may diverge from a direct line between the two points. The same rule would apply to a marked line, if there was enough to show that such line, though not a direct line, was intended as the boundary, provided by following the marked line the other terminus can be reached." *Marlow v. Bell*, 13 Gratt. 527, 530. See *Hamilton v. McNeil*, 13 Gratt. 389, 402.

F. STREAMS AND BODIES OF WATER AS LINES.

1. Location of Line.

a. Common-Law Rule.

"The well-known rule of the common law, which was and is, now the law of Virginia, except so far as altered by statute or inapplicable to the country, is, that lands bounded by the sea, or on navigable rivers where the tide ebbs and flows, extend to high water mark only; but bounded on rivers or upon the margin, or along the same, above tidewater, go to the center

of the stream." *Com. v. Garner*, 3 Gratt. 696. See also, *Groner v. Foster*, 94 Va. 650, 657, 27 S. E. 493; *Garrison v. Hall*, 75 Va. 150, 159; *Ravenswood v. Flemings*, 22 W. Va. 52, 62.

"So far as regards rivers and creeks not navigable, the rule last mentioned has always been considered and still is the law of Virginia. *Home v. Richards*, 4 Call 441; *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Crenshaw v. Slate River Co.*, 6 Rand. 245." *Com. v. Garner*, 3 Gratt. 696.

b. Nonnavigable Streams.

A person owning lands on one side of a stream not navigable, is entitled to a moiety of the bed of the stream. *Mead v. Haynes*, 3 Rand. 33; *Home v. Richards*, 4 Call 441.

And where land is conveyed which is bounded by a river or other watercourse not navigable, such conveyance carries with it the title to a moiety of the bed of such river or watercourse. *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731, 735.

In *Camden v. Creel*, 4 W. Va. 366, the court say: "There can be no doubt where an individual having title to lands lying on both sides of a watercourse grants the land lying on one side thereof and bounded thereby, that the grantee gets by such grant a moiety of the land of the watercourse, unless the grant clearly excludes such construction of it." *Carter v. C. & O. R. Co.*, 26 W. Va. 644, 653. See *Crenshaw v. Slate River Co.*, 6 Rand. 245.

But, where a grantor having title to lands lying on both sides of a head race of a mill owned by him below the land which he grants, conveys to a grantee by a deed lands on the opposite sides of this mill race bounded by it, the tracts on each side of the mill race being described by metes and bounds extending around the whole

of each tract separately and not extending around both of them together as one tract, the grantee gets no part of the bed of such mill race. *Carter v. C. & O. R. Co.*, 26 W. Va. 644.

Calls for Monuments on Bank.—

When a deed calls for a corner, which stands on the top of the bank of a stream not navigable, and the courses are up the line of said stream, though trees be marked or stakes planted along the top of the bank of such stream, the boundary of the tract would be the same, as if the deed had called for the water edge of the stream at low water mark as the boundary. *Carter v. C. & O. R. Co.*, 26 W. Va. 644; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42.

"In the case of McCulloch's lessee *v. Aten*, 2 O. 425, it is said, that the fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms, 'down the creek with the several meanders thereof.' They import the water's edge at low water, which is a decided natural boundary, and must control a call for corner trees on the bank." *French v. Bankhead*, 11 Gratt. 136, 155; *Carter v. C. & O. R. Co.*, 26 W. Va. 644, 656.

But if in such a deed as above described there be substituted instead of a stream not navigable the head race of a mill owned by the grantor on this race below the land granted, the boundary of the tract granted would be the top of the bank of the mill race along the line, on which trees have been marked or stakes planted and not the water edge of the mill race at low water mark. *Carter v. C. & O. R. Co.*, 26 W. Va. 644.

Call for Edge of River.—It was said in *Carter v. C. & O. R. Co.*, 26 W. Va. 644, 655, that there are cases from which it might be fairly deduced that, if the calls of a deed are to the edge of a nonnavigable river, and thence with the northern line of such river,

low water of such river would be the boundary of such tract. See *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42.

c. Navigable Waters.

See the title WATERS AND WATERCOURSES.

(1) In General.

Every riparian owner on navigable waters, owns the land within the boundaries of his lines extended to low water mark. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *French v. Bankhead*, 11 Gratt. 136. And, in the absence of anything in the statute to the contrary, they must be extended in the same direction that they reach ordinary high water mark. *Groner v. Foster*, 94 Va. 650, 657, 27 S. E. 493.

"As early as 1679, it was ordered and declared by the legislative assembly of Virginia, that 'every man's right, by virtue of his patent, extends into the rivers or creeks so far as lower water mark, etc.' (*Garrison v. Hall*, 75 Va. 159, and 1 Lomax Dig. 661); and the present statute declares that, subject to certain designated provisions, 'the limits or bounds of the several tracts of land lying on the said bays, rivers, creeks, and shores, and the rights and privileges of the owners of such lands, shall extend to low water mark, but no further, unless where a creek or river, or some part thereof, is comprised within the limits of a lawful survey.' Va. Code, § 1339. See also, 1 Rev. Code, 1819, ch. 87, p. 341." *Groner v. Foster*, 94 Va. 650, 657, 27 S. E. 493.

Apportionment of Riparian Rights.—

See generally, the title WATERS AND WATERCOURSES.

Such a riparian owner has the right to have the extent of such enjoyment upon the line of navigability determined and marked, and its boundaries defined, and a court of equity is the proper tribunal to make the apportionment and determine and establish the

boundary lines of the coterminous owners. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

In making the apportionment, however, between coterminous owners, the rule of division is, as the whole shore line of the coterminous owners at low water mark is to the whole line of navigability, so is each one's share of the shore line to his share of the line of navigability. The flats, or land under water, are to be thus divided regardless of the character or value of the flats, to be laid off as directly in front of the lands of each owner as a just regard to the rights of coterminous owners will permit. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

The portwarden's line, as defined by the persons invested with the power to establish it, is binding upon the courts in apportioning the water front amongst the parties entitled thereto. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

Each riparian proprietor was entitled under the law to his proper proportion of the whole portwarden's line, to be laid off to him as directly in front of his land as a just regard for the rights of coterminous owners would permit, and there is no valid ground for the exclusion of any part of it in making the apportionment. *Groner v. Foster*, 94 Va. 650, 655, 27 S. E. 493; *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

There is no authority for excluding from the apportionment any part of the portwarden's line on the ground that one part of it was less valuable than another. Such discrepancy in value can not be taken into consideration in apportioning the water front, for the apportionment is not the partition of a subject held in common, but of a subject in which the interest

of each owner is separate, and needs only to be segregated in order to prevent encroachment upon the rights of one another. Each owner is entitled to a portion of the size to which his land entitles him, regardless of the relative value. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493; *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

(2) Conveyance "To High Water Mark."

A conveyance to "high water mark" as a general rule vests in the grantee the right to the soil between ordinary high and low water mark, as incident or appurtenant to the adjacent land. A grant may be so limited to "high water mark" as to exclude riparian rights as incident to it, but the intention to do so must be clear and manifest upon the face of the deed. *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

And it will be presumed, in the absence of evidence to the contrary, that the original deeds conveyed to "high water mark," and that the riparian rights attached as incident to such a grant. *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. 534.

Cession to Federal Government.—

Under the enabling act (1 Rev. Va. Code, 1819, ch. 87, p. 341) a conveyance by the high water mark boundary passed to the United States the soil and jurisdiction to the low water mark at Old Point Comfort. *French v. Bankhead*, 11 Gratt. 136.

In determining the boundaries of the land ceded to the United States, the act, the surveyor's report and the deed are all to be looked to in order to ascertain what boundary was intended, although the deed does not refer to the survey in terms. *French v. Bankhead*, 11 Gratt. 136.

Looking to the act, the report and the deed, the intention was to convey by the high water mark, and that is the boundary of the conveyance. *French v. Bankhead*, 11 Gratt. 136.

(3) On the Ohio River.

Rights of riparian owners of land on the Ohio river extend to low water mark. *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42.

But riparian owners of land on the Ohio river, as against the state of West Virginia, hold their titles only to ordinary high water mark. *Ravenswood v. Flemings*, 22 W. Va. 52.

In *Barre v. Flemings*, 29 W. Va. 319, 1 S. E. 735, it was said: "In *French v. Bankhead*, 11 Gratt. 136, it was held, 'that under the act (1 Rev. Code, 1819, ch. 87, p. 341) the conveyance by the high water mark boundary passed to the United States the soil and jurisdiction to the low water mark.' This case, however, being controlled by a statute relating only to the tidewater section of Virginia, can not be treated as authority on the question now before us. This is also true as to the case of *Norfolk City v. Cooke*, 27 Gratt. 430." In this case it was held, that the riparian proprietors of land bounded on the Ohio river, in the state of West Virginia, own the fee in the lands to low water mark, subject to the easement of the public in that portion lying between high and low water mark, with the right of the state to control the same, for the purposes of navigation and commerce, without compensation to the owner. See pp. 738, 739, where the court reviews the case of *Ravenswood v. Flemings*, and states what it considers the real decision in that case, viz: That it was not intended to decide, either that the state had the fee below high water mark, or could authorize the taking of same for any purpose it chose. It recognized the ownership in fee on the riparian proprietor, subject to an easement in the public.

Immaterial That Line Is Run Along Bank.—A conveyance of land calls "thence N., 8 degrees W., 26-9-10 poles to a stake at Ohio river marked 'I,' thence down said river S., 62 degrees

W., 81-6-10 poles, to a stake on point at mouth of French creek." The line along the river is low water mark. *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42.

This is not changed by the fact that before the conveyance an actual survey was made, fixing the point at I just over the river bank, and running thence a straight line to point at the mouth of French creek, leaving a space between it and low water mark, and that a diagram representing such surveying and straight line was made, and the further fact that the deed conveying three parcels of land contains the clause: "These said calls are controlled by diagram made by R. A. G., county surveyor." *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42.

d. Effect of Change of Bed.

Where a stream changes its bed by gradual and imperceptible accretions, the boundary which it marks changes along with it, and the stream as it runs will continue to mark same; but where the change is not imperceptible, but by a sudden diversion of its course, the riparian claims are fixed by the original channel, if same can be determined. (Per Rives, J., dissenting.) *Mitchell v. Baratta*, 17 Gratt. 445, 468.

Where a stream is called for as the boundary of a tract of land, the title to which is in dispute, and under one chain of title it is called the eastern boundary and under the other the western boundary of such tract, and it appears beyond question that the stream has changed its course several times within the memory of living witnesses, but it is impossible to ascertain where it ran at the time in question, it must be disregarded as a boundary; the question of title must be determined upon a comparison of claims arising from actual possession, and not of the relative chains of title of the parties. *Mitchell v. Baratta*, 17 Gratt. 445.

2. As Controlling Course and Distance.

See ante, "Monuments as Controlling Course and Distance," I, B, 2.

"A well known stream or water-course which is called for in a title paper controls mere course and distance." *Robinson v. Lowe*, 50 W. Va. 75, 81, 40 S. E. 454.

3. Identification by Maps.

See post, "Surveys, Entries and Maps," IV, B.

G. PUBLIC ROAD AS LINE.

Where a call is to run with a public road from one terminus to another, the road should be followed, though it may diverge from a direct line between two points. *Marlow v. Bell*, 13 Gratt. 527.

H. DESCRIPTION OF BOUNDARIES IN WRIT OF RIGHT.

See the title WRIT OF RIGHT.

I. ARBITRATION OF BOUNDARY.

See the title ARBITRATION AND AWARD, vol. 1, p. 692.

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See Va. Code, 1904, ch. 93; W. Va. Code, 1899, ch. 60. See also, the title ANIMALS, vol. 1, p. 373.

II. Establishment by Agreement, Acquiescence, Estoppel, Limitations, etc.**A. FAVORABLY REGARDED BY COURTS.**

Courts will not disturb a parol agreement or long acquiescence in a boundary line, but will encourage such settlements of disputed, conflicting, or doubtful boundaries, as a means of suppressing spiteful and vexatious litigation. In questions of boundary, long and notorious possession authorizes the inference of any fact which can rationally be inferred to make such possession consistent with right. *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400.

B. ESTABLISHMENT BY AGREEMENT.

See ante, "Original Lines as Actually Run," I, C.

Executed, Oral Agreement, with Possession.—Disputed boundaries between adjoining lands may be settled by express oral agreement, executed immediately, and accompanied by possession according to such agreement. *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

"If the lines and corners be proved to have been actually run, and agreed on as a boundary between parties holding adjacent lands, those lines and corners are from thenceforth to be regarded as the limits of the possession of each." *Dogan v. Seekright*, 4 Hen. & M. 125, 130.

But where a large tract of land was laid off, for the convenience of selling, into small tracts, by running a base line and laying down the division lines by protraction, which division lines were never actually surveyed, and the coterminous owners of two of said tracts attempt to survey and mark the true division line between their said lots, and in so doing a mistake is made in running said line so as to include a large portion of one of said lots within the other, there being no dispute as to the true boundary, when said mistake is discovered neither of the parties is estopped thereby from claiming his rights, nor can it be construed as a license from the one party to the other to cut timber between the true line and the mistaken boundary. *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. 153, citing *Smith v. Davis*, 4 Gratt. 50.

Location of Fence by Consent.

Where, by its calls, a lot was fifty-five feet one way, but it appeared that the vendor thereof represented that such measurement would place its boundary at a certain point, giving it a greater depth, and such vendor allowed his

fence to be placed two feet beyond the fifty-five feet, the court said that, upon a review of all the evidence, this fence should be established as the true boundary line. *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593.

Binding on Parties and Privies Only.

—In ascertaining the boundaries of the land claimed by the plaintiff as purchaser of a part of a large tract sold by the commissioner of delinquent lands, no regard is to be had to any private arrangements or divisions by the plaintiff and the other purchasers of parts of the same tract of land at the same sales, to which defendants were neither parties nor privies. *Smith v. Chapman*, 10 Gratt. 445, 447.

Necessity for Consideration.—Where a dispute exists about the boundaries of land, and one of the parties yields his opinion, and acknowledges the right of his adversary, this acknowledgment shall not bind him, if at a future day he finds that he was mistaken, unless the acknowledgment was founded on some consideration. *Stuart v. Luddington*, 1 Rand. 403.

Ineffectual to Pass Title.—If two coterminal owners of land agree, by parol, to establish a line between them, which they both know to be, and which in truth was, different from the true line, the title does not pass thereby. *Harris v. Crenshaw*, 3 Rand. 14; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

This case is very different from the case of parties running a dividing line, and though they found it not to be the true line, yet agreeing to establish it as a line between them. The latter transaction may very possibly be considered equivalent to an actual surrender of the possession, by the true owner to the other, to hold as his property; and although it would not convey the title, yet it would be such a possession, as, after the lapse of twenty years, would enable him to maintain trespass even against him,

who had the right of property. *Harris v. Crenshaw*, 3 Rand. 14, 21.

But if the line was run and marked as a dividing line between them, and it was agreed upon, by parol, as the line; if there were two processionings of a part thereof, and the parties and those claiming under them acquiesced in the said line for twenty years, it is equivalent to a surrender of the possession of any land which may be cut off by the said line, although it might have belonged before the line was run, etc., to the other party. *Harriman v. Crenshaw*, 3 Rand. 14.

Effect of Mutual Mistake.—A mutual mistake as to the location of the dividing line, between a tract sold off and the part retained by the vendor, intended to cut off a certain number of acres, will not prevent such line from being the true boundary of the remainder of the tract, subsequently sold with reference to it as the boundary supposed by both parties to be the correct one, the sale being one of hazzard. *Seamonds v. McGinnis*, 3 Gratt. 319. See the titles MORE OR LESS; VENDOR AND PURCHASER.

C. ESTABLISHMENT BY ACQUIESCENCE, ESTOPPEL, ETC.

See the titles ADVERSE POSSESSION, vol. 1, p. 199; ESTOPPEL; LIMITATION OF ACTIONS.

Where the claimant of certain land is shown, in an action of ejectment brought by him therefor, to have been present at the running of the dividing line which he disputes, many years ago, and to have acquiesced in it as so run, he will be bound thereby. *Voight v. Raby*, 90 Va. 799, 20 N. E. 824.

Where deeds of partition between coparceners recited that a boundary line between them had been "run, made and established," and the parties had continued in possession up to the line so run and established, from the date of the deeds, for twenty years, less two

days, when a writ of right was instituted between parties claiming under them, seeking to set up the boundary described in the deeds, which was different from the line actually run by the parties; it was held, that after such long acquiescence by one party, and quiet possession by the other, that possession ought not to be disturbed. *Coles v. Wooding*, 2 Pat. & H. 189.

And if a line of partition between two cotenants be run and marked by mutual consent or agreement, or by order of court, and confirmed in the decree, and that decree be acquiesced in, the possession of each commences from that period, according to the line so marked, although that line be ever so erroneous; and the act of limitations may operate upon that possession, so as to render such erroneous line, in process of time, the legal boundary between the parties. *Dogan v. Seekright*, 4 Hen. & M. 125, 131.

Duty to Ascertain True Line—Compensation for Improvements.—It is not the duty of the owner of one tract of land to ascertain its boundary for the information of the owner of a coterminous tract, who, without himself ascertaining the boundary, constructs improvements on the other's tract, or on his own, in order to the better development of the former tract. The failure of the owner of the land to obtain and communicate such information is neither actual fraud nor culpable negligence. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

If, under a mistake as to the true boundary, one such owner speaks of a part of his land, or treats it, as the land of the other, or acquiesces in acts of ownership by the latter, this will not prejudice the title or right of the former, further than, under certain circumstances and upon proper proceedings, to create, and to subject the land to, a lien for permanent improvements made thereon, above the value of the use of the land; or to subject the title

and possession to the operation of actual adverse possession continued long enough, under the statute of limitations, to bar an action of ejectment. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

Certainly such innocent, though erroneous statements or acts, made to, or done in the presence of, the owner of coterminous land, without any purpose to deceive, and not relied on by the other as evidence of boundary, can not render the party so speaking or acting, in any manner liable, in equity, to the forfeiture of his own land, or the payment of money to indemnify the owner of the adjoining land for improvements he may have made on it, or for expenditure made elsewhere, in order to facilitate and enhance the use and value of the land owned by the other, as to the boundary of which the mistake has existed. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

The statements, acts, or acquiescence of the owner or claimant of land, are generally evidence against him, under all the circumstances, more or less forcible; but, unless they are vitiated by actual fraud, or culpable negligence tantamount to actual fraud, and are relied on by another as the foundation of material action or acquiescence, they do not estop the owner of the land from asserting and proving his title or boundary. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 408.

Acquiescence as Evidence of Agreement.—Long acquiescence by one adjoining proprietor in a boundary established by the other, is evidence of an agreement so fixing the division line between them. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

Where the evidence shows that a lot owner had maintained a fence on the line between himself and the street for upwards of ten years, if there is or was a dispute about this line (which is not at all clear by the evidence), ten

years' peaceable and adverse possession would bar the rights of the town. *Bowman v. Duling*, 39 W. Va. 619, 20 S. E. 567.

"The decisions have not reached any clear or distinct conclusion with reference to the controverted point as to the length of time which must elapse before an agreement fixing a division line can be inferred from an acquiescence therein." *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880, 885.

But such acquiescence in this state, for a period of over ten years, will justify a jury in inferring that such parol agreement establishing such division line existed; and a verdict based on such inference ought not to be set aside as plainly contrary to the evidence. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

So where a fence had been maintained as a dividing line between two adjoining owners, for upwards of thirty years, this established such line. *Bowman v. Duling*, 39 W. Va. 619, 20 S. E. 567.

Proof of Acquiescence.—"This acquiescence in a division which has been fixed and marked can be proven by any evidence that would satisfy a person that, in point of fact, such division had been accepted by both of the adjoining landowners as the division line between them." *Gwynn v. Schwartz*, 37 W. Va. 487, 9 S. E. 880, 886.

Such acquiescence may be shown by the adjoining landowners having actual possession and cultivating to such line; or, if it run through woods, by the proprietor who established such division line, with knowledge of the adjoining land proprietor, always clearing up to this line, and, with his like knowledge, cutting timber and peeling bark up to this division without the other making any objection to such claim or such acts of ownership, though he was present when such acts were being done. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

Necessity for Adversary Possession.

—The acquiescence or admission of the owner of land, made under a mistake as to his rights, should neither estop nor prejudice him from subsequently enlarging his possession to the limits of his deed, provided no actual adversary possession has intervened to defeat his title. *White v. Ward*, 35 W. Va. 418, 14 S. E. 22.

Estoppel by Deed to Dispute Description.—See the title ESTOPPEL.

Where a husband owns, in its entirety, one of two adjoining tracts of land and his wife an undivided one-eighth of the other, which she conveys to one of her cotenants, by deed, without warranty, in which her husband joins, reciting a description of the division line and one of its termini, different from that given in the deeds by which the husband obtained his lands, and referring to said terminus as an agreed corner; and afterwards, by partition, another of her cotenants obtains that portion of the land in which the wife owned a part, lying adjacent to said boundary line, and sues the husband and wife in ejectment for a small triangular piece of land, the title of which depends upon the location of the division line, in the absence of title by adverse possession, the husband having conveyed his land to his wife in the meantime, the defendants are estopped by the recitals in their deed from relying upon the description of the division line contained in the deeds under which they claim, and can not use said deeds as evidence of the location of the disputed line if objected to by the plaintiff. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

III. Construction of Descriptions in Deeds.

See ante, "In General," I, A; "Monuments as Controlling Course and Distance," I, B, 2.

A. IN GENERAL — LATITUDE THEREFOR.

Intrinsic certainty in a deed relative to specific property is impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it relates, or other objects or things that more or less directly and distinctly indicate and determine it. And, in the application of deeds and other documents to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts, to which the description or suggestions in the document may apply. *Warren v. Syme*, 7 W. Va. 474.

In construing a deed, its entire context must be considered, the description by metes and bounds, and also the general description, as lying between certain other known parcels. *Byrd v. Ludlow*, 77 Va. 483.

B. QUESTIONS FOR COURT AND JURY.

"The construction of a deed is for the court, but the location of the monuments and lines upon the ground is for the jury." *Summerfield v. White*, 54 W. Va. 311, 315, 46 S. E. 154.

And the determination of the location of the corners, courses and distance of a survey, in an action of ejectment, are questions to be determined by the jury under proper instructions from the court. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

Thus, in ejectment, involving the location of a disputed boundary line called for in a grant more than a hundred years old, the question whether marked trees found on or near the line were in fact line trees, was for the jury, or the court where a jury was waived. *Grief v. Norfolk, etc., R. Co.*, 2 Va. Dec. 600.

For what are the termini or bound-

aries in a grant or deed, is a question of law, for the court; but where the termini or boundaries are located is a question of fact, for the jury. *Grief v. Norfolk, etc., R. Co.*, 2 Va. Dec. 600, 603.

Application of Calls to Subject Matter for Jury.—Where, looking at the deed alone it is impossible to say where a particular line or corner called for in the deed will be found upon the land; the calls contained in the deed must be applied to the subject matter, and that goes beyond the mere matter of construction and requires the aid of a jury and the introduction of extrinsic evidence. If a monument called for by the deed is established by uncontradicted evidence it becomes binding upon the parties. *Summerfield v. White*, 54 W. Va. 311, 315, 46 S. E. 154.

Entire Boundary Involved in Disputed Identity of Survey—Repugnant Calls.—"A survey upon which a grant has issued is an entire thing, and if its identity be contested, the title to the whole and all its boundaries become more or less matter of dispute. It may very well happen, and in many cases must be, that the locality of the boundary lines of a survey in a particular part depends upon the calls in an opposite and extreme portion of the survey; and although there may be intermediate calls, yet if there should be any repugnancy between them, or any of them, it would be for the jury to say which are to be observed and which to be disregarded upon the principle that those which are more certain and important shall control those which are less so." *Clements v. Kyles*, 13 Gratt. 468, 482.

Hence, the land in controversy lying in the western part of a large survey, it is error to instruct the jury that if they are satisfied that certain specified corners of the survey are established, and the courses of the patent between these corners are correctly

laid down upon the plat of the survey made in the cause, it is all that is necessary for them to ascertain in this suit, as it is in that portion of said patent that the survey of the caveatees lies, as appears by the plat, and it is only to that portion of said land that they have set up title. *Clements v. Kyles*, 13 Gratt. 468, 469.

The court said: "It was their duty to consider the evidence offered as to all of the corners and lines of the survey; that where a corner was established to their satisfaction, the lines appearing to radiate from such corner should be so drawn as to converge at the same, and course and distance should both be changed so far as necessary for that purpose; and where no corner was found, the patent calls for course and distance must be their guide and must supply such lines as were not established by the proofs on the ground; that any conflict that might be found among the different calls was to be reconciled by them upon the principle above indicated and in this manner that they should give location to the entire survey, and determine for themselves whether it embraced the whole or any part of the land within the survey of the caveatees." *Clements v. Kyles*, 13 Gratt. 468, 482.

And: "It was not sufficient that the jury should have been satisfied that the courses of the intermediate lines around the western part of the survey had been laid down correctly, because the true length of each of those lines was quite as important as the course, and this was to be determined not by making a fanciful allowance in order to preserve a general average or variation but by the patent call for distance unless the same were controlled by a call for some natural object or some artificial monument sufficiently established, in which case the distance should be shortened or lengthened accordingly. And although the land covered by the caveatees' entry lay in

the western part of the Wood survey and within the compass of the intermediate lines running around that portion from what is called the 'burnt corner' to the 'beginning corner,' and a line connecting those two corners, yet it by no means follows that the title to the residue of the Wood survey and its boundaries were not also drawn into controversy." *Clements v. Kyles*, 13 Gratt. 468, 481.

Latent Ambiguity.—"If the corner called for in the deeds relied upon by the plaintiff, was so clearly described as to leave no doubt about the particular point in the river, the interpretation of the deed by the court would necessarily involve the consideration of the latent ambiguity arising from the fact that there are two Dry Fork Rivers, or rather two distinct and separate channels of the Dry Fork River. At least the claim of two such channels set up by the defendants and the evidence introduced in support thereof could not be ignored." *Summerfield v. White*, 54 W. Va. 311, 316, 46 S. E. 154.

"But where such certainty of location can not be made, the evidence of both parties must go to the jury, and a motion to strike out the evidence offered by the one or the other could not properly be sustained unless the evidence so stricken out were so slight as to be wholly insufficient to sustain a verdict based upon it." *Summerfield v. White*, 54 W. Va. 311, 316, 46 S. E. 154.

Omission of Course—Question for Court.—Where a testator in attempting to describe the boundaries of a tract of land he is disposing of, leaves out a course, which throws the whole into confusion, and the jury in a special verdict, say, that if the testator intended to convey by such boundaries as they describe, then they find that to be the land in question; if by certain other boundaries, which they also describe, then they find that the land devised was according to those bounds, the court may decide which are the

true boundaries. *Pendleton v. Vandevier*, 1 Wash. 381.

And where, if the course be supplied from other evidence in the case, there is no difficulty, his evident intention will be carried out and the missing course supplied. *Pendleton v. Vandevier*, 1 Wash. 381. See ante, "Supplying or Modifying Calls," I, B, 2, c.

C. CONFLICTING CALLS AND FALSE DESCRIPTION.

See post, "To Prove Mistake in Course and Distance," IV, A, 3.

The description given of the land intended to be granted, and which is copied into the grant from the certificate of the survey, must be such as, with the aid of proper parol testimony, will serve to identify and separate it from the land surrounding. But in no case is it necessary that every call shall be satisfied. Cases of grants having conflicting calls are of not uncommon occurrence, but such a grant is not therefore necessarily void. If the conflict be irreconcilable, one or the other of the conflicting calls may be rejected, and locality given to the survey by the rest; and in determining which call shall be disregarded, the rule is that the one less material and less certain shall yield to the one more material and more certain. *Smith v. Chapman*, 10 Gratt. 445, 474. See *Pasley v. English*, 5 Gratt. 141, 154.

And if there be found one call incongruous and irreconcilable with the other calls of the grant, but it appear that the survey can be located by those others, and it is shown, by whatever evidence, that this incongruous and incompatible call had been inserted in the certificate of survey by mistake, it would seem that there certainly could be no less reason and propriety in rejecting it than if the mistake were demonstrated by proof that the lines had been actually run when the original survey purported to have been made, and that no such object as that constituting the call in question anywhere

occurred upon them. *Smith v. Chapman*, 10 Gratt. 445, 474.

A false description does no harm when there is enough left to designate the subject matter with reasonable certainty, and such false description or repugnant call must be qualified or wholly rejected. *Robinson v. Braiden*, 44 W. Va. 187, 28 S. E. 798, 802; *Hunter v. Hume*, 88 Va. 24, 13 S. E. 305. See ante, "Omission of Incongruous Calls," I, B, 2, d.

D. PRESUMPTION AGAINST RETENTION, BY GRANTOR, OF NARROW INTERVENING STRIP.

Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor—especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract, though the trees marked and described have disappeared before the making of the deed. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

E. DESCRIPTION BY QUANTITY.

1. Importance.

Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances. *Hunter v. Hume*, 88 Va. 24, 13 S. E. 305.

The statement of the quantity of land supposed to be conveyed, and inserted in deeds by way of description, must not only yield to natural landmarks and marked lines, but also to descriptions in deeds by courses and distances. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880. See *Seamonds v. McGinnis*, 3 Gratt. 319.

But though the quantity of land mentioned in the deed, will not control the boundary, when ascertained by the description, with other paramount circumstances, nevertheless, the correspondence of quantity given by a line in question, with the quantity mentioned in the deed, or an approximation to such correspondence, may be considered as tending to establish such line as the true one. *Western Mining & Mfg. Co. v. Coal Co.*, 8 W. Va. 406.

Example.—A call in a deed of partition is “thence to the back line of the survey such course as will throw 500 acres of said 1,000 acre tract below said division line.” The “back line” is 508 poles long and a straight line from the point given to the extreme or upper end of the “back line” will not include the mount of 500 acres on the lower side of the division line. It was held, that as natural objects and fixed lines control magnetic calls and distances, it would seem that the call for the “back line” should control the quantity. *Tompkins v. Vintroux*, 3 W. Va. 148.

In a court of law the party is bound by the terms of his deed, and the line from the given point to the “back line” must be a straight one, and in an action of trespass the plaintiff, who claims on the lower side of division line, can not recover if the alleged trespass was committed on the proper side of a straight line from the given point to the extreme or upper end of the “back line.” *Tompkins v. Vintroux*, 3 W. Va. 148.

If the quantity called for be not embraced by the straight line, the party can only obtain relief in a court of equity on a proper case made. *Tompkins v. Vintroux*, 3 W. Va. 148.

2. Compensation for Deficiency in Quantity.

See the titles MORE OR LESS; VENDOR AND PURCHASER.

F. HEAD OF STREAM MEANS HEAD OF MAIN FORK.

In locating a grant, the point called for in the same, beginning at a large black oak on a ridge near the head of a branch, must, in the absence of other controlling evidence, be sought for or located on the ridge near the head of the main or longest fork of said branch. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335, 351.

G. CALLS OF OTHER DEEDS.

Where a call in a deed is for a call mentioned in another deed, that is only one means of identifying or assisting to identify the boundary of the former. All the evidence and material facts properly admitted in evidence tending to identify the boundaries of the survey are to be considered in its identification, and the court can not single out this fact, however material and forceful, to the exclusion of other material facts properly shown in the case. *Robinson v. Lowe*, 50 W. Va. 75, 84, 40 S. E. 454. See ante, “Lines and Corners of Adjoining Tracts,” I, D; post, “Weight of Evidence—Instruction,” IV, D.

But a deed, for a description of the land, may refer to another deed or map, and the deed or map is considered as incorporated in the deed itself for description of the land. *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

H. EFFECT ON DEED OF LEAVING LINE OPEN.

A party conveyed to another a tract of land within specified bounds, supposed to contain equal quantities of bottom and hill, and provided in the deed that the boundary on the side remote from the river should be extended or contracted according as the hill land should be found, on measurement, to be less or greater in quantity than the bottom land. The leaving of this line open did not effect the validity of the conveyance to pass title to all

the land within the boundary as finally fixed, and it was a mere executory contract as to any thereof. *Richards v. Mercer*, 1 Leigh 125.

IV. Evidence as to Boundaries.

A. PAROL EVIDENCE.

1. In General.

In *Clements v. Kyle*, 13 Gratt. 478, it is said: "From the perishable character of the landmarks in this country, evidence of hearsay as to particular facts may, under proper restrictions, be received upon a question of ancient boundary, yet such evidence should be carefully watched, because, from its very character, it may, in many or most cases, be impossible to meet or disprove it. There must always be some peril in departure from the broad general rules of evidence, and it should not be carried farther than required by the absolute necessities of the case. I think the rule is laid down sufficiently broadly in *Harriman v. Brown*, 8 Leigh 697, and I am not disposed to extend it in the least beyond the very terms in which it is there expressed." *Fry v. Stowers*, 92 Va. 13, 15, 22 S. E. 500.

"Questions of boundary, after the lapse of many years, become of necessity questions of hearsay and reputation. For boundaries are artificial, arbitrary, and often perishable; and when a generation or two have passed away, they can not be established by the testimony of eyewitnesses. In such cases, therefore, it becomes necessary to look to reputation, or depend upon hearsay evidence of the former existence and actual locality of an artificial boundary. 'That boundaries may be proved by hearsay testimony,' says the supreme court, 'is a rule well settled, and the necessity or propriety of which is not now questioned.'" *Harriman v. Brown*, 8 Leigh 697, 707. See *Stinchcomb v. Marsh*, 15 Gratt. 202, 208.

"The doctrine in England, as laid down in the books, is that though hear-

say is good evidence in matters of reputation, yet a particular fact can not be proved by tradition. *Outram v. Morewood*, 5 T. R. 123; 1 Starkie on Evid. 61. Yet, notwithstanding this general rule, there are cases which form exceptions to it." *Harriman v. Brown*, 8 Leigh 697, 711.

But upon questions of boundary in Virginia, not only general reputation, but also hearsay evidence as to particular facts, may, under certain circumstances, be properly received in evidence. *Harriman v. Brown*, 8 Leigh 697; *Clements v. Kyles*, 13 Gratt. 468, 477.

"The testimony so admitted must however be that of a witness who is dead; for if living he ought himself to be brought forward." *Harriman v. Brown*, 8 Leigh 697, 710.

2. To Locate Descriptive Calls.

Parol evidence is admissible to show the proper location of all descriptive calls, and determine if the land in dispute is embraced in the deed, and so give effect to the true intent of the parties. *Hunter v. Hume*, 88 Va. 30, 13 S. E. 305; *Baker v. Seekright*, 1 Hen. & M. 177; *Pasley v. English*, 5 Gratt. 141; *Elliott v. Horton*, 28 Gratt. 773; *Dogan v. Seekright*, 4 Hen. & M. 125.

"Extrinsic evidence, it is said, is always admissible to explain the calls of a deed, for the purpose of their application to the subject matter, and thus to give effect to the deed." *Hunter v. Hume*, 88 Va. 24, 29, 13 S. E. 305. See also, *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361; *Thorn v. Phares*, 35 W. Va. 771, 14 S. E. 399.

But the evidence of witnesses as to verbal statements of the deceased former owner, made several years after the written contract was made, and when the contract was not present, should not prevail against the express call for "said hollow below, etc.," contained in the written contract, the same being a natural landmark and doubtless familiar to the parties to the con-

tract, at the time it was made. *Hill v. Proctor*, 10 W. Va. 59, 80.

And to supply by parol new terms of description, and additional boundaries not called for, or, for anything appearing on the deed, intended to be called for, but, on the contrary, expressly excluded by the special and precise calls of the deed, can not be permitted, without impairing the security of titles. *Pasley v. English*, 5 Gratt. 141, 155.

To Identify Marked Lines.—See ante, "Original Lines as Actually Run," I, C.

Extrinsic Evidence to Locate Corner Ambiguously Described.—Where the description of the corner in controversy, contained in the deed executed by the defendants, read as follows: "Beginning opposite Uriah White's house in the middle of Dry Fork at an agreed corner between Thomas S. White, dec'd, and Uriah White," and calls for no monument, which can be ascertained by mere inspection, and without measurement or calculation, and, opposite Uriah White's house, Dry Fork is claimed to have two channels over thirteen poles distant from each other, in either of which, the point may be, as determined by the evidence, the description does not import such certainty of location as to estop the defendants from introducing evidence tending to show that the corner in question is not a certain rock in one channel of Dry Fork, as claimed by the plaintiff, and the court properly overruled plaintiff's motion to strike out such evidence. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

3. To Prove Mistake in Course and Distance.

See ante, "Conflicting Calls and False Description," III, C.

It has been held, that parol evidence is admissible to prove that the calls for courses and distances in a deed are mistaken, and do not designate the true boundary of the land intended to

be conveyed. *Elliott v. Horton*, 28 Gratt. 766, and cases cited. *Norfolk Trust Co. v. Foster*, 78 Va. 419.

"In case of *Herbert v. Wise*, 3 Call 242, it was shown that such mistakes as leaving out lines, putting north for south, and east for west, were to be corrected by parol evidence of the true intent of the parties. See also, *Shaw v. Clements*, 1 Call 438; *Elliott v. Horton*, 28 Gratt. 766; *Baker v. Seekright*, 1 Hen. & M. 177; *Dogan v. Seekright*, 4 Hen. & M. 125; *Pasley v. English*, 5 Gratt. 141." *Hunter v. Hume*, 88 Va. 24, 29, 13 S. E. 305.

4. As to Boundaries of Streets.

See the title **STREETS AND HIGHWAYS**.

Ancient reputation and possession in respect to the boundaries of streets in a town, are entitled to more respect in deciding upon the boundaries of the lots, than any experimental survey that may afterwards be made. *Ralston v. Miller*, 3 Rand. 44.

5. Admissions of Owner.

Any admission the owner may have made while such owner, which tended to show that his boundaries were located as the plaintiff claims they are, was admissible evidence. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347. The fact that he did not live upon the land, or that he perhaps had never seen it, did not affect the admissibility of the evidence. It was proper for these facts, together with all the circumstances connected with his admission, to go to the jury, and it was for them to give it such weight as they deemed proper under all the circumstances of the case. *Fry v. Stowers*, 92 Va. 13, 16, 22 S. E. 500.

If there was a controversy between witness and owner as to the boundary of the land in question, in which the latter disparaged his own title, that conversation was clearly admissible; but if the conversation was between witness and the surveyor, in the owner's presence merely, and the remarks

of witness were not addressed to the owner, his silence could not be considered as an admission of the truth of such declaration, because, if not addressed to him, it can not be said to have called for a reply. *Fry v. Stowers*, 92 Va. 13, 17 S. E. 500.

6. Declarations of Deceased Persons as to Boundary.

a. In General.

"In *Harriman v. Brown*, 8 Leigh 697, it was held, that evidence is admissible to prove the declarations of a deceased person as to the identity of a particular corner tree or boundary, provided such person had peculiar means of knowing the fact; as, for instance, the surveyor or chain carrier, who were engaged upon the original survey, or the owner of the tract or of an adjoining tract calling for the same boundaries; and so of tenants, processioners, and others whose duty or interest would lead them to diligent inquiry and accurate information of the fact, always, however, excluding those declarations, which are liable to the suspicion of bias from interest." *Corbleys v. Ripley*, 22 W. Va. 154, 158; *Hill v. Proctor*, 10 W. Va. 59; *Clements v. Kyles*, 13 Gratt. 477; *Reusens v. Lawson*, 91 Va. 226, 238, 21 S. E. 347.

Upon the question of ancient boundaries or corners, the declarations of deceased persons as to such boundaries or corners may be given in evidence, provided such persons had peculiar means of knowing the fact in question, and the declarations are not liable to the suspicion of bias from interest. *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500.

But before such declarations are admissible, it must appear, first, that the party making the declarations was at the time in a situation to know the boundary of the land, as if he was the owner of it or of an adjoining tract having the same boundary in dispute, and also that he had no interest to misrepresent. The admission of such

evidence is made an exception to the general rule, that hearsay evidence is excluded. It is admitted from necessity, and the law throws around it the two safeguards mentioned. *Corbleys v. Ripley*, 22 W. Va. 154, 158.

It was said in *High v. Pancake*, 42 W. Va. 602, 26 N. E. 536, that the statement of this general rule in *Harriman v. Brown*, 8 Leigh 697; *Hill v. Proctor*, 10 W. Va. 59, as above set out, would allow declarations merely because the declarants were owners, because of their interest and opportunity to ascertain the facts and their various means of obtaining information, and that this is supported in other states, but that in West Virginia such declarations are evidence to an extent only; that is, they must be definite statements of facts, not mere claims of title to land or as to where the line should run. See post, "Must Be Particular, Not General," IV, A, 6, c.

b. Declarations of Surveyor, Chainman, etc., as to Survey.

In a controversy concerning the boundary or locality of a tract of land granted by the commonwealth, upon a survey made by a duly authorized surveyor, declarations by such surveyor, or by chain carriers who assisted him in making such survey or by other persons who were present at such survey, of the acts done by, or under the authority of, such surveyor, in making such survey, are admissible evidence, unless clearly irrelevant; provided that such declarations were not made post litam motam; and are not in contradiction of such surveyor's official report of such survey; and that the persons who made the declarations, are dead at the time of the trial. *Overton v. Davisson*, 1 Gratt. 211; *Smith v. Chapman*, 10 Gratt. 445, 455.

Statements of a chainman who is dead, as to the corner and line trees of a survey are admitted as evidence; but statements as to the locality of the land and the streams the lines

would cross, are not admissible evidence to fix the locality of a survey, within the rule in *Overton v. Davisson*, 1 Gratt. 211; *Smith v. Chapman*, 10 Gratt. 445.

Judge Lee, in *Smith v. Chapman*, 10 Gratt. 456, said: "Here the declarations of the chain carrier that were rejected were not in relation to any act done by the surveyor or under his authority at the time of making the survey, but were rather in the nature of opinions or deductions of the chain carrier from facts which he supposed to be within his knowledge, but which he failed to state."

But though the declarations of a surveyor are not admissible in evidence to contradict his report, still the declarations of other persons, if otherwise admissible, may be received in evidence to contradict said report. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

c. Must Be Particular, Not General.

Declarations of a former owner of land, now dead, are admissible to show the identity of a particular corner tree or other corner or marked boundary line; but not a mere general statement or claim that certain land was in his boundary, or where the lines would run, or that he owned the land, without reference to any corners or marked lines. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536.

"We must have a declaration establishing a fact, as a corner tree or particular marked line, not simply a statement that the land is within his boundary or the same conveyed in a certain deed, or that a line would cross a creek at a certain point, without more. It would be like the case of *Smith v. Chapman*, 10 Gratt. 445, where statements of a dead chain carrier as to corner and line trees were admitted, but his statements as to the locality of the land, and the streams which the lines would cross, were rejected, because mere opinions of the chain car-

rier from facts which he supposed to be within his knowledge, but not given. The statement must be as to a particular fact, a corner or line tree, or something equivalent, as held by Judge Lee in *Clements v. Kyles*, 13 Gratt. 477, 478." *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536, 538.

"In case of a mere private boundary, if the individual was living, he could not give evidence of the common opinion, but must testify to his own knowledge respecting the boundary and how that knowledge was derived. This knowledge often rests on tradition merely. The alleged boundary has perhaps been pointed out by some one who professed to have information respecting it. Reputed boundaries are often proved by the testimony of aged witnesses; and the hearsay evidence of such witnesses has been admitted to establish lines in opposition to the calls of an ancient patent." *Corbleys v. Ripley*, 22 W. Va. 154, 157.

d. Must Have Duty or Interest to Ascertain Facts.

The statement of a person living on the land at the time, made many years before the trial, at time of which he was dead, pointing out to the witness two of the corners called for in a patent, is not competent evidence, he not having been the surveyor or chain carrier at the making of the survey, or owner of that or adjoining lands calling for the same boundaries, or having any motive or interest to inquire and ascertain the facts. *Clements v. Kyles*, 13 Gratt. 468.

"That his living within the bounds of the survey gave him the opportunity to see trees marked as corners of some survey, found accidentally or otherwise, would surely not be sufficient unless some duty or interest can be traced to him by which he would have been prompted to make diligent inquiry and to obtain accurate information within the meaning of the rule as propounded

in *Harriman v. Brown*, 8 Leigh 697." *Clements v. Kyles*, 13 Gratt. 468, 479. See ante, "In General," IV, A, 6, a.

So where witness was neither the surveyor nor a chain carrier at the making of the original survey of the land whose corners and boundaries were in controversy, nor was he the owner of that tract, or any adjoining tract calling for the same boundaries, neither does it appear that he had ever been a tenant upon or engaged as a processioner of, the said land, nor was his situation in reference to it such as to make it his duty or his interest to make diligent inquiry, and to obtain accurate information, as to the corners or boundary lines as to which his declarations were made, but the most that can be said is that he was the son-in-law of an adjacent landowner, and that he had been a chain carrier upon some other survey, his declarations are clearly not within any of the exceptions made in favor of the admissibility of hearsay evidence. *Fry v. Stowers*, 92 Va. 13, 15, 22 S. E. 500.

e. Must Be Made Ante Litem Motam.

Such declarations, to be admissible, must not be made post litem motam. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536; *Smith v. Chapman*, 10 Gratt. 445, 455; *Overton v. Davisson*, 1 Gratt. 211.

f. Bias from Interest.

The declarations of a deceased person as to the corners and lines of a tract of land owned by him, when the declarations were made, are admissible as evidence, if at the time they were made he had no interest to misrepresent. But if the circumstances and his situation at the time show that he had an interest to make false representations as to corners or lines, such declarations are inadmissible. *Corbleys v. Ripley*, 22 W. Va. 154.

They must be free from suspicion of bias from interest. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536; *Harriman*

v. Brown, 8 Leigh 697; *Clements v. Kyles*, 13 Gratt. 468, 477; *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500.

Thus, where a vendor still continued to own land adjoining in part other land sold by him, at the time of the sale, he was therefore interested in the location of the boundaries of the land conveyed, and his interest was adverse to that of his vendee. Under these circumstances declarations of such vendor are obnoxious to the suspicion of bias from interest, and are incompetent against such vendee. *Hill v. Proctor*, 10 W. Va. 59, 85.

But it was competent for such vendee to prove the declarations of his vendor, made at the time of the contract for the conveyance, and afterwards, as to the identity of the particular boundary or corner of such sale, before a later conveyance by the same vendor to an adjoining owner, and also after such conveyance, because between these two vendees, after his conveyance to the latter, he had no interest in such boundary adverse to the latter. *Hill v. Proctor*, 10 W. Va. 59, 85.

And where the owner of a tract of land, conveyed it to his son, and he to the plaintiffs, who brought an ejectment suit against the defendant, who claimed beyond the line claimed by plaintiffs; and the plaintiffs, to prove the lines and corner as they claimed them, offered to prove declarations made by such owner, deceased more than twenty-five years before, when he owned the land, that the lines and corners were situated as claimed by plaintiffs, it was held, that the declarations were inadmissible, because of his interest. *Corbleys v. Ripley*, 22 W. Va. 154.

7. Declarations to Explain Character of Possession.

Declarations of one in actual possession of land, explanatory of the character of his possession—that is, for instance, how he claimed, under what

title, and to what limits—are admissible. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536.

But such declarations of a deceased owner are not competent evidence to prove that he had title, or to prove possession. *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536.

8. Family Traditions and Reputation.

Though family traditions and reputation are admissible in evidence upon questions of boundary, they are not admissible to prove or disprove a title. *Cline v. Catron*, 22 Gratt. 378.

9. Opinion as to Identity.

The opinion of a witness, although he be a surveyor, unsupported by other evidence, as to the identity of a tract of land, unless he also state some fact or facts to enable the court to determine the location of the tract, is clearly insufficient to enable the court to locate the land. *Randolph v. Adams*, 2 W. Va. 519. See also, *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658. And see the title EXPERT AND OPINION EVIDENCE.

10. Evidence of Character of Marks on Trees.

Evidence introduced as to the character of the marks upon the trees claimed to be line trees, tending to show correspondence with the marks upon an admitted corner tree, is admissible. *Grief v. Norfolk, etc., R. Co.*, 2 Va. Dec. 600, 603.

"Whether the trees so marked and found on or near the line were in fact line trees, and marked when the original line was surveyed, was a question of fact for the jury. Blocking the trees was one of the means of proving the fact, but it was not the only way of doing so." *Grief v. Norfolk, etc., R. Co.*, 2 Va. Dec. 600, 602.

B. SURVEYS, ENTRIES AND MAPS.

See ante, "In General," I, A; "Declarations of Surveyor, Chainman, etc., as to Survey," IV, A, 6, b.

1. Surveys Generally.

A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them, but not as to strangers. *Lee v. Tapscott*, 2 Wash. 276, cited in *Jones v. Carter*, 4 Hen. & M. 195; *Southall v. McKeand*, Wythe 96. *French v. Bankhead*, 11 Gratt. 136.

A survey annexed to the record, and not excepted to in the court below, will be considered as admissible evidence in the supreme court; the more especially, if accompanied by the surveyor's deposition. *Johnson v. Brown*, 3 Call 259; *Jones v. Carter*, 4 Hen. & M. 184, 194.

The written entry of a surveyor, or his survey, which is made and returned under the sanction of an oath would be evidence. *Harriman v. Brown*, 8 Leigh 697, 711.

Survey under Direction of Court—Surveyor Dead.—In an action to try the title to land, an order is made directing the surveyor to go upon it, and make a survey and report. This he does, but before the cause comes on for trial, the surveyor dies. His report is competent evidence. *Cline v. Catron*, 22 Gratt. 378.

Evidence That Survey Was Never Made on Land.—Defendant in ejectment having introduced the patent under which he claimed, and also evidence to prove that it should be located as he claimed so as to cover the land in controversy, to do which it was necessary that all the courses in the patent should be reversed, to rebut this testimony, the entry on which the patent was founded, and the survey thereon, in which the courses were the same as in the patent, and five other large surveys bearing the same date and made by the same surveyor as that under which the defendant claimed, are competent evidence for the purpose of showing that the survey under which the defendant claimed had

never been made upon the land; and thus to repel his claim to reverse the courses of his patent. *Smith v. Chapman*, 10 Gratt. 445.

Line Run with Party as Chainman.

Admissible as Protracted Line.—On a survey directed in a cause, some of the lines are run when one of the parties acts as chainman. Upon a second order of survey another chainman is employed and all but one of these lines is again run. The line not run the surveyor says he ascertains to be correct by other lines run, and the line is submitted to the jury not as a line run but as a protracted line. This is not error. *Smith v. Chapman*, 10 Gratt. 445.

And as the plaintiff disclaimed any benefit from this line as a measured line, and contented himself with treating it as a line laid down by protraction; and as the court in permitting the plat to go in evidence to the jury, restricted the use of the line in any other way than as a protracted line merely, the objection growing out of the irregularity in the first instance in permitting one of the lessors of the plaintiff to act as one of the chainmen in making the survey, was successfully answered and overcome. *Smith v. Chapman*, 10 Gratt. 445, 454.

Certificate from Surveyor's Books.

In a case of caveat the caveator claims under a patent issued to W in 1756, which does not refer to any survey. In order to show that the patent was founded on a survey, the caveator offers in evidence a copy from the books of the surveyor of Augusta county, of a certificate of a survey and plat made for W, dated in November 1749. The certificate itself does not contain the calls for course and distance or other marks, but these are given on the plat, and they agreed with the grant in its general and locative calls. It is competent evidence for the purpose for which it is offered. *Clements v. Kyles*, 13 Gratt. 468.

2. Contemporaneous and Neighboring Survey.

In a controversy concerning the boundary or locality of a tract of land granted by the commonwealth, pursuant to a survey, the calls and descriptions of a survey made by the same surveyor, about the same time, or recently thereafter, of a coterminous or neighboring tract, upon which last mentioned survey a grant has also issued from the commonwealth, whether to a party to the controversy, or a stranger, is proper evidence upon such question of boundary or locality unless plainly irrelevant. *Overton v. Davisson*, 1 Gratt. 211; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

But surveys made many years after the survey in question, and by a different surveyor, are not competent evidence as to the boundaries of the first survey, under this rule. *Clements v. Kyles*, 13 Gratt. 468, 469.

The rule as laid down in *Overton v. Davisson*, 1 Gratt. 211, as limited and explained by *Clements v. Kyles*, 13 Gratt. 468, was adhered to in *McMullin v. Lewis*, 5 W. Va. 144, and neighboring surveys made by surveyors other than the surveyor who made the survey of the tract in question, were rejected, the court saying: "No principle or precedent can be found for extending the rule any further than it is laid down in *Overton v. Davisson*."

Necessity for Grant and Correspondence Therewith.—But a grant must have issued on such survey to render it admissible, and if the calls of the survey on the surveyor's books do not correspond with those of the grant, the books are not admissible in evidence; in case of doubt, the true location of the survey may be shown by evidence aliunde. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

3. Entries in Evidence.

Entry Can Not Control Grant.—The recital and description in an entry can

not contradict or control the local calls in a grant. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335.

But the calls and descriptions in an entry of vacant land must be controlled by the calls and descriptions in the grant issued on such entry. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335.

Entry in Evidence to Identify Calls of Patent.—See ante, "Lines and Corners of Adjoining Tracts," I, D.

4. Maps of Contemporaneous Surveys.

Streams mentioned in an old survey, no longer capable of being located by the names given, may be identified from maps of contemporaneous surveys. *Kain v. Young*, 41 W. Va. 618, 24 S. E. 554.

C. VERDICTS AND JUDGMENTS ON QUESTIONS OF BOUNDARY.

See the title FORMER ADJUDICATION OR RES ADJUDICATA.

In General.—Although the principle of the admissibility of traditionary evidence in cases of a public nature has been extended by our courts to questions of private boundary, it is difficult to perceive how this can render admissible the verdicts and judgments in cases between others, although the same boundary may have been the subject of dispute. Such verdicts and judgments may have been founded upon the hearsay or tradition given in evidence, or upon evidence of a totally different character. The identity of the boundary as claimed on the ground, with that described in the muniments of title relied on, may have been established by the conformity of natural objects actually found with those called for. It may have been made out by artificial monuments shown to exist as marked trees of the kind called for, the annulations on which were found to agree with the years elapsed since the date of the survey relied on. It may have been deduced from a connection with one or more adjoining surveys,

the location and boundaries of which were sufficiently proven or undisputed. Or it may have been determined from several of these different sources of evidence, or all, combined. *Stinchcomb v. Marsh*, 15 Gratt. 202, 206.

"That the monuments of boundaries, owing to the perishable materials of which they were made, may gradually disappear, has led to the admission of traditionary evidence concerning them, but it can furnish no sufficient reason for breaking down the well-established barrier which restricts the effect of a verdict and judgment as evidence of the facts in issue in the cause, to those who were parties or stood in privity with those who were." *Stinchcomb v. Marsh*, 15 Gratt. 202, 208.

Judgment Settling State Line.—If the boundary line between two states has been judicially ascertained in a suit between those states so as to be binding on them, it is equally binding on the citizens of those states. *Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

D. WEIGHT OF EVIDENCE—INSTRUCTION.

If, in the trial of an ejectment suit, the plaintiff offers evidence to prove where one of the corners of a survey is located, and the defendant offers evidence to show where another corner of the survey is located, though they can not be both correct, unless the corners and distances of the survey are much changed, it would be erroneous for the court to instruct the jury that, if they found the corner which the plaintiff had attempted to establish was correctly located by him, they should locate the survey by its corners and distances, beginning at this established corner. All that the jury could properly be told would be that it was competent for them to locate such survey; thus leaving it to them if they believed that the defendant's evidence had also satisfactorily established a corner, to so change and

modify the corners and distances as to make the points, both by the plaintiff's evidence and by the defendant's evidence, as corners in the survey as located by the jury. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335. See *Robinson v. Lowe*, 50 W. Va. 75, 84, 40 S. E. 454.

V. Equitable Relief in Controversies as to Boundary.

A. JURISDICTION OF EQUITY GENERALLY.

A court of equity will not exercise jurisdiction to settle title or boundary of lands between conflicting claimants, except where to do so is merely incidental to the exercise of its fixed jurisdiction on other grounds than adjudication upon such conflicting claims. *Carberry v. West Va., etc., R. Co.*, 44 W. Va. 260, 28 S. E. 694; *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532; *Burns v. Mearns*, 44 W. Va. 744, 30 S. E. 112; *Bright v. Knight*, 35 W. Va. 40, 13 S. E. 63; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Cresap v. Kemble*, 26 W. Va. 603; *Hill v. Proctor*, 10 W. Va. 59; *Johnston v. Jerrett*, 14 W. Va. 236; *Davis v. Settle*, 43 W. Va. 37, 26 S. E. 564; *Manchester Cotton Mills v. Manchester*, 25 Gratt. 825; *Steed v. Baker*, 13 Gratt. 380; *Carrington v. Otis*, 4 Gratt. 235; *Lange v. Jones*, 5 Leigh 192; *Stuart v. Coalter*, 4 Rand. 74; *Robinson v. Moses*, 2 Va. Dec. 686.

In so far as point one of the syllabus in *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, conflicts with this proposition, the same is disapproved in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164.

And a court of equity will not entertain a bill to compel defendants to litigate their respective claims to the property, or to establish a boundary line between them, where the complainant has no equity against the defendant claiming adversely to him. *Sulphur Mines Co. v. Boswell*, 94 Va. 480, 27

S. E. 24; *Carrington v. Otis*, 4 Gratt. 235, 252.

But a court of equity has jurisdiction, and is the proper tribunal, to make the apportionment of riparian rights, and to determine and establish the boundary lines of the coterminous owners. *Groner v. Foster*, 94 Va. 650, 27 S. E. 493.

B. SOME PECULIAR EQUITY NECESSARY.

Courts of equity will not interpose to ascertain boundaries, unless, in addition to the confusion of the controverted boundaries there is suggested some peculiar equity, which has arisen from the conduct, situation, or relation of the parties, but will leave the parties to their remedies at law. *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415; *Stuart v. Coalter*, 4 Rand. 74.

An equity against other persons will not give such jurisdiction. *Steed v. Baker*, 13 Gratt. 380, 386; *Stuart v. Coalter*, 4 Rand. 74.

C. INSTANCES OF SUCH AN EQUITY.

"In the first place, if the confusion of boundaries has been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the court. And if the fraud is established, the court will, by commission, ascertain the boundaries, if practicable; and if not practicable, will do justice between the parties, by assigning reasonable boundaries, or setting out lands of equal value." *Hill v. Proctor*, 10 W. Va. 59, 77.

"In the next place, it will be a sufficient ground for the exercise of jurisdiction, that there is a relation between the parties, which makes it the duty of one of them to preserve the boundaries; and that by his negligence, or misconduct, the confusion of boundaries has arisen. A bill in equity will lie to ascertain and fix boundaries, says Mr. Story in his *Equity Jurisprudence*, § 621, where it will prevent a

multiplicity of suits. Story, Eq. Jur., §§ 619, 620, 621, 615. The same author in § 99a says: 'Courts of equity will also interfere and grant relief where there has been, by accident, a confusion of boundaries between two' estates. See *Lange v. Jones*, 5 Leigh 192, upon the subject of jurisdiction." *Hill v. Proctor*, 10 W. Va. 59, 77.

Prayer for Production of Deed in Defendant's Possession Insufficient.—A bill which charges that the defendant has in his possession a deed and plat which will show the true boundaries of land claimed by the complainant, and which prays for the production of the deed, but does not aver that the deed is necessary for the purpose, but admits that the courses and distances are well known to the complainants, is bad on demurrer. The complainant has an adequate remedy at law. *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415.

VI. Procession of Land—How Far Binding.

A procession of land of two co-terminous landowners is not binding unless they were present or had notice of the proceeding. *Bradford v. Bradford*, Jeff. 86. See, as to proces-

sioning and settling boundaries of land, Va. Code, 1904, ch. 106.

VII. Removal of Landmark as Crime.

Sufficiency of Charge.—Where an information charges that defendant did knowingly and willfully, without lawful authority, cut down and carry off a line tree between his land and the land of a certain J. H. contrary to the form of the statute, the offense is not so charged as to be punishable by any law in force in Virginia. *Daniel, J.*, dissenting. *Com. v. Powell*, 8 Leigh 719.

See, as to penalty for injuring or removing boundary marks, Va. Code, 1904, § 3729; W. Va. Code, 1899, ch. 145, § 27. But no prosecution could be maintained under this statute against one having title to the land from which he forcibly removed a fence, although the land was in possession of another under claim of title. *Campbell v. Com.*, 2 Rob. 791. Or where the defendant removes the fence under a claim of right, believing it to be his own, and that he had a bona fide right to it. *Wise v. Com.*, 98 Va. 839, 36 S. E. 479; *Ratcliffe v. Com.*, 5 Gratt. 658. See also, *State v. Ohio River R. Co.*, 38 W. Va. 242, 18 S. E. 583.

BOUNTIES.

Minor Entitled to Bounty Earned.—Bounty, paid to a minor citizen of the United States, where he has enlisted in the military service either of the United States or of the state, as well as his pay, belongs to the minor and not to his father, and where such bounty is given to the father it constitutes a debt due by the father to the son if not intended as a gift, and the conveyance of land to the son by the father to satisfy such debt should be regarded as made for a valuable consideration. *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821. See generally, the title **PAR-ENT AND CHILD**.

Land Warrants—Where Rescinded—Mandamus Does Not Lie.—In 1830, an allowance of bounty land was made to the heirs of M. as an officer in the Virginia navy. The warrants were issued, but were returned to the land office in 1833, where they have remained uncanceled ever since. Upon an application by the representative of the heirs of M. for a mandamus to the register of the land office to deliver to him these warrants, he produces from the files of his office the copy of a letter from the secretary of the commonwealth to the register of the land office, dated in September,

1833, in which he says he returns the warrants by the order of the governor, the order making the allowance of the bounty having been rescinded; it was held, there being doubt upon the case, the mandamus will not be issued. *Milliner v. Harrison*, 32 Gratt. 422. See the title PUBLIC LANDS.

Limitation of Action.—The statute

of limitations begins to run against bounties from the time the claim is presented and payment refused, and at the expiration of five years from that time the same becomes debarred. *Shaw v. County Court*, 30 W. Va. 488, 4 S. E. 439. See also, the title LIMITATION OF ACTIONS.

BOYCOTT.

The essential idea of boycotting is a confederation, generally secret, of many persons, whose intent is to injure another, by preventing any and all persons from doing business with him, through fear of incurring the displeas-

ure, persecution and vengeance of the conspirators. *Crump v. Com.*, 84 Va. 940, 6 S. E. 620. And such combination in that case was held a criminal conspiracy. See also, the titles CONSPIRACY; STRIKES.

BRACKETS.—In *Early v. Wilkinson*, 9 Gratt. 72, it is said: "The ordinary use of brackets in printing, is to enclose a parenthesis; which is defined by lexicographers to be, 'a sentence so enclosed in another sentence as that it may be taken out without injuring the sense of that which encloses it.'"

BRAKEMAN.—See the titles CARRIERS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS.

In *Chesapeake, etc., R. Co. v. Anderson*, 93 Va. 650, 25 S. E. 947, it is said: "The word *brakeman* is defined by Webster as follows: 'The man whose business it is to manage the brake on railways.'"

Branch Banks.

See the title BANKS AND BANKING, ante, p. 254.

BRANCH RAILROAD.—Where by its charter, power is given railroad company to construct branch or lateral roads, such power includes authority to construct a branch line running in the same general direction as the main line; and the fact that the new line will connect the main line with another railroad, makes it none the less a **branch road**. The court said: "What is a lateral or **branch road**? The word 'lateral,' according to Webster, means, 'proceeding from the side; as, the lateral branches of a tree; lateral shoots;' and this, we take it, is the sense in which this word is to be understood when we speak of branch or lateral railroads. A lateral railroad is nothing more nor less than an offshoot from the main line or stem. And this is the meaning attributed to it by the supreme court of Pennsylvania in the case of *McAbey's Appeal*, 107 Pa. St. 558. And, indeed, some of the cases go further, and hold that under the branching power, a **branch road** may be constructed from the terminus as well as from any other point on the main line of the road. *Western Pa. R. R. Co.'s Appeal*, 99 Pa. St. 162; *Mayor v. Railroad Co.*, 48 Pa. St. 358; *Howard Co. v. Bank*, 108 U. S. 314." *Blanton v. R. F. & P. R. Co.*, 86 Va. 618, 10 S. E. 925. See generally, the title RAILROADS.

Brandy.

See the titles INTOXICATING LIQUORS; JUDICIAL NOTICE.

Brass Knuckles.

See the title WEAPONS.

Breach of Prison.

See the titles ESCAPE; PRISONS AND PRISONERS; RESCUE

BREACH OF PROMISE OF MARRIAGE.

I. Nature of Action, 613.

II. Time within Which Action Must Be Brought, 613.

III. When Right of Action Accrues, 613.

IV. Contract Illegal When Consideration Contra Bonos Mores, 613.

V. Conditions Implied in Contract—Change of Health, 614.

VI. Action Dies with Person, 614.

VII. Pleading and Practice, 614.

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IX. Damages, 615.

CROSS REFERENCES.

See the titles DIVORCE; FRAUDULENT AND VOLUNTARY CONVEYANCES; MARRIAGE; MARRIAGE CONTRACTS AND SETTLEMENTS; SEDUCTION.

I. Nature of Action.

The demand for damages for breach of promise of marriage is an action ex delicto though it is true that the tortious act is referable to a contract. *Burton v. Mill*, 78 Va. 481.

II. Time within Which Action Must Be Brought.

An action for damages for breach of promise to marry must be brought within one year from the time the right accrued. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33; *Grubb v. Sult*, 32 Gratt. 203. See generally, the title LIMITATION OF ACTIONS.

III. When Right of Action Accrues.

If one repudiates his promise and declares that he will not be bound by it, the promisee need not wait for the time of performance to arrive, and, if the engagement is general, need not request its fulfillment, but may sue at once for the breach. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

IV. Contract Illegal When Consideration Contra Bonos Mores.

A promise of marriage made in consideration of sexual intercourse is il-

legal and void. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

V. Conditions Implied in Contract—Change of Health.

A contract to marry is coupled with the implied condition that both parties remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable. *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621.

VI. Action Dies with Person.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 29.

VII. Pleading and Practice.

Declaration.—After verdict in an action for breach of a promise to marry, judgment ought not to be reversed on the ground that the time when the marriage was to be solemnized is left blank in the declaration. *Milstead v. Redman*, 3 Munf. 219.

VIII. Evidence.

Extrinsic Circumstances.—The general rule in breach of promise suits is that no evidence can be given of any fact having a tendency to aggravate or diminish the damages, which has occurred after the commencement of the suit. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 699.

In an action for breach of promise to marry, extrinsic circumstances may be given in evidence in mitigation or aggravation, and punitive damages may be recovered. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 35.

Financial Position of Defendant.—Testimony as to the pecuniary condition or wealth of the defendant at the time of his breach of promise, or during the time when he might reasonably have been expected to fulfill it; al-

though some of it consisted of instruments executed after suit was instituted, yet if those instruments contain admissions by the defendant, who executed them, throwing light upon his pecuniary condition during the period named and before suit, is admissible for the purpose of showing the loss which the plaintiff has sustained by the nonfulfillment of the contract. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 699.

Letters Expressive of Affection.—In an action for breach of promise of marriage contract, the jury is allowed to infer the contract from the bearing and conduct of the parties towards each other; and letters expressive of affection and addressed to the plaintiff by tender epithets, are admissible as tending to prove the contract. *Tefft v. Marsh*, 1 W. Va. 38.

Good Character of Plaintiff.—Character, when attacked, can always be sustained by reputation, and seldom in any other way. Hence, evidence of plaintiff's good character, where the defendant has previously introduced certain letters, and marked and examined the plaintiff upon certain passages thereof, intending to cast a cloud upon her character, is admissible. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 699.

Evidence of Seduction.—Evidence of seduction is admissible whether averred directly or not in the declaration to prove the violation of his promise by the defendant. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698.

Proof of Seduction in Aggravation of Damages.—The law is well settled that when seduction has been practiced under color of a promise to marry, in an action or suit for the breach of such promise it is proper to aver and prove the seduction in aggravation of the damages. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 57; *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698.

Letters to Third Party.—In an action for breach of promise of marriage

it is not error to refuse to allow the defendant to introduce in evidence letters written by the plaintiff to another than the defendant, when it appears that the letters are not improperly indelicate, and in no way compromise the character of the writer, for which purpose they were offered in evidence. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

Burden of Proof.—Where D. brought suit for breach of promise of marriage against P., and pending the suit P. enters into a contract of marriage with C., and for a pretended consideration conveys all his property, rendering himself hopelessly insolvent, and there are facts and circumstances which justify a presumption of notice to C. of the fraudulent intent of P., the burden of proof is shifted upon her, C. To prove want of such notice, and if upon her failure to testify relative thereto, this presumption becomes conclusive. *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

IX. Damages.

As to admissibility of evidence upon question of damages, see ante, "Evidence," VIII.

Punitive Damages.—In an action for

breach of promise punitive damages may be recovered. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 35.

Elements of Damage in General.—In an action for a breach of promise of marriage recovery may be had for injured feelings, anxiety of mind, wounded pride, and blighted affections. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 35; *Grubb v. Sult*, 32 Gratt. 209.

Amount of Damages Is within the Discretion of the Jury.—An action for a breach of promise of marriage has very little resemblance to other contracts. In the latter the damages are limited by fixed rules to the pecuniary loss sustained, while in the former the damages are in the discretion of the jury. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 35; *Grubb v. Sult*, 32 Gratt. 209.

In an action for breach of promise of marriage, it being impossible, from the nature of the case, to fix any rule or measure of damages, the jury are allowed to take into consideration all the circumstances; and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. *Burton v. Mill*, 78 Va. 481.

BREACH OF THE PEACE.

I. Trespass vi et Armis, 616.

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CROSS REFERENCES.

See the titles ARREST, vol. 1, p. 719; BAIL AND RECOGNIZANCE, ante, p. 196; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUSTICES OF THE PEACE; SCIRE FACIAS; WARRANTS.

As to the authority of conservators of the peace to require bond for appearance in court to answer a charge of breach of the peace, see the title BAIL AND RECOGNIZANCE, ante, p. 196. As to particular offenses which are breaches of the peace, see the appropriate titles. As for instance as to assault and battery, see the title ASSAULT AND BATTERY, vol. 1, p. 729.

I. Trespass vi et Armis.

See the title TRESPASS.

"The mere breaking and entering the close of another, though in contemplation of law a trespass committed vi et armis, is only a civil injury to be redressed by action; and can not be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offense, and becomes the subject of a criminal prosecution." *Henderson v. Com.*, 8 Gratt. 708.

The going upon the porch of another man's house armed, and from thence shooting and killing a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of females in the house, is a misdemeanor, for which an indictment will lie. *Henderson v. Com.*, 8 Gratt. 708. See post, "Indictment," II.

II. Indictment.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

An indictment at common law for taking a horse "unlawfully and injuriously" is insufficient. The taking of the horse thereby charged, is not so described as to constitute a breach of the peace; and this is true although the usual phrase "with force and arms" is

previously inserted; these words alone do not imply such force as will sustain an indictment for breach of the peace. *Com. v. Israel*, 4 Leigh 675.

A court in an indictment under the statute of 1822-23, ch. 34, § 1, for punishing the willful taking and carrying away personal property, must allege that the property taken away by the defendant, belonged to another person; and that the taking was "knowingly and wilfully without lawful authority." *Com. v. Israel*, 4 Leigh 675.

Inserting Name of Prosecutor.—In an indictment for a trespass or misdemeanor, it is not necessary to insert the name or surname of a prosecutor at the foot of the indictment, if it appears that the indictment was found true on the evidence of witnesses sent to the grand jury either at their own request, or by direction of the court, and this whether there was a previous presentment or not. *Wortham v. Com.*, 5 Rand. 669.

Indictment Held Sufficient.—An indictment against one H. for breach of the peace in the following language: "For that he did break and enter the close of one P., situate in the county of W., and at the house of said P., did then and there wickedly, mischievously and maliciously, and to the terror and dismay of one N. P., wife of said P., fire a gun in the porch of said house, and then and there did shoot and kill a dog belonging to said house without legal authority, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the commonwealth," is suffi-

cient to maintain a prosecution. *Henderson v. Com.*, 8 Gratt. 708. See ante, "Trespas vi et Armis," I.

III. Recognizance to Keep the Peace and Be of Good Behavior.

A. AUTHORITY TO REQUIRE SURETIES.

See generally, the title BAIL AND RECOGNIZANCE, ante, p. 196.

1. General Rules.

"By the common law no man can be required to give sureties to keep the peace or be of good behavior, simply because he has committed a past misdemeanor. But such sureties to keep the peace could only be required of a person to protect some individual against injury, which he has just cause to fear such person intends to commit against him." *State v. Gould*, 26 W. Va. 258.

At common law the causes for which surety to keep the peace may be required are as follows: "Whenever a person has just cause to fear that another will burn his house or do him corporal hurt as by killing or beating him, or he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the parties giving him satisfaction upon oath that he is actually under such fear, and that he has just cause to be so, by reason of the others having threatened to beat him, or laid in wait for that purpose; and that he doth not require it out of malice or for vexation." *Haw. b. 1, ch. 60, § 6*. 'And it seems the better opinion that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as

strong in the case of battery as imprisonment; and yet there is no doubt, but that one threatened to be beaten may demand the surety of the peace.' *Haw. b. 1, ch. 60, § 7*. But surety of the peace is grantable only on an apprehension of present or future danger and not for a battery, etc., that is past; in this last case the offender may be indicted. *Dalton, ch. 116*." *State v. Gould*, 26 W. Va. 258. See post, "At Common Law," III, A, 3, a.

"Under the act of 33 Edw. III, ch. 1, it hath been holden that a man may be bound to his good behavior for causes of scandal against good morals as well as against the peace; or for haunting bawdy houses with women of ill fame, or keeping such women in his house. Then also night walkers, eavedroppers; such as keep suspicious company, or reported to be pilferous or robbers; such as sleep in the day and walk at night, common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehavior may reasonably bring them within the general words of the statute as persons not of good fame.' *Haw. b. 1, ch. 61, § 2; 4 Bluch. Com. 256*." *State v. Gould*, 26 W. Va. 258.

"By 1 Rev. Code of 1819, ch. 74, persons could be required to give sureties for their good behavior who are not of good fame, thus leaving the law substantially as it was under 34 Edw. III, ch. 1. And to these particular cases were specified in the Rev. Code of 1819, in which sureties for good behavior might be required. And to this day the general statutory provision has remained, that persons not of good fame could be held to give surety for their good behavior, the law being unchanged by the statutes changing from time to time certain special cases specified as cases, in which a person could be required to give sureties for their good behavior. The ground, on which persons could generally be held to give

surety for their good behavior, has thus always been that they were persons of bad character leading low and degraded lives." *State v. Gould*, 26 W. Va. 258.

Statutory Provision of West Virginia.—"Code, ch. 153, p. 702, authorizes no one but persons not of good fame to be required to give securities for their good behavior except in a very few cases set out specifically in the statute law. (Code, ch. 153, §§ 1, 9, 11.)" *State v. Gould*, 26 W. Va. 258. "Every justice of the peace shall have power to require from persons not of good fame, security for their good behavior for a term not exceeding one year." See post, "In West Virginia," III, A, 3, b.

Statutory Provision in Virginia.—Every judge throughout the state and every justice, commissioner in chancery, notary, and county surveyor while in the performance of the duties of his office within his county or corporation shall be a conservator of the peace and may require from persons not of good fame security for their good behavior for a term not exceeding one year. Va. Code, 1904, § 3912. See post, "In Virginia," III, A, 3, c.

2. County Court Prior to 1848.

The county court has authority to require a party to enter into a recognizance to keep peace, at least where the proceeding was commenced before the act of 1848, Sess. Acts 1847-48, ch. 14. *Welling's case*, 6 Gratt. 670. County courts were abolished by the constitution of 1902. See the title COURTS.

3. Upon Conviction of a Misdemeanor.

See post, "As Punishment," III, B.

a. At Common Law.

See ante, "General Rules," III, A, 1. "There was a discretionary jurisdiction at common law in the court trying a person charged with misdemeanor, to bind the accused, after conviction and as part of the judgment, to good behavior for a time, and that jurisdic-

tion was not statutory. It was a jurisdiction inherent in every court of record, having criminal jurisdiction." *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131; *State v. Gould*, 26 W. Va. 258.

"For crimes of an infamous nature, such as petit larceny, perjury or forgery at common law, gross cheats, conspiracy not requiring a villianous judgment, keeping a bawdy house, bribing witnesses to stifle their evidence, and offenses of the like nature against the first principles of natural justice and common honesty, it seems to be in great measure left to the prudence of the court to inflict such corporal punishment and also such fine and lien to the good behavior for a certain time, etc., as shall seem most proper and adequate to the offense, from the consideration of the baseness, enormity and dangerous tendency of it; the malice, deliberation, and willfulness or the inconsideration, suddenness and surprise with which it was committed; the age, quality, and degree of the offender; and all other circumstances which may any way aggravate or extenuate the guilt." Hawk. P. C., vol. 2, p. 631." *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131.

"Binding to the good behavior was a discretionary judgment at the common law, given by a court of record, for an offense at the suit of the king, after a common-law conviction by a verdict of twelve men." *State v. Gilliland* (W. Va.), 38 S. E. 516. (Decided March 30, 1901.)

b. In West Virginia.

See ante, "General Rules," III, A, 1.

Courts of record have a discretionary jurisdiction, in case of conviction, for a gross common-law misdemeanor, punishment for which has not been prescribed by statute, to require of the defendant sureties for good behavior. To this extent only, the principles announced in *State v. Gould*, 26 W. Va. 258, are overruled. *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131.

Such jurisdiction does not exist when the conviction is for a statutory misdemeanor or a common-law misdemeanor for which punishment is prescribed by statute. *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131.

Where such surety is required, it should be a general bond for good behavior, there being no authority to take a special recognizance against the commission of a specific act, not in itself a gross misdemeanor. *State v. Gilliland* (W. Va.), 38 S. E. 516. (Decided March 30, 1901.) For subsequent opinion, see 51 W. Va. 278, 41 S. E. 131.

Such jurisdiction does not exist when the conviction is for the simple selling of intoxicating liquors which is a statutory offense. *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131. See the title INTOXICATING LIQUORS.

Upon a verdict of guilty under an indictment charging that the defendant did unlawfully and willfully, and cruelly beat, shoot, torture, and otherwise ill treat a mule, the court in rendering judgment can not add as a part thereof an order requiring the defendant to give a bond with approved security to keep the peace or be of good behavior and in default thereof be imprisoned, till such bond is given. *State v. Gould*, 26 W. Va. 258. See the title CRUELTY TO ANIMALS AND CHILDREN.

Review on Error.—If the court in rendering a judgment upon verdict of guilty against a defendant in any case upon the conviction of him of any misdemeanor, not a gross common-law misdemeanor, add to its judgment as a part thereof an order requiring the defendant to give a bond with approved security to keep the peace or be of good behavior and in default thereof to be imprisoned, till such bond is given, the case on writ of error will be reversed, and the proper judgment will be entered by the appellate court without remanding it to the court be-

low. *State v. Gould*, 26 W. Va. 258. See also, *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131, overruling *State v. Gould*, 26 W. Va. 258 on another point. See the title APPEAL AND ERROR, vol. 1, p. 418.

c. In Virginia.

See ante, "General Rules," III, A. 1.

No case in the Virginia reports recognizes the discretionary jurisdiction at common law of courts trying a person charged with a misdemeanor, in case of conviction, to add to the judgment as a part thereof an order requiring the defendant to give a bond with approved security to keep the peace or be of good behavior and in default thereof to be imprisoned, till such bond is given. As the common law obtains in Virginia in so far as it has not been repealed and is not repugnant to the laws, this jurisdiction would seem to exist in cases of conviction of gross common-law misdemeanors, punishment for which has not been prescribed by statute. See the opinion in *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131, overruling *State v. Gould*, 26 W. Va. 258.

B. AS PUNISHMENT.

See ante, "General Rules," III, A, 1; "Upon Conviction of a Misdemeanor," III, A, 3.

Surety for the peace or good behavior when taken before an offense has been committed is not meant as any degree of punishment. Jurisdiction to require surety for the peace falls under the title of preventive justice and is distinct from punishing justice. The requisition of sureties upon conviction of a misdemeanor is a part of the penalty inflicted. The order or judgment requiring the convicted person to enter into bond for good behavior is punishment. The bond is required under pain of imprisonment and, if the defendant fails to enter into a recognizance for his good behavior the punishment inflicted is fre-

quently more severe than that imposed for the misdemeanor itself. *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 131.

"If a person have been convicted of a misdemeanor, it is usually part of the judgment that he shall find security for his good behavior for some time.' *Bac. Abr.* vol. 9, p. 308." This requisition of sureties, although mentioned as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors, must be understood rather as a caution against the repetition of the offense than any immediate pain or punishment. *State v. Gilliland*, 51 W. Va. 278, 41 S. E. 134.

C. WARRANT AND ITS EXECUTION.

A warrant to arrest persons of whom surety for breach of the peace is demanded can not be executed by any one except a sworn officer or person to whom it was directed by the magistrate who issued it. It cannot be executed by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself. The warrant is thereby rendered altogether illegal and void. *Wells v. Jackson*, 3 Munf. 458. See the title WARRANTS.

D. APPEAL IN VIRGINIA.

See the title APPEAL AND ERROR, vol. 1, p. 666.

Where a justice of the peace requires surety of the peace of any person, such person has an absolute right of appeal to the circuit court of the county or the corporation court of the corporation. In the court the cause is to be heard *de novo* upon the evidence. Read *v. Com.*, 24 Gratt. 618.

In such a case it is error to reverse the judgment of the justice and remand the case to the justice to be tried by him. Any subsequent trial of the case by the justice is null and void. Read *v. Com.*, 24 Gratt. 618.

If in such case the justice again tries and convicts the accused, and he again appeals to the appellate court the proceeding before the justice on the second trial being null the accused is in court upon the first appeal. Read *v. Com.*, 24 Gratt. 618.

E. DEFECTIVE SCI. FA.

A recognizance had been entered into by the defendant to keep the peace generally, and particularly towards J. S. The sci. fa. issued on this recognizance merely set forth that the defendant had failed to perform the condition of the said recognizance. This sci. fa. is defective in not stating how, or in what, he had broken his recognizance, and it ought to be quashed. *Randolph v. Brown*, 2 Va. Cas. 351. See the titles BAIL AND RECOGNIZANCE, ante, p. 196; SCIRE FACIAS.

Breaking and Entering.

See the title BURGLARY AND HOUSE BREAKING.

Breweries.

See the title LICENSES.

BRIBERY.

CROSS REFERENCES.

See the titles CRIMINAL LAW; ELECTIONS; EVIDENCE; ILLEGAL CONTRACTS; INDICTMENTS, INFORMATION AND PRESENTMENTS; PUBLIC OFFICERS.

Definition and Nature of the Offense.—Bribery is defined as "the voluntary giving or receiving anything of value in corrupt payment for an official act done or to be done." (2 Bish. New Cr. Law, § 85). Therefore, a commissioner on the board of education, who accepts money from the agent of a publishing company as an inducement to attend a meeting of the board, when it is his legal duty to attend anyhow, for the performance of which duty he receives \$1.50 per day in compensation from the state, is guilty of the offense. *Honaker v. Board of Education*, 42 W. Va. 170, 24 S. E. 544.

Bribery of Public Officers.

Arbitrators.—The first section of chapter 108 of the Code of West Virginia provides, that "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitrators." And the third section says: "Upon the return of such award made under such an agreement (whether any previous record of the submission has been made or not), it shall be entered up as a judgment or decree of the court." Therefore, an arbitrator is a judicial officer within the meaning of the statute making it a criminal act to offer bribes to judicial officers. *State v. Lusk*, 16 W. Va. 771.

Board of Education.—Where the attendance of a member of the board of education was obtained by bribery, and his vote was necessary in order that a majority of the board should be favorable to the execution of a contract, such contract thus procured and made is against public policy, and void for want of the sanction of a competent majority of the board to make it.

Honaker v. Board of Education, 42 W. Va. 170, 24 S. E. 544. See generally, the title ILLEGAL CONTRACTS.

Acceptance of Money for the Performance of a Legal Duty.—A commissioner on the board of education, who accepts money from the agent of a publishing company as an inducement to attend a meeting of the board, when it is his legal duty to attend anyhow, for the performance of which duty he receives \$1.50 per day in compensation from the state, is guilty of committing the crime of bribery. *Honaker v. Board of Education*, 42 W. Va. 170, 24 S. E. 544.

Legislators.—Section 6, ch. 5, of the Criminal Code of Virginia, 1877-78, aims at the offense of paying money or other compensation to secure the passage or defeat of any measure, and was doubtless intended to apply to the use of money in the line of bribery and corruption, debauching the members, or buying votes; and not to contracts with attorneys for purely professional services, such as addressing the legislature or its committee with the intention to reach its reason by argument. *Yates v. Robertson*, 80 Va. 475.

Corrupt Agreement between Justices of the Peace.—A corrupt agreement between two justices of the peace, A and B, to the following effect: That A will vote for C as commissioner of the revenue in consideration that B will vote for D as clerk; and that B will vote for D as clerk in consideration that A will vote for C as commissioner of the revenue, and the actual voting of the said two justices, in pursuance of said corrupt agreement, is not an offense within the statute, against buying and selling offices, because the corrupt bargains and

sales, prohibited by that statute, are those by which the party bargaining or selling is to receive some profit or some assurance of profit directly or indirectly to himself. But such a corrupt agreement (and the execution of it), is a misdemeanor at common law, for which an information or indictment will lie. *Com. v. Callaghan*, 2 Va. Cas. 460. See the titles **ILLEGAL CONTRACTS**; **PUBLIC OFFICERS**.

An indictment for attempting to bribe a deputy sheriff to summon designated persons upon a jury to try a felony, held to be good, though the amount of the bribe is not set forth, and though the offense is not an offense at common law. *Com. v. Chapman*, 1 Va. Cas. 138.

Indictment Good When Substantial Requisites Are Present.—An indictment which charges that there was a controversy, that certain parties were selected by the parties to whom the controversy was submitted for arbitration, that the defendant did promise money to one of said arbitrators, with intent to bias his opinion and influence his decision as such, is substantially good under § 7, ch. 147, W. Va. Code, p. 688. *State v. Lusk*, 16 W. Va. 770.

Information—Election.—Where an information is filed charging an officer with bribery in casting his vote at an election, the information must allege that an election was holden, although the court be satisfied that an election took place, and that upon such election a corrupt vote was given. The failure to make such allegations will be fatal.

Newell v. Com., 2 Wash. 88. See generally, the title **ELECTIONS**.

Attempt to Bribe.—An attempt to obstruct or impede the administration of justice by inducing a witness to absent himself from court is unquestionably a misdemeanor. It was so at common law, and it was expressly declared a misdemeanor by the Code of West Virginia, ch. 147, § 30, p. 691. In order to constitute an attempt, however, there must be more than a mere intent to commit the crime, and on an indictment for giving money to one person to be transferred to another, for the purpose of bribing such other person to absent himself from court when called as a witness, the court held, that such indictment was fatally defective because it did not allege that such was paid or offered to the witness. Without this, the act done by the defendant is not of such a nature as to constitute an attempt to commit the offense mentioned in the indictment. *State v. Baller*, 26 W. Va. 90.

There can be no question but that to solicit or in any manner induce a witness to absent himself from a trial, in which the witness has been summoned to testify, is an indictable offense, though it is questionable whether in general the solicitation of a person to commit a crime is indictable, and it is clear that there are many crimes to commit which the mere solicitation would not be an indictable offense. *State v. Baller*, 26 W. Va. 102. See generally, the titles **ATTEMPTS AND SOLICITATION TO COMMIT CRIME**, ante, p. 135; **WITNESSES**.

Bribery of Witnesses.

See the titles **ATTEMPTS AND SOLICITATION TO COMMIT CRIME**, ante, p. 135; **BRIBERY**, ante, p. 621; **OBSTRUCTING JUSTICE**.

BRIDGES.

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I. Definitions and Distinctions.

Passage Way Over Obstructions.—"The term 'a bridge,' conveys to my mind the idea of a passage way, by which travelers and others are enabled to pass safely over streams or other obstructions. A structure of stone which spans the width of a stream, but is wholly inaccessible at either end (whatever may be its architecture), does not meet my ideas of what is meant in law and common parlance by a bridge." Cardwell, J., in *Home Building Co. v. Roanoke*, 91 Va. 60, 20 S. E. 895, quoting Dayton, J., in *Freeholders v. Strader*, 35 Am. Dec. 532.

Under the West Virginia Code.—The word bridge as used in certain designated sections of the West Virginia Code is defined by the Code to mean, unless a different construction

is required by the context, any state or county bridge owned by a company or person. W. Va. Code, 1899, p. 355, ch. 43, par. 44.

Included within Term Streets.—Bridges are embraced within the term streets, used in reference to streets of municipal corporations. *Wilson v. Wheeling*, 19 W. Va. 323.

Ferry Distinguished.—It has been said that a bridge and a ferry are different things. *Mason v. Bridge Co.*, 17 W. Va. 410.

II. Establishment and Maintenance.

A. PRIVATE BRIDGES.

Establishment by County.—A bridge erected by an individual for public benefit, or for his own purposes, and dedicated by him to the public, may

be established by the county court as a public bridge; but only in the mode prescribed by the statute. 2 Rev. Va. Code, 1819, ch. 236, § 7, p. 236; *Sampson v. Goochland*, 5 Gratt. 241.

Maintenance by County.—The county court is not bound to repair or maintain a bridge, erected by an individual, with whatever view to the public advantage, and though dedicated by him to the public use, and actually used by the public, and although on a public road, unless it has been adopted by the county court in the mode prescribed by the statute. *Sampson v. Goochland*, 5 Gratt. 241.

Duty of Person Constructing to Maintain.—If an individual, without authority, for his own purposes, or even for the public advantage, constructs a bridge in a public road, it is incumbent on him to keep it in such a condition as not to impede the free and convenient use of the highway. *Sampson v. Goochland*, 5 Gratt. 241.

B. PUBLIC BRIDGES.

1. Jurisdiction of Courts to Establish, Alter or Repair.

The West Virginia Code, 1899, § 25, ch. 43, provides in substance, that when a bridge is necessary within a county, and it is not practicable for the road surveyor to have it built or repaired within the means at his disposal, "the county court of the county may contract for the same, or any part thereof, on such terms as may be agreed upon, and pay for the work in whole or in part out of the county treasury." *State v. County Court*, 33 W. Va. 589, 11 S. E. 75; *Davis v. Wayne County Court*, 38 W. Va. 104, 18 S. E. 373.

Formerly, in Virginia, a public bridge could be established by a county court under the provisions of the statute conferring such power. The county court could establish a bridge only in the mode prescribed by the statute. It was necessary that the record of the court show that the or-

der establishing the bridge was made by a county court, constituted according to the directions of the statute, or the order would be invalid. *Sampson v. Goochland*, 5 Gratt. 241. See also, 2 Rev. Va. Code, ch. 236, § 7, p. 236.

An order of the county court directing a bridge to be repaired or rebuilt was not sufficient to establish the bridge as a public bridge, unless the record showed that the court was properly organized for that purpose. *Sampson v. Goochland*, 5 Gratt. 241.

2. Causeway in Adjacent County.

A county is not liable for any part of the expenses of maintaining a causeway wholly in an adjacent county, though necessary to approach a bridge over a stream between the two counties. *Gloucester Co. v. Middlesex Co.*, 88 Va. 843, 14 S. E. 660. But see Va. Code (Pollard's Edition), § 99.

3. Bridge or Causeway between Adjacent Counties.

Under the Va. Code (Pollard's Edition), § 990, a circuit judge has, in vacation, jurisdiction to compel a county by mandamus to contribute to maintain a bridge or causeway over a place between it and an adjacent county. *Gloucester Co. v. Middlesex Co.*, 88 Va. 843, 14 S. E. 660; *Brander v. Chesterfield Justices*, 5 Call 548.

4. Contracts for Construction.

Interpretation.—Where a county entered into a contract for making a road and building a bridge according to certain specifications, and added, "to the satisfaction of the court," it was held to mean that it must be done according to the specifications, and that it would be to the satisfaction of the court. *Kinsley v. Monongalia Co.*, 31 W. Va. 464, 7 S. E. 445. See post, "Evidence," II, B, 8.

5. Bond and Security from Contractor.

Statutory Requirement.—Section 25 of the West Virginia Acts, 1874-75, provides that when a bridge is necessary within a county or across the bound-

any thereof, and it is not practicable for the surveyor of the road precinct to have it built or repaired with the means at his disposal, the county court the county may contract for same, or any part thereof, on such terms as may be agreed upon, and take bond and security from any contractor for the faithful performance of his contract. *Davis v. Wayne County Court*, 38 W. Va. 104, 18 S. E. 373.

Action on Bond.—The commissioners on behalf of the supervisors of a county contracted with a bridge builder to build a bridge for the county, reciting that the contractor was a bridge builder by trade and that the commissioners knew but little about bridges, and providing that the contractor should furnish all the materials and complete the bridge in a durable and substantial manner so that it should stand the test of time and flood and be finished and delivered for use on or before December 1, 1868; the bridge to be paid for in installments, but the last installment, which was to be paid by certificate of indebtedness out of the county levy of 1869, was not to be paid until the whole work was completed and received. For the faithful performance of this contract the contractor executed bond with security. Upon the report of the commissioners that the bridge had been completed so far as they could see, except one of the abutments, which seemed to them to be cracking and settling, the supervisors on November 16, 1868, issued certificates for the last installment to be paid out of the levy of 1869 and delivered them to the contractor. Within two years thereafter, a part of the bridge fell down and the county brought an action at law on the bond against the sureties therein. They filed their bill in equity, alleging the foregoing facts and claiming that the supervisors, by receiving the bridge in the condition it was then in and making the last payment as they did, varied and

changed the obligation of their undertaking and thereby released them from liability on their bond, and asking a perpetual injunction against the prosecution of the action at law against them. Held, that the facts alleged in the bill did not show that the obligation of the plaintiffs had been varied or changed by the action of the supervisors, and that they were consequently not discharged, and that the bill should be dismissed on demurrer. *Leonard v. County Court*, 25 W. Va. 45.

6. Necessity of Notice to Public of Alteration.

Since § 35 of chapter 43 of the W. Va. Code of 1868 has been amended and re-enacted, so as to read as it now stands in Code, 1887, p. 326, the alteration by the county court of an existing county bridge, in order to place the same on better ground or grade, does not render it necessary to give the notice to the public, which was formerly required by § 30 of chapter 43 of the Code. *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747. Compare *Conrad v. Lewis Co.*, 10 W. Va. 784.

7. Proceedings to Compel Erection, Alteration or Rebuilding.

To Compel Erection.—When bridges or causeways are necessary within the limits of a county, and the surveyor of the road with his assistants can not make or maintain the same, the superior court of law for such county, hath the power to compel the justices, by writ of mandamus, to build or repair such bridge or causeway. *Com. v. Justices of Kanawha Co.*, 2 Va. Cas. 499.

Formerly it was held in Virginia that a mandamus would lie from a superior court of law to a county court, to compel the county to build a bridge, or causeway, according to the act of assembly concerning public roads. 1 Rev. Va. Code, 1792, ch. 19, § 7; 2 Rev. Va. Code, 1819, ch. 236, § 9; *Com. v. Fairfax County Court*, 2 Va. Cas. 9; *Brander v. Chesterfield*, 5 Call 548.

Mandamus to Compel Rebuilding.

Mandamus will not lie to compel the county court, under the provisions of § 23, ch. 39 of the W. Va. Code, to rebuild a county bridge which had been destroyed, when it appears that the court has, under the provisions of chapter 43, decided to build a bridge across the same river 110 yards from the site of the former bridge, and thereby, in effect, deciding to change the location of the former bridge. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72.

In such case the court will not, by mandamus, inquire into the regularity of the order of the county court establishing such bridge, and altering the location of the former bridge. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72.

Parties to Proceedings to Alter and Rebuild.—Citizens and taxpayers merely as such, having no special property or interest to be affected, save in common with all other citizens and taxpayers, can not become parties to a proceeding by a county court to alter the location of and rebuild a county bridge. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488.

Review of Proceeding to Alter or Rebuild.—Citizens and taxpayers merely as such, having no special property or interest to be affected, save in common with all other citizens and taxpayers, can not, under W. Va. Code, 1887, ch. 39, § 47, sustain an appeal to review the proceeding of a county court to alter the location of and rebuild a county bridge. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488.

A circuit court can not entertain an appeal obtained in such case by such citizens and taxpayers, and a writ of prohibition will go to prohibit such court from entertaining such an appeal. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488.

8. Evidence.

Order of Court to Repair Showing Previous Establishment.—An order of a county court directing a bridge to be repaired or rebuilt was held not to be evidence that the bridge had been previously established. *Sampson v. Goochland*, 5 Gratt. 241.

Competency of Order.—Where a county court made a contract for the construction of a bridge in accordance with certain specifications attached to and made part of the contract, in a suit by the contractors to recover a balance claimed to be due them on the contract, after the work was completed and received by the county, as they claimed, if the plaintiffs themselves offered in evidence an order of the county court, which showed that the county court acted upon the report of the committee appointed to superintend the building of the bridge, which stated that it would take all that remained unpaid to make good certain deficiencies in the work, and showed on its face that the court declined to receive any pay for his work, the order is incompetent evidence upon the question as to whether the work had been received by the county or not. *Chenoweth v. Ritchie County Court*, 32 W. Va. 628, 9 S. E. 910. See ante, "Contracts for Construction," II, B, 4.

Burden on Contractor to Show Compliance with Terms of Contract.—Where a county court made a contract for the construction of a bridge in accordance with certain specifications attached to and made part of the contract, in a suit by the contractors to recover a balance claimed to be due them on the contract, after the work was completed and received by the county, as they claimed, it was held, that the plaintiffs must show affirmatively that they had complied with the contract and specifications, or that the work had been received, before they would be entitled to recover. *Cheno-*

with *v. Ritchie County Court*, 32 W. Va. 628, 9 S. E. 910.

III. Control and Management.

Construction of Act of February 9, 1882.—The act of February 9, 1882, empowering the supervisors of Stafford county to build a bridge across Rappahannock river, and commissioners appointed by the county judge to manage it after its erection, is held to be simply a grant by the state of certain privileges for public purposes, and contains none of the elements of a contract. *Stafford Co. v. Luck*, 80 Va. 223.

IV. Liability for Injuries Resulting from Defective Bridges.

A. PRIVATE BRIDGES.

Where an individual, without authority, for his own purposes, or even for the public advantage, constructs a bridge in a public road, it is incumbent on him to keep it in such a condition as not to impede the free and convenient use of the highway. If he suffers it to become ruinous, so as to operate as an obstruction, he becomes guilty of a nuisance, for which he is liable. *Sampson v. Goochland*, 5 Gratt. 241.

The owner of a bridge along a private road is not liable to one attempting to cross it for injuries occasioned by the fall of the bridge, where it appears that neither the public nor the person injured were expressly or impliedly invited to use it, and the owner had endeavored to prevent its use by erecting gates at each end of it, which were kept constantly closed, and frequently locked, and had placed a notice in a conspicuous place on the bridge forbidding its use without application to the owner or his servants, and where the party injured had been instructed by his master and also by the owner of the bridge, to take another route, and the owner had no reason to believe that the instructions

would not be obeyed. The owner of the bridge, under the circumstances, owed the person injured no duty, and without this there could be no negligence. *Carson Lime Co. v. Rutherford*, 102 Va. 244, 46 S. E. 304.

A master can not be held liable for an injury resulting from the fall of a private bridge known by him to be in a defective condition where he used due precaution to prevent the use of the bridge, and the only notice he had of an intention to use the bridge by the party injured, who had been instructed to take a different route, was his statement that he intended to go over the bridge, made to a servant of the owner who had no authority to authorize a disregard of his instruction, or to consent for his master to the use of the bridge, but whose sole duty was to look after a lime kiln when in operation, and to keep an account of the loads of lime delivered, some of which the person injured was handling. *Carson Lime Co. v. Rutherford*, 102 Va. 244, 46 S. E. 304.

B. PUBLIC BRIDGES.

In General.—By statute it is provided that where a bridge is in an incorporated city, town or village, and under the jurisdiction of the authorities thereof, that any person, who sustains any injury to his person or property by reason of the bridge being out of repair, may recover all damages sustained by him, by reason of such injury, against the corporation in which the bridge is located. Acts, W. Va., 1872-73, ch. 194, § 60, p. 58; *Wilson v. Wheeling*, 19 W. Va. 337. See also, *Griffin v. Williamstown*, 6 W. Va. 312.

Failure to Provide Guard Rail.—Where an injury is the combined result of a horse becoming suddenly frightened, and shying away from a pile of rock beside the roadway, and the failure of the county court to provide a suitable guard rail along the approach to a bridge, the county is liable for the damages sustained by

reason thereof. *Rohrbough v. Barbour County Court*, 39 W. Va. 472, 20 S. E. 565.

C. BRIDGES MAINTAINED BY MUNICIPAL CORPORATIONS.

See the title MUNICIPAL CORPORATIONS.

By statute, in West Virginia, a municipal corporation is absolutely liable for injuries caused by its failure to keep in repair bridges. *Gibson v. Huntington*, 38 W. Va. 177, 18 S. E. 447; *Chapman v. Milton*, 31 W. Va. 385, 7 S. E. 22; *Griffin v. Williamstown*, 6 W. Va. 312; *Wilson v. Wheeling*, 19 W. Va. 337. See W. Va. Code, 1887, ch. 43, § 53, p. 331.

Where municipal corporations are charged with the duty of keeping in good order and condition the streets

and public roads and bridges lying within their corporate limits, they are liable for injuries to persons or property happening by reason of their neglect to keep the same in good order and condition. They are bound to keep the streets and public roads and bridges in a proper state of repair, free from all obstructions or defects in the road bed, which reasonable vigilance and care can detect and remove. *Griffin v. Williamstown*, 6 W. Va. 312.

V. Discontinuance.

Under the provisions of chapter 43 of the West Virginia Code, 1899, the county court may discontinue a bridge in the same manner that it may discontinue a public road. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72.

BRIEFS.

CROSS REFERENCES.

See the title ARGUMENTS OF COUNSEL, vol. 1, p. 713.

Where a cause has been submitted with leave to file additional briefs before a certain day, and such briefs are not filed, the court will decide the case upon the arguments made. The failure of counsel to file additional briefs within the time given by the court was not occasioned by any default of the court. The facts of this case do not justify a rehearing. The views of all parties were presented to the court by the petition in appeal, or the briefs.

Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669, 866.

It is not the province of a reply brief of an appellant to assign errors for the first time. Errors assigned in such a brief can not be considered. *Hawpe v. Gardner*, 103 Va. 91, 48 S. E. 554, citing *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928, § 3464, Va. Code, 1887 (§ 3464, Va. Code, 1904). See the title APPEAL AND ERROR, vol. 1, p. 503.

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I. Definitions.

A. IN GENERAL.

See post, "Brokers in General," IV, A.

A broker, without special designation, is defined in the text books to be "An agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation for a compensation commonly called brokerage." Story on Agency, § 28; 4 Am. & Eng. Ency. of Law (2d Ed.), 960; *Adkins v. Richmond*, 98 Va. 94, 34 S. E. 967.

Single Act Will Not Constitute One a Broker.—One single sale of land for reward by one for another, taken alone, without anything to show that the former professed to follow or practice the business of a broker, buying or selling for others stocks, securities, or other property for commission or reward, will not make the party making the single sale a broker, under § 2, ch. 32, W. Va. Code. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

B. REAL ESTATE BROKERS.

See post, "Brokers of Real Estate," IV, B, 1.

A real estate broker or agent is defined to be one who negotiates the sale of real property. *Halsey v. Monteiro*, 92 Va. 583, 24 S. E. 258.

Agents or brokers may be defined as "those who negotiate the sale or purchase of real property." *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

C. SHIP BROKERS.

See generally, the title SHIPS AND SHIPPING.

"Any person engaged in the management of business matters occurring between the owners of vessels and of shippers or consignors of the freight which they carry, shall be deemed a ship broker." See § 62, acts of 1875, 1876, p. 189. And where a person engaged as the purchasing agent of a lumber company agrees with the captain of the vessel that he will furnish

him a cargo of lumber in consideration of two and one-half per cent. of the freight which such captain shall receive, such person can not be regarded as a ship broker, there being no contract between the owners of the vessel and the agent of the consignors of the cargo. *Woody v. Com.*, 29 Gratt. 837.

D. COUPON BROKERS.

Any party buying and selling such (state) coupons shall be deemed a broker within the meaning of the license laws of this state. Va. Code, 1904, § 411.

Tax Receivable Coupon Brokers.—Within the meaning of § 65 of the act of 1867, which was approved March 15, 1884, all persons who sell tax receivable coupons from bonds of the state of Virginia, are designated as tax receivable coupon brokers. *Com. v. Lucas*, 84 Va. 303, 4 S. E. 695.

As to the distinction between coupon brokers and tax receivable coupon brokers, see post, "Statutory Provisions Requiring License," II.

Lawyers Engaged in Disposing of Coupons.

Attorneys, who are employed to enter upon a long, difficult, harassing, and systematic effort to compel the state to receive in payment of taxes, coupons upon bonds which had many years to run, which bonds were confided to the attorneys with instructions to detach and use the coupons as they deemed most wise and judicious, are not mere brokers for the disposition of the coupons; they are lawyers engaged in an arduous and difficult task, requiring a high degree of skill, diligence and learning. *Parsons v. Maury*, 101 Va. 522, 44 S. E. 758.

E. INSURANCE BROKERS.

For definition of, and information as to, insurance agents and brokers, see generally, the title INSURANCE.

F. COMMERCIAL BROKERS.

See the title FACTORS AND COMMISSION MERCHANTS.

II. Statutory Provisions Requiring License.

See generally, the title **LICENSES**.

Contract Not Absolutely Void.—The general rule is that a contract in violation of law is void; but where the statute requires a license "to practice the business of stock or other broker, by buying and selling for others, stock, securities or other property for a commission or reward," and imposes a penalty for a violation thereof, a contract of a real estate agent to sell real estate for another for commission or reward, in violation of such requirement, is not for that reason absolutely void. *Ober v. Stephens*, 54 W. Va. 354, 46 S. E. 195.

Intention of Legislature as to Penalty.—Unless it clearly appears that the legislature intended that the penalty imposed by § 32, W. Va. Code, 1899, for practicing the business of a stock or other broker without a license, should not constitute the only punishment to be inflicted for the violation of this law, it will be held as the exclusive penalty. *Ober v. Stephens*, 54 W. Va. 354, 46 S. E. 195.

Broker of Tax Receivable Coupons.—Section 65 of acts of 1883-1884 makes it an offense to do business as a tax receivable coupon broker without a license. Sections 50, 60, of same act make it an offense to do business as a stockbroker without license. These two offenses are widely different. The former offense can not be punished under an indictment charging the latter offense. *Com. v. Lucas*, 84 Va. 303, 4 S. E. 695.

Distinctions between Coupon Brokers and Tax Receivable Coupon Brokers.—The offense of selling tax receivable coupons under § 65 is not charged by an indictment alleging that defendant "did deal in certificates of debt commonly called 'Virginia coupons,' * * * without license under §§ 58, 60, of the act of assembly, * * * for the year 1883, p. 588," as the court

must take cognizance that there are in Virginia coupons outstanding that are not tax receivable. *Com. v. Lucas*, 84 Va. 303, 4 S. E. 695.

Special Tax Required.—Persons engaged as tax receivable coupon brokers, must pay a special license tax much greater than that required of an ordinary stockbroker. *Com. v. Lucas*, 84 Va. 303, 4 S. E. 695.

Fine of Ship Broker for Acting without License.—Under the acts of assembly, 1875-1876, p. 189, "No person or corporation shall without a license authorized by law, act as a ship broker, etc." And, for the violation of this statute, a fine of not less than one hundred dollars nor more than five thousand dollars for each offense may be imposed. *Woody v. Com.*, 29 Gratt. 837.

As to who is a ship broker within this provision, see ante, "Ship Brokers," I, C.

III. Employment.

A. WHAT WILL CONSTITUTE EMPLOYMENT.

Mutual Promises Are Sufficient Consideration.—A promise of remuneration for service to be performed makes a valid consideration for a contract. If one employs another as agent for remuneration on performance, the contract is based on sufficient consideration, and is mutually binding. *Rowan v. Hull*, 55 W. Va. 336, 47 S. E. 92.

A Vendor Can Not Be Broker for Purchaser.—The assertion of the defendant that he brought a note to the plaintiff, pursuant to the request of the latter that he would bring him good paper for discounting at two per cent. per month, is no averment that, in the transfer of the note, the defendant acted as the agent for plaintiff, and such an averment would be absurd upon its face inasmuch as, according to his own admission, he brought the note for sale and actually sold it to the plaintiff, which, in the nature of the

things, he could not do as the plaintiff's agent. *Lyons v. Miller*, 6 Gratt. 440. See generally, the title **BILLS, NOTES AND CHECKS**, ante, p. 401.

B. FORM OF CONTRACT.

A broker may be employed orally or by writing. *Davis v. Gordon*, 87 Va. 566, 13 S. E. 35.

Owner Charged, When There Is a Memorandum in Writing.—A person owning lands may by parol authorize another to make a contract for the sale thereof; and if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing, signed by the person authorized to make it. *Yerby v. Grigsby*, 9 Leigh 387. See *Kennedy v. Ehlen*, 31 W. Va. 540, 8 S. E. 398; *Conaway v. Sweeney*, 24 W. Va. 649; *Davis v. Gordon*, 87 Va. 566, 13 S. E. 35. See post, "Particular Kinds of Brokers," IV, B.

Signature of Agent Not Essential.

A written proposition to employ one as agent to sell land, signed by the proposer, accepted by the agent, though not signed by him, makes a binding contract of agency between them, and is a bilateral mutual contract, and enforceable against both. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92. See generally, the titles **AGENCY**, vol. 1, p. 240; **CONTRACTS**.

Inspection of the Writing by Purchaser.—The failure of the purchaser to inspect the writing authorizing an agent to sell real property, will affect him with notice of any defects or qualifications contained in such writing. *Morris v. Terrell*, 2 Rand. 6.

IV. Authority, Powers and Duties.

A. BROKERS IN GENERAL.

See ante, "In General," I. A.

Strictly a Middleman or Negotiator.

—A broker is a mere negotiator be-

tween the other parties, and he never acts in his own name, but in the name of those who employ him. Where he is employed to buy or sell goods, he is not intrusted with the custody or possession of them, and not authorized to buy or sell in his own name. He is strictly, therefore, a middleman, or intermediate negotiator between the parties. *Davis v. Gordon*, 87 Va. 566, 13 S. E. 35.

In an action by certain real estate agents against their principals for advances made by such agents during the continuance of their authority, to the use of their principals, it was not error for the court to instruct the jury that "every delegation of authority, or creation of an agency, unless the extent of such authority or agency be expressly limited, carries with it the power to do all those things which are necessary, proper, and usual to be done in order to effectuate the purpose of the agency, and embraces all the approximate means necessary to accomplish the desired ends." The word "approximate" in the instruction is not more comprehensive than the usual and more suitable word "appropriate." *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720.

Broker and Factor Compared.

—A broker differs in some respects from a factor. A factor may buy and sell in his own name, as well as in the name of his principal. A broker, as we have seen, is always bound to sell in the name of his principal. A factor is intrusted with the possession, control, and disposal of the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, usually has no such possession, management, control, or disposal of the goods, and consequently has no such special property or lien. *Davis v. Gordon*, 87 Va. 567, 13 S. E. 35. See generally, the title **FACTORS AND COMMISSION MERCHANTS**.

Usual Authority Presumed.—If a man expressly empower another as his auctioneer, broker, factor or other professional agent, and privately restrict his power, a presumption of authority to deal with the goods according to the agent's usual course of business will arise. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

B. PARTICULAR KINDS OF BROKERS.

1. Brokers of Real Estate.

a. Nature of Agency and Power in General.

See ante, "Real Estate Brokers," I, B.

A real estate agent is not a general agent, but a special agent acting under limited power. He must pursue his instructions and act within the scope of his limited power; not to exceed or deviate from it. *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914; *Halsey v. Monteiro*, 92 Va. 588, 24 S. E. 258; *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414; *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35.

Effect of Payment by Owner of Advertising Bill.—Where real estate agents are authorized to advertise a proposed auction sale of certain lots, and the advertisement bill is paid by the owner, such action on the part of the owner does not convert the special agency into a general agency, so as to authorize such agent, seven months later, to sell the lots in the manner, and at the price different from what was arranged for the auction sale. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35. See generally, the title AUCTIONS AND AUCTIONEERS, ante, p. 174.

Erecting Advertising Signs on the Lots.—The act of real estate agents in erecting signs on the lots placed in their hands to sell showing that the said lots were for sale by them, without mentioning the owner's name, does not constitute them the general agents of the owner. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35.

May Make Improvements.—The fact that certain persons were engaged as real estate agents at the time of their employment, does not prevent their being made general agents of their employers, and while they would not have the authority to make improvements on the lands of their employers by virtue of their business merely as real estate agents, yet such authority could be exercised by them when specially conferred upon them. *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720. See also, *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

b. Authority by Custom.

Owner Not Affected by Custom until He Knows of It.—The owner of property could not be affected by any local custom of real estate agents doing business in the city of Roanoke, until it was shown that he knew of such custom at the time he placed the property in question with the agent for sale (if he did so place it), or that such custom was of such long continuance and so certain, general, universal, and notorious as that knowledge thereof would reasonably be presumed on the part of his testator. *Hansbrough v. Neal*, 94 Va. 727, 27 S. E. 593. See generally, the title USAGES AND CUSTOMS.

Quære. Does a real estate agent have the presumed authority to deal with the property in his hands according to his usual course of business? *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

c. Power to Sell.

(1) Exclusive of Power to Option.

See generally, the title VENDOR AND PURCHASER.

A written power to sell land does not include the power to option, unless so expressed. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701.

Unauthorized Option.—An option not authorized by a written power to sell is not binding on the landowners, nor a

coagent under such power to sell, without express ratification. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701.

(2) Effect of Unauthorized Acts.

Do Not Bind Principal.—A real estate agent, authorized to rent certain premises, or to sell them at a certain price, can not bind his principal by giving permission to an adjoining proprietor to change the boundary or fences. *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180.

Noncompliance with Terms of Authority.—Where the owner of property authorizes a real estate broker to sell it for \$16 per acre, one-third cash, and the balance on a credit of one, two, and three years; or \$10,000 cash; and the said broker sells it, one-third cash in sixty days, with the exception of \$5 paid down, and the residue on a credit of thirty-six months, the court declared this to be a noncompliance with the terms of the authority conferred and not binding on the principal. *Halsey v. Monteiro*, 92 Va. 584, 24 S. E. 258.

Sale without Owner's Consent.—An agent can bind his principal only by action within the scope of his authority. An agent employed to effect the sale of only one parcel of land and in a specified manner, is a special and not a general agent. The sale of corner lots made by such agent without the owner's consent, and in his absence, and below minimum price fixed by him will not be binding upon the owner. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35.

Sale in His Own Name.—If a broker sells the goods of his principal in his own name (without some special authority to do so), inasmuch as he exceeds his proper authority, the principal will have the same rights and remedies against the purchaser, as if his name had been disclosed by the broker. *Davis v. Gordon*, 87 Va. 567, 13 S. E. 35.

Execution of Contract of Sale.—See

post, "Power to Complete Contract of Sale," IV, B, 1, d.

d. Power to Complete Contract of Sale.

(1) Beyond the Scope of Broker's Ordinary Authority.

The business of a broker generally, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled; generally, the title to be examined, and the conveyance with its covenants to be agreed upon and executed by the owner—all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duties and are not within the authority of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale on behalf of his principal. *Halsey v. Monteiro*, 92 Va. 585, 24 S. E. 258; *Davis v. Gordon*, 87 Va. 559, 566, 13 S. E. 35; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

Limited to Negotiations Concerning Contract.—Real estate brokers negotiate the sale or purchase of real estate. Their powers are ordinarily limited to negotiating a contract, and do not extend to the execution of a contract of purchase or sale, and in this respect they differ from merchandise brokers. *Davis v. Gordon*, 87 Va. 565, 13 S. E. 35. See also, *Halsey v. Monteiro*, 92 Va. 585, 24 S. E. 258; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

Authority to List Confers Only Limited Power.—Authority given to "list" property, and to "place property on commission," confers no power to sign a contract of sale. *Halsey v. Monteiro*, 92 Va. 584, 24 S. E. 258.

Unauthorized Acts May Be Disclaimed.—Real estate agents, by letter, asked owner for a chance to sell land for him, and for his terms. Owner answered, at one time: "My price is \$9,000," and at another, "I have concluded to take \$10,000, * * * and will give you two per cent. Awaiting reply." Three days later the agents telegraphed owner: "Sold lots as per your letter." But owner had nowhere authorized them to sell, and disclaimed the sale; held, their authority did not extend to making the sale, but only to transmitting offers for owner's approval, and it was incumbent on purchaser to look to their authority. *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

(2) Authority May Be Conferred by Parol.

May Not Attach a Seal.—A broker may be employed to make a contract for the sale or lease of real estate which will be sufficient under the statute of frauds, by an instrument not under seal, and even by parol; but he may not attach a seal to the instrument made under such an authority. An authority "to close the bargain," is not authority to sign the name of the principal to a contract of sale. *Davis v. Gordon*, 87 Va. 566, 13 S. E. 35. See also, *Kennedy v. Ehlen*, 31 W. Va. 540, 8 S. E. 398; *Conaway v. Sweeney*, 24 W. Va. 649. See ante, "Form of Contract," III, B. See generally, the title FRAUDS, STATUTE OF.

(3) Effect of Express Power to Sell.

Authority to sell land implies authority to do everything necessary to complete the contract and to make it binding. *Yerby v. Grigsby*, 9 Leigh 390.

(4) Proof of Authority Required.

See generally, the titles CONTRACTS; SPECIFIC PERFORMANCE.

When specific performance is sought of a contract made with an agent, it is necessary to establish the authority of

agents by clear, certain and specific proof. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414; *Halsey v. Monteiro*, 92 Va. 588, 24 S. E. 258; *Simmons v. Kramer*, 88 Va. 411, 13 S. E. 902.

Where the evidence does not establish the authority of the agent to make a sale of the real estate in controversy, the specific performance prayed for can not be decreed. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

(5) Incidents to the Power.

Receipt of Purchase Money.—In *Yerby v. Grigsby*, 9 Leigh 387, the syllabus is as follows: "When the owner of lands authorizes another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase money as is to be paid in hand, is a necessary incident to the power to sell." But see opinion of court in *Mann v. Robinson*, 19 W. Va. 57, denying the correctness of this syllabus.

Money to Be Paid at a Future Time.—When the owner of land authorizes an agent to make a contract for the sale thereof, and it is done by the agent, he has no authority, as an incident to the authority conferred upon him, to collect any portion of the purchase money, which by the terms of the contract are to be paid at a future time. *Mann v. Robinson*, 19 W. Va. 49.

Quære. Has such agent, except under peculiar circumstances, authority to receive so much of the purchase money, as is to be paid in hand, as a necessary incident to his power to sell? *Mann v. Robinson*, 19 W. Va. 49.

Can Not Set Up Surrendered Title Bond against Principal.—It is well established that an agent can not make himself adverse to the interests of his principal. Therefore, a real estate agent can not set up a title bond, acquired from one who had surrendered it against his principal, or a purchaser from such principal, by offering to pay the purchase price stipulated for by the party to whom the

title bond was originally issued. *Gibbons v. Jackson*, 10 Leigh 381. See also, *Moseley v. Buck*, 3 Munf. 232.

Failure to Disclose Interest—Fraud upon Purchaser.—If the agent for the sale of land, in order to effect a sale, induces a purchaser to join him in the purchase on terms of equality, and fails to disclose that he owns an interest in the land, this constitutes a fraud upon the purchaser, and avoids the sale at the election of the purchaser. *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

e. Fraud and Adverse Interest—Purchase and Sale by Agent for Himself.

A real estate agent may deal directly with his principal, and sell to him property which he was employed to buy for him, provided the principal in making the purchase from him acts with full knowledge, and there is no deception or concealment on the part of the agent. Where an agent represents to his principal that he paid \$20,000 for a piece of property for which he paid \$18,000, and sold to him for \$20,000, the agent can not enforce the contract. *Jackson v. Pleasanton*, 95 Va. 658, 29 S. E. 680. See also, *Halsey v. Monteiro*, 92 Va. 583, 24 S. E. 258; *Moseley v. Buck*, 3 Munf. 232. And see post, "Bad Faith of Broker," V, A, 10; "Broker to Principal," VI, B; "Principal to Third Persons," VI, D.

Agent Must Not Conceal Anything.—The relation between principal and agent is one of trust and confidence, and the law exacts of the agent the utmost good faith towards his principal. It is a general rule that an agent can not become the purchaser of the property of his principal. If he may do so at all, it must be when there has been no concealment on the part of the agent, and after he has disclosed all the facts concerning the interest he is to take in the purchase, so that his principal may act with full knowledge. Where duty and interest conflict, the

law forbids. The position of seller and buyer is antagonistic. It is the interest of the owner to sell for as high a price as he fairly can, and of the purchaser to buy as low as he may. So the duty of the agent to obtain the highest price for his principal conflicts with his own interest to get the property for as little as possible. An agent can not, therefore, so act as to bind his principal when the agent has an adverse interest in himself. *Halsey v. Monteiro*, 92 Va. 583, 24 S. E. 258. See also, *Jackson v. Pleasanton*, 95 Va. 658, 29 S. E. 680. See generally, the title AGENCY, vol. 1, p. 240.

Violation of Trust.—A real estate broker, who purchases for himself the property placed in his hands to be sold for his principal, for a smaller sum than is offered by another bidder, in violation of his trust, will not be allowed to reap any benefit from the transaction, and the sale will be set aside. *Buck v. Copland*, 2 Call 218.

If an agent employed to sell a tract of land, become himself the purchaser by bargaining with his employer, from whom he conceals the fact that a better price could be had from another person, he is guilty of fraud, and the contract ought to be vacated. *Moseley v. Buck*, 3 Munf. 232. See also, *Gibbons v. Jackson*, 10 Leigh 381; *Jackson v. Pleasanton*, 95 Va. 658, 29 S. E. 680.

May Not Retain the Benefit of a Fraudulent Purchase.—The court of equity will compel the agent to reconvey the land, on receiving back his purchase money, with interest, and make him account for the rents and profits, when he has purchased his principal's property fraudulently. *Moseley v. Buck*, 3 Munf. 232.

As to liability of broker to principal, see post, "Broker to Principal," VI, B.

Could Not Buy at Price Named.—Where owner constituted certain brokers agents to sell his land at an agreed price on commission, held, such agents could not buy for themselves

at the price named. Where the option paper left it doubtful whether it gave power to buy as well as to sell, the courts will not infer that the optionee was entitled to become the purchaser. *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246.

After the termination of the agency, the agent has the same right as any other person to deal in the property. *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203. See generally, the title AGENCY, vol. 1, p. 240.

Coagent May Buy, Regardless of an Unauthorized Option.—A coagent under a power to sell, is not bound by an unauthorized option, not given or ratified by himself, and if he purchase the land for himself, he can not be held as a trustee for the claimant under such option. *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701. See generally, the title VENDOR AND PURCHASER.

Agent Denying Agency—Statute of Frauds.—Where a man merely employs an agent to buy an estate, who buys it for himself, and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he can not compel the agent to convey the estate to him, as that would be in violation of the statute of frauds. *Nash v. Jones*, 41 W. Va. 769, 24 S. E. 593. See generally, the title FRAUDS, STATUTE OF.

f. Acting as Agent for Both Parties.

A broker is primarily the agent of the party by whom he is originally employed, and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principals, in which case he may act as the agent of both parties in making the memorandum of sale. 4 Ency. of Law (2d Ed.) 966; *Coddington v. Goddard*, 16 Gray 442-444. Therefore, a broker, who is the agent of the plaintiff exclusively, has no authority to make an entry on his books which can be produced in evidence against the defendant in the

suit. *Carpenter v. Chemical Co.*, 98 Va. 177, 35 S. E. 358. See also, *Davis v. Gordon*, 87 Va. 567, 13 S. E. 35.

Consent of Parties Necessary.—A man can not be the agent of both the buyer and seller in the same transaction, without the intelligent consent of both parties; nor can an agent act for himself and his principal, nor for two principals on opposite sides in the same transaction, without like consent. All such transactions are voidable, and may be repudiated by the principal without proof of injury on his part. Nothing will defeat this right of the principal except his own confirmation after full knowledge of all the facts. The object of this principal is to remove all possible temptation from the agent. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397.

Not Agent of the Other Party until Bargain Is Complete.—For some purposes (as for the purpose of signing within the statute of frauds) a broker is treated as agent of both parties. Hence, when he is employed to buy and sell goods, he is accustomed to give to the buyer a note of the sale, commonly called a sale note, and to the seller a like note, commonly called a bought note, in his own name, as agent of each, and thereby they are respectively bound, if he has not exceeded his proper authority. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35.

g. Signature of Broker Sufficient.

The signing by the agent of his own name is sufficient. The statute does not make it indispensable that he should sign the name of the landowner. *Yerby v. Grigsby*, 9 Leigh 387. See also, *Conaway v. Sweeney*, 24 W. Va. 649, citing this case.

h. Termination of Authority to Act as Broker.

Upon Payment and Delivery of the Title.—The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title and payment for the property. *Board*

of *Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203.

Matters Arising after Expiration Not Admissible.—Where, by the terms of the agreement set out in declaration, the agency expires on a day certain, a letter of principal written after that day declining to extend the agency, is not admissible in evidence in behalf of the agent, though it was in response to letter of agent written during the agency, saying he could have completed the sale of the land but for principal's delay in having the land surveyed; and that he could still complete it, if his agency were extended ninety days, and asking for such extension. *Smith v. Tate*, 82 Va. 657. See generally, the title EVIDENCE.

Revocation.—An agency uncoupled with an interest, and not for a fixed time, may be revoked by the principal at will, without liability for damages; and, though it be for a fixed time, still it may be revoked at will, but the principal will be liable to the agent for damages, for wrongful revocation within such time. There is often a difference between a power to revoke, and a right to revoke, as between principal and agent. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92. See generally, the titles AGENCY, vol. 1, p. 240; POWERS.

Agency Must Be More than a Bare Power.—Mere commission or reward to be earned by an agent in executing the agency does not, alone, make the agency one coupled with an interest. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92.

2. Stock Brokers.

When Stock Brokers May Recover Loss.—A broker bought stocks for a customer on a "margin" of ten per cent. above their market values. The stocks depreciated, and the broker, after calling at the boarding house of the customer and not finding him, sold the stocks without giving him any notice, and, after crediting the customer with

the ten per cent. "margin" and the amount realized for the stocks, found a balance due him, for which he sued. *Held*, although under *Markham v. Jaudon*, 41 New York 235, the broker had no right to sell the stocks, except under judicial proceedings after due notice, and if a loss occurred by a sale in any other way, the customer was entitled to recover the highest market value between the time of the sale and the time of bringing suit, yet, as in this case, the broker credited the customer with the amount realized from the sale, and there was nothing to show that the stock had been worth more at any time since the sale, the broker was entitled to recover the amount shown by him to have been lost on the transaction. *Tunis v. Torrey*, 1 Va. Dec. 487.

V. Compensation.

A. WHEN BROKERS ARE ENTITLED TO REWARD

1. General Rule.

According to Mr. Story in his work on Agency, § 329, "the general rule of law as to commissions undoubtedly is, that the whole service or duty must be performed, before the right to any commission attaches, either ordinary or extraordinary; for an agent must complete the thing required of him before he is entitled to charge for it. But cases may occur in which an agent will be entitled to a remuneration for his services, in proportion to what he has done, although he has not done the whole service, or duty originally required. This must arise either from the known usage of the particular business or from the entire performance being prevented by the act or neglect of the principal himself; or from the intervention of an overwhelming calamity, or irresistible force, which has rendered it impossible." *Reynolds v. Tompkins*, 23 W. Va. 233. See generally, the titles AGENCY, vol. 1, p. 240; USAGES AND CUSTOMS.

A real estate broker, to be entitled to compensation must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commission. When he has found such a purchaser who has entered into a valid contract, his right to compensation can not be defeated by the fault of the seller, by his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract. *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477. See also, *Reynolds v. Tompkins*, 23 W. Va. 229; *Parker v. National B. & L. Ass'n*, 55 W. Va. 147, 46 S. E. 811.

Contract Not Executed by the Parties.—Where a broker had an agreement drawn up between a park association, of one part, and three trustees (of which such broker was one) of the other part, in which it was set forth that said trustees were to buy and hold certain land for such association on the following terms and conditions: First, that the land must be paid for with five thousand shares of the stock of the company, as full paid up stock (but for which nothing was ever paid), of the par value of one hundred dollars each; second, that three hundred and seventy-one acres of the land was to be set apart as a town site, and divided into lots, and from the sale of the lots and a part of the said stock, fifty thousand dollars was to be raised, and paid to the proprietors of the land; and third, that the trustees each were to receive one thousand shares of the said stock as their own property; and the agreement was not executed by the parties, but was repudiated by the other two trustees before its delivery and never became operative upon them; held, that the said broker could not recover against his associate trustees for the one thousand shares of stock to which he should have been entitled as commission if the said agreement had been executed. *Bowles v. Allen*, 2 Va. Dec. 42.

Failure to Survey.—Owner's failure to have the land surveyed does not excuse agent's failure to make a binding contract of sale, nor entitle him to damages in lieu of commission, when the authority to sell expressly empowered agent to have the survey made himself at the owner's expense. *Smith v. Tate*, 82 Va. 657. See generally, the title DAMAGES.

Covenant Not Broken When Consideration Fails.—Covenant that plaintiff, as agent authorized to sell defendant's tract of land, shall have commission, if he sells same at not less than \$20,000, whether it contained 400 acres or 500, is not broken when agent makes a conditional verbal sale, not binding on the purchaser, on condition that the tract on survey shall contain not less than 400 acres exclusive of certain mountain land constituting part of it. *Smith v. Tate*, 82 Va. 657.

No Compensation for Conditional Sale When Avoided.—The owner of property agrees with a broker that he will give him all over and above \$11,000 that he may obtain for his farm. The broker sells the property for \$10,000 the purchaser agreeing to assume the encumbrances against the property in case they were not in excess of \$4,000, and if they were, the contract of sale should be void. When the attorney for the purchase came to examine the title, it was ascertained that the liens upon the land amounted to more than \$40,000; and the purchaser declared the contract void. Held, the broker could not recover the difference between the \$11,000 and the \$14,000, as the contract was not binding. *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477.

2. Strict Compliance Required of Special Contract for Commission.

It is no doubt competent for an owner of property and an agent for the sale thereof, to make a contract whereby the agent shall have his commission upon the sale regardless of the price, but where a special contract for com-

mission, dependent upon a sale at a given price, is made, the agent or broker is bound to as strict a compliance with that contract as any other person who enters into an agreement to do or perform something as a condition precedent to his right of recovery. *Parker v. National B. & L. Ass'n*, 55 W. Va. 147, 46 S. E. 811. See also, *Reynolds v. Tompkins*, 23 W. Va. 229; *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477.

3. Effect of Default by Purchaser in Deferred Payments.

Sale Under a Deed of Trust.—Where a broker, who sold certain property for a receiver, was entitled to have only a proportionate part of his commission out of the sum paid down, and was to participate at the same rate in the deferred payments, but the purchaser made default in the deferred payments, and the property was sold under a trust deed securing the unpaid purchase price, and was bid in by another for a nominal sum, but the purchaser, pursuant to a guaranty he had made to the receiver, paid a much larger sum, the broker is entitled to his commission on said larger sum. *Peters v. Anderson*, 2 Va. Dec. 266.

No Commission When There Is Defalcation of Payment.—The owner of real estate employed as agent to sell it on terms set out in a writing which contained the following as one of the clauses to be inserted in the contract of sale: "Should any of the above payments not be made at maturity, all former payments to be forfeited, and neither party to have any claim upon the other." A sale was effected on these terms. The agent was to receive a commission of five per cent. on the purchase money, to be paid out of the payments as made. After making several payments, upon which the agent received his commission, the purchaser became utterly insolvent and defaulted in his payments, and the owner took back the land, canceled the purchaser's

obligations for future payments, and with his assent sold and conveyed the land to another party. The first purchaser forfeited the payments already made, and released all claims to the land, for a sum in excess of the balance of principal sum due by him. Agent sued for commissions on so much of the original purchase money as was not paid by the first purchaser. Held, he was not entitled to recover, as the parties had only done what they had the right to do under the terms of their contract effected through him, and upon which he based his claim for compensation. It was further held, upon the evidence, that the owner had not, by agreement or conduct, made any change in the agent's rights under the original contract of employment. *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871.

Commissions Paid from Cash Payments.—Receiver of insolvent bank employed agent to sell real estate on a commission of ten per cent. It was not agreed whether commissions should be paid out of cash payment or out of entire price when paid. Agent sold for \$85,000, whereof \$10,000 was paid and default made as to residue. Held, agent was entitled to ten per cent. only on such sum as had been or should be paid. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974.

4. Interference Does Not Defeat Right. a. By Principal.

If an agent with authority to sell, upon a certain commission, in the event of a sale, procures a purchaser at the price and on the terms authorized, who would have taken the property at the price, and the owner of the property steps in, ignores the agent, and sells to the purchaser so secured, at the same price and on the same terms, or at a less price, and on the terms proposed to the purchaser by the agent, even if they were different from the terms stipulated in the authority to sell, the owner is liable to pay to the agent the

amount of commission stipulated to be paid. *Reynolds v. Tompkins*, 23 W. Va. 229. See generally, the title AGENCY, vol. 1, p. 240.

b. By Coagent.

Principal Must Pay First Negotiator.

—If the owner has several agents appointed to sell the same land, and one of them finds a purchaser, and negotiates with him to sell the land at a certain price and on terms differing from those specified in the authority to sell, and when the sale is about to be consummated, another agent of the owner meets the same person, who talks to him about the offer of the first agent, and with full knowledge of the negotiations of the first agent, the second agent sells the same property to such person for a less price, but on the same terms as to cash down and time in which to pay the deferred payments, and the owner is ignorant of the negotiations of the first agent with the purchaser, but ratifies the sale by the second agent, made on the terms proposed by the first, he is not liable to the second but to the first agent, and should pay him a reasonable compensation for procuring said sale. *Reynolds v. Tompkins*, 23 W. Va. 229. See generally, the title AGENCY, vol. 1, p. 240.

5. Commission for Single Negotiation by Stockholder.

Where a stockholder effected a loan with his company for a third person, and charged a commission for negotiating the same, such commission can not be regarded as brokerage, though the word "brokerage" was used when the memorandum was written. It was simply compensation for the stockholder's trouble in negotiating and guaranteeing the loan. *Keagy v. Trout*, 85 Va. 398, 7 S. E. 329.

6. Double Commissions by Consent.

Promoters of Corporation.—Real estate agents, who are promoters in the organization of a corporation at the time when they enter into a contract

of agency with certain land owners at a stipulated commission, are not permitted to collect such commission when they effect a sale of the land to the corporation, in whose interests and for whose organization they are working, unless, with full knowledge of all the facts, the corporation agrees that they might receive such compensation from the landowners. *Central Land Co. v. Obenchain*, 92 Va. 142, 22 S. E. 876. See generally, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

7. Additional Commissions.

Assignee of Purchaser Liable.—In an action by a real estate broker for commissions, it appeared that defendant H. had agreed in writing to give plaintiff a certain cash commission, and had thereafter orally agreed to give additional commissions in case plaintiff procured a reduction of the price asked by the owner, and that such reduction was made by procuring from such owner additional property without additional consideration. It also appeared that defendant H. wrote to defendant W., stating the terms of the written contract, and that he had agreed to give plaintiff a cash commission; and defendant W., without making inquiry as to any agreement for additional commissions, replied that he would take "the deal" from the hands of defendant H., and assume the payment of the commission and the price; and defendant W. obtained the additional property; held, that he was liable for the additional commissions. *Humphreys v. Hoge*, 2 Va. Dec. 410.

Subsequent Agreement.—In an action by a real estate broker for commissions on a purchase of land, he testified that, in addition to a cash commission which had been paid by defendant, there was an agreement made at another time for payment of additional commissions in case plaintiff procured a purchase for less than a certain price, and defendant testified

that no contract for additional commissions was made at the time the original contract was made, but did not state that no such contract was made thereafter; and there was evidence to show that, after the sale had been completed, defendant stated to a third person that he had paid plaintiff a cash commission, and that plaintiff "will receive something more in the future;" held, that the evidence sufficiently established a contract for additional commissions. *Humphreys v. Hoge*, 2 Va. Dec. 410.

8. Husband Not Liable for Commissions for Selling Wife's Land.

If real estate agents sell land for a man and his wife, they have the right to compensation, but in the absence of any agreement on the part of the husband that he would pay for selling his wife's interest in the land, he can not be held liable therefor. *Hansbrough v. Neal*, 94 Va. 727, 27 S. E. 593.

9. Order on Receiver No Bar to Denial of Decree.

No Admission of Correctness.—Receiver reported sale to court stating agreement as to commissions, and procured a decree for payment thereof, "whenever whole price should be fully paid." Agent, who was no party to the suit, drew an order on receiver for a sum out of any funds payable to him as commissions under the court's decree. Held,—the order did not estop agent from denying correctness of the decree. *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974.

10. Bad Faith of Broker.

An agent to purchase real estate, who takes title to himself, and, claiming as owner, uses and enjoys the land, and refuses to surrender possession to his principal upon the offer of the latter to reimburse him, with interest, for all advances made in securing title to the property and to assume payment of the unpaid purchase money, can not recover of his principal compensation

for making the purchase. The bad faith of the agent deprives him of the right to compensation. *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573.

11. Statute of Limitations.

If the evidence shows that their cause of action accrued more than three years before the institution of their suit, real estate agents can not recover compensation for their services. *Hansbrough v. Neal*, 94 Va. 726, 27 S. E. 593. See generally, the title **LIMITATIONS OF ACTIONS.**

Statute Runs from the Time When Right of Action Accrued.—As a general rule, where there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run against advances lawfully made by the agent in the prosecution of the undertaking or agency, or against compensation for the services of the agent, until the termination of the undertaking or agency. But if the agent has the right to require payment for such advances or compensation for services prior to the termination of the agency, or if the advances are repudiated by the principal as unauthorized, or not required by the nature of the employment or agency, the statute begins to run from the time the agent has the right to demand payment for services or advances, or, if such advances are repudiated as unauthorized, from the time of such repudiation. *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720.

B. JURISDICTION WHERE ACTION MAY BE MAINTAINED.

The Home Office.—If a corporation, at its home office, employs an agent to sell its stock, and subsequently informs its agent by telegram, in answer to a telegram from him, that it has no more stock for sale, but that he can continue to sell stock in conjunction with another, who had an option on all the stock left, and divide commissions with him, and the agent does proceed

to make sales, this is not a new contract, but a modification of the original agreement, and an action to recover commissions on stock sold before and after the said telegram must be brought within the jurisdiction of the home office, and can not be maintained in the jurisdiction where the telegram was received by such agent. *Ferguson v. Grottoes Co.*, 92 Va. 316, 23 S. E. 761. See generally, the titles CORPORATIONS; JURISDICTION.

VI. Liability.

A. PRINCIPAL TO BROKER.

Only Liable for the True Amount Paid by Broker.—If the evidence shows that a deed of trust was fraudulently obtained by an agent from his principal in his own favor, for a larger amount than was due, the deed should stand as a security for only the amount actually due. *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573.

Principal Liable for Taxes.—Where the agent is required to pay rent while he retains the possession of the land from his employer, he should be credited with any money he may pay out for taxes. *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573.

B. BROKER TO PRINCIPAL.

Must Pay for Use of Land, and for Personal Property Not Delivered.—Where an agent has retained possession of land, and of personal property thereon bought and paid for by his principal, and has used and enjoyed the same as his own under a claim of right and has refused to deliver possession thereof to his principal until the same has been recovered from him by the principal after lengthy litigation, the agent is properly chargeable with a reasonable annual compensation for the use and occupation of the land, and with the value of the personal property not delivered to the principal. *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573. See generally, the titles AD-

VERSE POSSESSION, vol. 1, p. 199; EJECTMENT.

Broker Has No Lien in the Absence of Agreement.—Where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien upon such securities for a general balance, or for the payment of other claims, in the absence of an agreement between the parties to that effect. *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576. See generally, the titles BANKS AND BANKING, ante, p. 254; LIENS.

Circumstances Where Agent Is Justifiable in Waiting for Instructions.—N., living in the country, employs M., a broker in Richmond, to invest his moneys in Missouri bonds. In November, 1862, M. invests at \$112.50, and February, 1863, he invests at \$125. In March, N. sends a claim upon the Confederate government to M. for collection, and tells of other funds which will be paid in to M. in May, and directs him to invest in Missouri bonds. M. collects the claim, and invests it at \$160, and so writes to N. May 23 the funds spoken of by N. are received by M. and then Missouri bonds have advanced seventy or eighty per cent. above the last investment, and are difficult to be gotten. On June 29 M. writes to N. acknowledging the receipt of this fund, stating that Missouri bonds were then at 230 to 235, and asks whether he shall invest at the advanced price when to be had. M. receives no answer to his inquiry, and therefore does not invest the money in his hands; the Missouri bonds continue to advance in price. Held, M. was justified in waiting for further instructions, and is not liable to N. for the loss. *Bernard v. Maury*, 20 Gratt. 434.

C. BROKER TO THIRD PERSONS.

A Verbal Promise Is Good as a Defense.—Where a real estate broker

promises a prospective customer, verbally, that he shall have the refusal of a certain piece of property, and afterwards such broker purchases the property himself, and no trust is proved, he may plead the statute to prevent frauds and perjuries in an action on the contract. *Buck v. Copland*, 2 Call 218. See generally, the title **FRAUDS, STATUTE OF**.

Bill and Note Broker.—Where a person is acting as the agent of another in transferring negotiable paper, and discloses, not only his agency, but also the name of his principal for whom he is acting, such agent is not liable personally on the contract. *Lyons v. Miller*, 6 Gratt. 440.

Where a person sells a note in his own name for a valuable consideration, and it is clearly shown that he accounted with the maker of the note at a discount of four per cent. per month, while the discount to the plaintiff was only two per cent. per month, and that the difference was actual profit to the seller himself, such transferrer can not avoid personal responsibility for the genuineness of the instrument by claiming to have acted for a principal. *Lyons v. Miller*, 6 Gratt. 440.

Equity Will Not Aid to Enforce Inequitable Contract.—A real estate agent, who makes misrepresentations to a purchaser in regard to his principal's title, such principal being the vendor, in order to induce the purchaser to assign his title bond to him (the agent), can not sustain a suit in equity against such purchaser. *Gibbons v. Jackson*, 10 Leigh 381.

D. PRINCIPAL TO THIRD PERSONS.

Excessive Acts.—A person dealing with an agent who exceeds or deviates from his authority, deals with him at his peril. He can not in such case hold

the principal bound, unless there has been an intelligent ratification of the unauthorized act of the agent, free from mistake or fraud. *Halsey v. Monteiro*, 92 Va. 588, 24 S. E. 258; *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414; *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914.

Claim of Fraud and Double Dealing Must Be Made in the Pleadings.—It is no ground for relief to a purchaser to claim that members of the purchasing syndicate were the land agents through whom the sale was effected, and received a commission from the seller for their services, and that the agents occupied such improper and incompatible relation to the transaction as rendered it fraudulent; unless taken advantage of in the pleadings. *Ander-son v. Creston Land Co.*, 96 Va. 263, 31 S. E. 82.

Custom of Trade.—A custom or usage of real estate agents to get up syndicates to purchase real estate in their hands for sale can not affect a purchaser who has no knowledge of such custom. To be secretly in the service of one party, while ostensibly acting solely for the opposite party, is a fraud upon the latter, and a breach of public morals which the law will not permit. A custom of trade can not change the intrinsic character of the contracts of parties who are ignorant of such custom. In the case at bar the notes held by appellants and the deed of trust made to secure them, were each executed by one who had no authority to execute them, and the evidence fails to show that the principals, after full knowledge of all the facts, confirmed or ratified the acts of those who professed to act in their behalf. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397. See generally, the title **USAGES AND CUSTOMS**.

Brothel.

See the title **DISORDERLY HOUSES**.

BROTHERS.—The term **brothers** extended to mean **brothers** and their heirs. *M'Clintic v. Manns*, 4 Munf. 331.

Bucket Shop.

See the titles **GAMBLING CONTRACTS**; **GAMING**.

BUGGERY.—The penetration of a beast by a man against the order of nature without emission constitutes **buggery**. *Com. v. Thomas*, 1 Va. Cas. 307. See also, the title **SODOMY**.

Builders.

See the titles **INDEPENDENT CONTRACTORS**; **WORKING CONTRACTS**.

Builder's Lien.

See the title **MECHANICS' LIENS**.

BUILDING AND LOAN ASSOCIATIONS.

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CROSS REFERENCES.

See the titles **BANKRUPTCY AND INSOLVENCY**, ante, p. 232; **CONFLICT OF LAWS**; **CORPORATIONS**; **FOREIGN CORPORATIONS**; **INTEREST**; **USURY**.

I. Organization.

The act of May 29, 1852, which authorized the organization of building fund associations without order of court, has not been repealed by subsequent statutes. *Davies v. Creighton*, 33 Gratt. 696.

This act was omitted from Va. Code, 1887, and, being a law of a general nature, was repealed by § 4202. *Crabtree v. Bldg. Ass'n*, 95 Va. 673, 29 S. E. 741.

II. Powers and Rights in General.

Right to Qualify, Diminish or Waive Powers Conferred.—The articles of an association prescribed the limits within which the corporation can properly act; the by-laws indicate the extent to which the corporation has seen fit to put into action the powers which the articles have conferred, and though the charter or articles in conferring the power may use imperative of mandatory language, yet if it be a benefit, a privilege or advantage conferred upon the corporation, such as the power to impose fines on delinquent stockholders, and not a duty imposed, it may qualify, diminish, or waive its exercise in whole, or in part. *Dupuy v. Eastern B. & L. Ass'n*, 93 Va. 460, 25 S. E. 537.

Levy and Enforcement of Fines and Fees.—When the statute provides that, "stated dues, fines, etc.," may be assessed and collected, the association may levy reasonable fines and may provide for payment of a reasonable transfer fee and the payment of these may be enforced by the corporation. *McGannon v. Cent. Bldg. Ass'n*, 19 W. Va. 726; *Dupuy v. Eastern B. & L. Ass'n*, 93 Va. 460, 25 S. E. 537; *Parker v. U. S. Bldg., etc., Ass'n*, 19 W. Va. 744.

Preference by Confession of Judgment Prohibited.—A building association can not defeat a claim of the

assignee or a member by confessing judgment in favor of another creditor. *Tate v. Building Ass'n*, 97 Va. 82, 33 S. E. 382.

Of Foreign Association.—Foreign building associations legally doing business in this state have the same rights, powers, and privileges, and are subject to the same regulations, restrictions, and liabilities, as domestic associations. *Archer v. Baltimore B. & L. Ass'n*, 45 W. Va. 37, 30 S. E. 241.

Foreign Association Must Comply with State Laws.—A foreign building and loan association can do no act, make no contract, and exercise no power in this state not permitted to like corporations organized under the laws of this state. The exercise by such corporation of any power not possessed by a similar domestic corporation would be repugnant to the public policy of the state, and for that reason would be restrained by the courts of this state. *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653; *Prince v. Holston Nat. B. & L. Ass'n*, 55 W. Va. 19, 46 S. E. 712.

III. Officers and Agents.

Representations of Agents.—A building association is not bound by the statements of its agent as to a balance due on a loan, it appearing that his duty was simply to receive and receipt for premiums and dues payable to the association. *Day v. Building Ass'n*, 96 Va. 486, 31 S. E. 902.

Estoppel of Secretary Prosecuted for Embezzlement to Deny Legal Existence of Association.—One who as secretary of a building fund association receives and wrongfully appropriates its funds, can not be heard, upon a criminal prosecution therefor, to contradict the legal existence of such association. *Shinn v. Com.*, 32 Gratt. 899; *Pixley v. Roanoke, etc., Co.*, 75 Va. 320; *Crump v. U. S. Mining Co.*, 7 Gratt. 352. See note in 11 Am. &

Eng. Corp. Cas., N. S., 398 et seq.; Nat. B. & L. Ass'n v. Ashworth, 91 Va. 706, 22 S. E. 521.

IV. Stock.

A. TIME OF MATURITY.

New York Statute Construed.—According to New York law, an association has no power to guarantee that stock will be matured in a fixed time. To hold otherwise would be to so decide at the expense of other stockholders. *Campbell v. Building Ass'n*, 98 Va. 729, 37 S. E. 350.

Nor is obligation to pay dues on stock void for uncertainty. The company had no power to make anything but an indefinite contract, so far as the time when its stock would mature is concerned. *Campbell v. Building Ass'n*, 98 Va. 735, 37 S. E. 350.

B. LIABILITY INCIDENT TO OWNERSHIP OF STOCK.

Forfeiture No Defense When Waived by Company.—One who has forfeited his stock by reason of nonpayment of dues, can not insist on such forfeiture to escape the liability incident to the ownership thereof when the company has waived such forfeiture. *Nickles v. People's Bldg. Ass'n*, 93 Va. 380, 25 S. E. 8.

C. EFFECT OF ASSIGNMENT OF STOCK TO ASSOCIATION.

The assignment of his shares of stock to the association, does not release a member from his covenant, as a party to the articles of association, to make his regular monthly payments on stock, and on account of fines. *White v. Mechanics' Bldg. Fund Ass'n*, 22 Gratt. 233; *Edelin v. Pascoe*, 22 Gratt. 826; *Winchester Bldg. Ass'n v. Gilbert*, 23 Gratt. 787. See the titles INTEREST; USURY.

A borrowing member of a building association, assigning his stock to it as collateral security for his loan, and agreeing to pay periodical dues on his stock, still continues a member of the

association. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

The doctrine that when a shareholder becomes a borrower to the full par value of his stock, and surrenders his stock to the association, he is no longer a shareholder, nor entitled to share in its profits and losses, is foreign to the purpose of building associations, and tends to destroy their character as such. For so long as a borrower is interested in the earnings of the association, and entitled to a pro rata distribution thereof as a credit on his stock or dues, he must be rated as a member. *Day v. National B. & L. Ass'n*, 53 W. Va. 550, 44 S. E. 779.

D. REDEMPTION OF STOCK.

A building fund association by the redemption of shares of stock acquires the right of property therein. The assignment thereof to the association is not an hypothecation for a loan, but an absolute surrender of them to the association, and consequently can not entitle such assignor to participate in the final division and distribution. *White v. Mechanics' Bldg. Fund Ass'n*, 22 Gratt. 233; *Winchester Bldg. Ass'n v. Gilbert*, 23 Gratt. 787; *Cason v. Seldner*, 77 Va. 293.

In this case the division was required to be made when the accumulated fund should be sufficient to pay on each of the unredeemed shares two hundred dollars; after the payment of all debts and liabilities of the association. It was held, that such article of the association was not in conflict with § 7 of the statute under which the association was organized. *White v. Mechanics' Bldg. Fund Ass'n*, 22 Gratt. 233.

V. Loans.

A. IN GENERAL.

Statutes and By-Laws Part of Contract of Loan.—The statutes relating to a building association, and its by-laws, so far as they touch its loans, are a

part of the contract of loan made by it; and wherein the contract of loan violates such statute or by-laws it is void, and the contract is construed according to the statute or by-laws, and so enforced, as every borrowing member is charged with the knowledge of the same. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

Lien for Advances—Priority.—A building fund company agrees to advance to one of its members money to build a house on a lot owned by him, and advances a part of the money and takes a lien upon the lot and the buildings which may be erected upon it, to secure the advances made and to be made. The member then makes a contract for the building of a house on the lot, with a mechanic who, to raise money faster than it can be gotten from the company, assigns the contract to a person who undertakes to advance the money; and the contract is recorded, so as to create a mechanic's lien. After the contract is recorded, the company advances money from time to time, as it had agreed to do, which is paid to the assignee in part satisfaction of his advances to the mechanic, with a knowledge on his part, that it comes from the company, and that the company claims priority of lien upon the property. The company is entitled to priority over the mechanic's lien, for its advances made after the contract was recorded, as well as for its advances made before. *Iaeger, etc., v. Bossieux*, 15 Gratt. 83, 76 Am. Dec. 189; *Nat. Mut. B. & L. Ass'n v. Blair*, 98 Va. 490, 36 S. E. 513.

Sale under Deed of Trust.—Borrower from a building association gave a deed of trust allowing sale on defaults for cash enough to pay sums due to association and credit as to the residue. It was held, that such deed did not authorize sale for cash enough to cover amounts not yet due. *Fox v. Cottage Bldg. Fund Ass'n*, 81 Va. 677.

When a deed of trust authorizes a

sale to pay an amount to be ascertained by referees appointed according to the articles of association, the sale should not be made until such indebtedness is ascertained. *National B. & L. Ass'n v. Ashworth*, 91 Va. 796, 22 S. E. 521; *White v. Mechanics' Bldg. Fund Ass'n*, 22 Gratt. 233; *Morgan v. Brent*, 25 Gratt. 104; *Kendrick v. Whitney*, 28 Gratt. 646; *Horton v. Bond*, 28 Gratt. 815; *Rohrer v. Travers*, 11 W. Va. 155; *Scott v. Ludington*, 14 W. Va. 387; *Christian v. Cabell*, 22 Gratt. 82; *Lipscombe v. Rogers*, 20 Gratt. 660; *Wash., etc., R. Co. v. Alex., etc., R. Co.*, 19 Gratt. 617; *Carroll Co. v. Collier*, 22 Gratt. 310; *Pairo v. Bethell*, 75 Va. 831; *Alexander v. Howe*, 85 Va. 201, 7 S. E. 248; *Muller v. Stone*, 84 Va. 838, 6 S. E. 223.

Loan Secured by Deed of Trust on Real Estate of Third Party.—In any case a building association, that loans money to a member, has a right to take a deed of trust on the real estate of a third party to secure the payment of the money loaned and the interest thereon and all fines and other charges, with which the member may be legally assessed by reason of his ownership of the shares redeemed and the repayment of all sums, which the association may have to pay for taxes or insurance on the property conveyed by the deed of trust, and also to secure the premium bid by the member for the preference in taking such loan, provided the association has not forfeited its right to take or demand such premium by neglecting to see that the money loaned was applied to the purpose named in W. Va. Code, 1899, ch. 54, § 25. *Pfeister v. Wheeling Bldg. Ass'n*, 19 W. Va. 676. See post, "Power to Make Contracts Contrary to Usury Law," V, B, 1.

In such cases the building association is under no obligation to notify such third person of the failure of the member, who has borrowed the money, to pay his interest, fines or dues

promptly. Such third person must protect his own interest by making inquiries as to whether the member is fulfilling his obligations to the association. *Pfeister v. Wheeling Bldg. Ass'n*, 19 W. Va. 676.

B. INTEREST, PREMIUM AND USURY.

Generally, as to interest and usury, see the titles INTEREST; USURY.

1. Power to Make Contracts Contrary to Usury Law.

Courts Have No Power to Authorize.—The legislature may create a corporation with power to make contracts contrary to existing usury laws. But the courts have no such power. The power that erects may remove. Article 1, § 6 of the Bill of Rights has no application to such case. *Smoot v. Building Ass'n*, 95 Va. 686, 29 S. E. 746; *Town of Danville v. Pace*, 25 Gratt. 1; *Bosang v. B. & L. Ass'n*, 96 Va. 119, 30 S. E. 440; *Crabtree v. Old Dom. Bldg. Ass'n*, 95 Va. 670, 29 S. E. 741; *White v. Mechanics' Bldg. Fund Ass'n*, 22 Gratt. 233; *Archer v. Balt. B. & L. Ass'n*, 45 W. Va. 37, 30 S. E. 241; *Pfeister v. Building Ass'n*, 19 W. Va. 676; *Parker v. U. S. Bldg. Ass'n*, 19 W. Va. 769. See the title USURY.

A charter granted under § 1145 of Va. Code, 1887, is subject to the general laws of the commonwealth. An association organized under § 1145 can not vouch its charter to justify or excuse any violation of the law upon the subject of usury. *Crabtree v. Building Ass'n*, 95 Va. 670, 29 S. E. 741.

Purposes for Which Money Loaned Must Be Used.—Homestead and building associations in this state are incorporated under W. Va. Code, 1899, ch. 54, p. 411. Section 25 of this chapter provides: "Homestead and building associations formed under this chapter may be for the purpose of raising money to be used among the members of such corporation in buying lots or houses, or in building or repairing

houses;" section 20 provides: "Such corporations shall not use or direct the funds thereof for or to any other object or purpose than those mentioned in the preceding section; and in case said funds shall not be so used or directed, the association so using or directing them shall forfeit all its rights and privileges as a corporation;" and section 27 provides: "Every such corporation is authorized to levy, assess and collect from its members such sums of money by stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation by its laws shall provide; also to acquire, hold, convey, and encumber all such real estate and personal property, as may be legitimately pledged to it on such loans or transferred to it in the due course of lawful business; provided that the dues, fines, and premiums paid by the members of such corporation, although paid in addition, to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious." It was held, that by virtue of these sections it is the duty of a building association in this state to see that money paid to its members on loans advanced under the provisions of § 27 is used by the member to buy lots or houses or to build or repair houses, and when a building association fails to perform its duty in seeing that the money so loaned by it is applied by the members to the purpose specified in § 25, it thereby forfeits the privilege conferred on it by the proviso in § 27 of being exempted from the operation of the usury laws in receiving premiums on money so loaned and used for illegitimate purposes. *Pfeister v. Wheeling Bldg. Ass'n*, 19 W. Va. 676.

But in such a case the corporation has a right to enforce the payment of the principal of the money actually advanced to the member redeeming his

share with legal interest thereon at the rate of six per cent. per annum, but has no right to collect compound interest on the money so actually advanced, though this be stipulated in the contract. Nor has it the right to enforce the payment of the premium bid, such premium being regarded as usurious interest in such case. But it has in such case a right to enforce the collection of such reasonable fines, as it may have imposed on the member for the nonpayment promptly of dues. *Pfeister v. Wheeling Bldg. Ass'n*, 19 W. Va. 676.

2. Authority to Fix Premium.

Building associations are authorized to adopt by-laws fixing a minimum premium at which to award loans to their members, such premiums to be deducted from the loans in advance or paid in periodical installments. *Archer v. Baltimore B. & L. Ass'n*, 45 W. Va. 37, 30 S. E. 241; *McConnell v. Cox*, 50 W. Va. 469, 40 S. E. 349; *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653; *Prince v. Holston National B. & L. Ass'n*, 55 W. Va. 19, 46 S. E. 711; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149, 46 S. E. 817; *Counselman v. National B. & L. Ass'n*, 97 Va. 261, 33 S. E. 603; *Gray v. Baltimore Loan Ass'n*, 48 W. Va. 164, 37 S. E. 533.

"Every building and loan association shall have the power to provide by its by-laws for selling to the stockholders who shall bid the highest premium therefor, the money in the treasury, or in default of bidders at or above a minimum premium, may award to a member the value of any shares held by him less such minimum premium; the minimum premium and the mode of making the award to be fixed by the by-laws. Or such association may charge and receive a premium bid by the stockholder for the priority of right to such loans, in periodical installments, but the by-laws of every association shall set forth whether the

premium bid for the prior right to such loan shall be deducted therefrom in advance, or be paid in periodical installments." *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653.

There is a difference between a premium, the amount of which is ascertained and fixed at the time the loan is made, and then divided into installments and paid periodically, and a premium of a certain sum, to be paid on such share each month for an indefinite and uncertain length of time. The former arrangement is plainly contemplated and required by our statute. *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653.

Our statute requires no precedent fixtures or certainty as to the stock dues, but as to the premium it must be so fixed in advance that the borrower can know exactly how many dollars he is to pay on account of premium, and how much of his money is to go into profits or losses of the company, and not become a direct credit upon his loan. *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653.

3. What Constitutes Usury.

"A percentage payable indefinitely at fixed periods is interest, and although it be called 'premium,' and is in addition to the legal rate of interest already charged, it is usurious, and should be expunged from the account." *McConnell v. Cox*, 50 W. Va. 471, 40 S. E. 349.

Obligation to Pay Six Per Cent. until Termination of Association.—A bond which obligates a stockholder to pay interest at six per cent. per annum on the sums actually received until the termination of the association does not render the transaction usurious. *White v. Mechanics' Bldg. Fund Ass'n*, 22 Gratt. 233; *Edelin v. Pascoe*, 22 Gratt. 826; *Winchester Bldg. Ass'n v. Gilbert*, 23 Gratt. 787. See the titles INTEREST; USURY.

4. What Constitutes a Loan within Operation of Usury Law.

When in redeeming shares a building association advances money to a member, who has bid the highest premium for the precedence in taking the money, such advance of money is a loan, and as such it is under the operation of the statute against usury, except so far as it is protected against the operation of the usury law by the proviso in W. Va. Code, 1899, ch. 54, § 27. *Pfeister v. Wheeling Building Ass'n*, 19 W. Va. 676. See ante, "Power to Make Contracts Contrary to Usury Law," V, B, 1.

5. Conflict of Laws.

As to conflict of laws in general, see the title CONFLICT OF LAWS.

Comity recognizes only the general laws of the foreign state, not the local exemptions from, or exceptions to, such laws; therefore, a building and loan association exempted from the usury laws of its own state can not carry that exemption into and assert it in the courts of another state. *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653.

The *locus solutionis* determines whether the contract be usurious. If the by-laws show that the contract is to be performed in a state by whose laws the contract is valid, the contract will be deemed valid when made. *Nickels v. People's Bldg. Ass'n*, 93 Va. 380, 25 S. E. 8; *National B. & L. Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Ware v. Banker's L., etc., Co.*, 95 Va. 680, 29 S. E. 744; *People's B. & L. Ass'n v. Tinsley*, 96 Va. 322, 31 S. E. 508; *Counselman v. Building Ass'n*, 97 Va. 261, 33 S. E. 603; *Saunders v. Baltimore Ass'n*, 99 Va. 140, 37 S. E. 775.

Right of Foreign Association to Contract for Premiums and Fines.—"A foreign building and loan association doing business in this state may con-

tract for premiums and fines in addition to legal interest on money loaned on stock, when so authorized by the laws of the state of its creation, without violating the usury statutes of this state." *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653. See *Archer v. Baltimore B. & L. Ass'n*, 45 W. Va. 37, 30 S. E. 241.

Provisions Enforcible by Foreign Company against Virginia Stockholders.—A building and loan association, organized under the laws of a foreign state which expressly declare that "the imposition of fines for the nonpayment of dues or fees or other violations of the articles of association, or the making of the monthly payment required by the articles, or of any premium for loans made to members shall not be deemed to be a violation of the provisions of any statute against usury," may enforce such provisions against a Virginia stockholder. *Cowan v. National Mut. B. & L. Ass'n*, 2 Va. Dec. 658.

6. Defense of Usury Is Personal.

The defense of usury is personal to the debtor and one who purchases land that is under a deed of trust to a building and loan association for usurious debt can not set up usury as a defense against the association. *Prince v. Holston Nat. B. & L. Ass'n*, 55 W. Va. 19, 46 S. E. 708; *Saunders v. Baltimore B. & L. Ass'n*, 99 Va. 140, 37 S. E. 775.

But a purchaser charged with a usurious debt can set up the defense of usury if the debtor unites with him in the defense or his consent to such defense appears in the record. *Harper v. Building Ass'n*, 55 W. Va. 149, 46 S. E. 817.

VI. Termination of Membership and Effect Thereof.

When death intervenes membership in a building and loan association ceases, and fines for the nonpayment

of dues, interest and premium can not be collected. *Shahan v. Shahan*, 48 W. Va. 477, 37 S. E. 552.

Terms of Withdrawal Governed by Constitution.—The terms of a member's withdrawal from a building association are governed by the constitution of the association. Though the language used in the constitution be inappropriate in a particular case, yet if the general purpose intended can be carried out, some of the details may be disregarded in order to effect the general purpose. *Haigh v. United States B. & L. Ass'n*, 19 W. Va. 792; *Eastern Bldg. Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298.

Subsequent By-Law Can Not Take from a Stockholder the Right to Withdraw.—The law is well settled that a building association by subsequent by-laws can not take from a stockholder therein a vested right, such as the manner and time of withdrawal of their stock acquired under by-laws existing at the date of the contract made with the association at the time said shares were acquired. *Savage v. People's B. & L. Ass'n*, 45 W. Va. 275, 31 S. E. 991.

The position of a withdrawing member is anomalous. He is not an ordinary creditor; he can not compete with outside creditors. He is not a member, for he can not take part in the affairs of the society. He can not sue at all until there is money in the treasury legally applicable to the payment of his claim; and until that time the statute of limitations does not begin to run against him. If the association refuse to provide for such fund, he may ask for a receiver to wind up the affairs of the company. *Andrews v. Roanoke Building Ass'n*, 98 Va. 445, 36 S. E. 531.

As to effect of notice of withdrawal after insolvency, see post, "Right of Stockholders Can Not Be Defeated by Notice of Withdrawal," VII, D.

VII. Insolvency.

A. ASSIGNMENT PRESUMED TO BE BY AUTHORITY OF STOCKHOLDERS.

A deed of assignment by an insolvent corporation for the benefit of creditors and stockholders is presumed to have been made by the authority of the stockholders, until it is shown to be without such authority. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

B. ACQUIESCENCE PRECLUDING STOCKHOLDERS FROM CONTESTING VALIDITY OF ASSIGNMENT.

Where an assessment by an insolvent building association of its assets for the benefit of creditors and members made by order of the directors, without authority of stockholders, is acquiesced in for a considerable time, or acted under by positive acts of stockholders, and its impeachment would disturb the state of things arising under the assignment, such stockholders will be barred by laches and acquiescence from contesting the validity of the assignment to the prejudice of other parties. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

C. EFFECT UPON A BORROWING MEMBER.

Debts Are at Once Collectable.—When a building association becomes insolvent and unable to go on with its business, and its affairs must be wound up, the debts of a borrowing member are at once collectable, though not yet payable by their terms; and the obligation of members to pay dues on stock ceases, as the loan contract is abrogated by the insolvency, so far as the contract remains unexecuted. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 512, 38 S. E. 670.

Must Be Charged with His Debt and Credited with All Moneys Paid in.—Upon insolvency of a building as-

sociation, in winding up its affairs a borrowing member must be charged with his debt and interest, and credited with all moneys paid in by him except dues on stock. After payment of debts he gets his share of the residue, in the final distribution of what remains after payment of expenses of winding up and debts. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

Court May Credit Value of Stock on His Indebtedness.—If it be safe to all interests and practicable to ascertain the present value of the stock, the court may, for the present relief of a borrowing member, credit that value of his stock on his indebtedness, without deferring its application till the final wind up. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

Dues Paid on Stock Not to Be Credited on His Debts.—Upon the insolvency of a building association the dues paid on stock by borrowing members are not to be credited on the debts of such members. *Young v. Improvement B. & L. Ass'n*, 48 W. Va. 513, 38 S. E. 670.

D. RIGHT OF STOCKHOLDERS CAN NOT BE DEFEATED BY NOTICE OF WITHDRAWAL.

When insolvency exists as a fact the right of the stockholders to equality in the distribution of the assets of the association attaches, and can not be defeated by a notice of withdrawal, nor by any dealing between the members and the officers of the association which falls short of actual payment. "Insolvency," as here used, means inability of the association to satisfy the demands of its own members. *Colin v. Wellford*, 102 Va. 581, 46 S. E. 780.

VIII. Taxation.

Tax upon Capital Void.—A tax upon the capital of a building and loan association is void. Such associations

have no capital to be taxed. If, in fact, there is a given sum in the treasury it came from stockholders and they are thus taxed with it, and to assess it to the association would be duplicate taxation. *Ohio Valley B. & L. Ass'n v. Cabell Co.*, 42 W. Va. 818, 26 S. E. 203.

Ordinance May Exempt from Taxation.—An ordinance may exempt from taxation "the capital of building and loan associations whose loans should thereafter be applied exclusively to constructing buildings within the corporate limits of a certain town" *Danville v. Shelton*, 76 Va. 325.

IX. Pleading and Practice.

Suit by Stockholders — Multifariousness.—Stockholders who come into a court of equity and seek to have their contracts of subscription rescinded on the ground that they were fraudulently obtained, can not in the same bill complain of the malfeasance or misfeasance of the corporate directors in the management of the corporate property, and seek relief which rests upon their relation as stockholders of the defendant company. Such relief must be considered a distinct act of affirmation and ratification of the very transaction which they in another part of their bill sought to repudiate. *Day v. Building & Loan Ass'n*, 53 W. Va. 553, 44 S. E. 779.

Defense of Usury Must Be Plead.—In a suit against a building and loan association to enforce the collection of a demand the defense of usury must be pleaded either by special plea or answer or it can not be relied upon at the hearing. *Building, etc., Ass'n v. Westfall*, 55 W. Va. 315, 47 S. E. 74.

Withdrawing Member Can Recover Amount Due Him under Common Counts.—"A member of a building association who complies with its constitution and by-laws, and, under their provisions, withdraws, can recover

the amount due him under such constitution and by-laws, by an action of assumpsit, in which there is no special count, but only the common counts." *Haigh v. United States B. & L. Ass'n*, 19 W. Va. 793; *Savage v. People's B. & L. Ass'n*, 45 W. Va. 275, 31 S. E. 991.

All Stockholders Should Be Made Parties to Winding Up Suit.—In a

suit to wind up the affairs and to collect and distribute the assets of the association, all the stockholders should be made parties, including such as are alleged to have been illegally released from their obligations to the association. *Cason v. Seldner*, 77 Va. 299; *Styles v. Laurel, etc., Co.*, 45 W. Va. 374, 32 S. E. 227. See W. Va. Code, 1899, §§ 25, 26, 27, 28, 29.

Building Contracts.

See the title WORKING CONTRACTS.

BUILDING RESTRICTIONS.

CROSS REFERENCES.

See the titles COVENANTS; DEEDS.

As to statutory and municipal regulations and restrictions for guarding against damages from fires, see the title FIRES.

Provisions Restraining Erection of Certain Buildings Held to Be Covenants.—A deed conveying land to a railroad company for railroad purposes contained the following provision: "Provided, however, that the said company shall have no power to sell or convey said land to any other person, nor shall the said company have the right to use any portion of said land for any other purposes than those strictly connected with the business

of the road. Nor shall said company have the right to erect any buildings on said land designed for residence for the agents or servants of the company, or for any other person." It was held, that these provisions amounted to covenants, and not to conditions subsequent, the nonfulfilment of which would result in a forfeiture of the estate. *King v. Norfolk & Western R. Co.*, 99 Va. 625, 39 S. E. 701.

BUMPER.—See *Richmond, etc., R. Co. v. George*, 88 Va. 225, 13 S. E. 429.

Burden of Proof.

See the title PRESUMPTIONS AND BURDEN OF PROOF.

BURGLARY AND HOUSEBREAKING.

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I. Definitions.

At the common law burglary is defined as the breaking and entering of the mansion house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. *Clarke v. Com.*, 25 Gratt. 911.

"Burglary is the breaking and entering the house of another in the night time with intent to commit a felony therein, whether the felony be actually committed or not." *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1100.

By statute, both in Virginia and West Virginia, the common-law crime of burglary has been enlarged. The statutes do not, however, attempt to define burglary, except to declare that if a person break and enter a dwelling house in the night time with intent to commit larceny, although the thing stolen, or intended to be stolen, is of less value than twenty dollars, he shall be deemed guilty of burglary. Va. Code, 1887, §§ 3704-3706; W. Va. Code, 1899, ch. 145, §§ 11-13; *State v. Meadows*, 22 W. Va. 766; *State v. Cad-*

dle, 35 W. Va. 73, 12 S. E. 1100; *Benton v. Com.*, 89 Va. 570, 16 S. E. 725. See post, "Elements of the Offense," II.

Breaking and entering a house in the night time, with intent to commit larceny, may be punished by imprisonment in the penitentiary or in jail, at the discretion of the jury, and is a felony. Va. Code, 1887, § 3706; *Benton v. Com.*, 89 Va. 570, 16 S. E. 725.

II. Elements of the Offense.

A. BREAKING AND ENTERING.

In General.—In order for a person to commit the crime of burglary or housebreaking he must break and enter a house. *Clarke v. Com.*, 25 Gratt. 912; *Finch v. Com.*, 14 Gratt. 643; *Hunter v. Com.*, 7 Gratt. 641.

The word "break" used in the statute as to housebreaking is borrowed from the law in regard to burglary. If then, in any case, a party shall by even slight force remove or displace anything attached to the house as a part thereof, and relied on by the occupant for safety of the house, it is housebreaking within the meaning

of the statute, if the other constituent parts of the offense exist. *Finch v. Com.*, 14 Gratt. 643.

Opening Closed Door.—An entry into a dwelling house in the daytime, through a door that was closed so that it came within the casing, and to open which required some degree of force, constitutes in law a breaking; though there was no fastening of any other kind on the door. *Finch v. Com.*, 14 Gratt. 643.

Entering by Consent of One Joint Owner.—A and B rented a room jointly, of which each had a key. C. rented an adjoining room, the doors of the two rooms entering upon the same porch near each other. They frequently interchanged visits. On the night of March 11, 1874, A locked his door, took his key and started to church. On the way he met B, who said he was going to his room, and would follow him to the church soon. B and C. conspired to steal A's goods in his absence, and B opened the door with his key, and they entered the room, and took and carried away A's trunk with its contents. It was held, that this was not such a breaking as would constitute burglary in *C. Clarke v. Com.*, 25 Gratt. 908.

Removal of Cloth Hung Over Window.—Quære, whether the removal of a cloth from one of the nails by which it hung over a window is a sufficient breaking to constitute burglary. *Hunter v. Com.*, 7 Gratt. 641.

Constructive Breaking.—The breaking which is an essential part of the crime of burglary may be either actual or constructive. Constructive breaking is not by violence, which, more or less, is supposed to be embraced in every actual breaking; but is, "where an entrance is obtained by threats, fraud or conspiracy." *Clarke v. Com.*, 25 Gratt. 912.

B. PREMISES SUBJECT TO BURGLARY.

Kind of House.—"The criminal law

of this state includes all buildings, as either a dwelling house, or outhouse adjoining thereto, or occupied therewith, or as an office, shop, warehouse, banking house, or building other than a dwelling house. The use of the building at the time of the offense determines its character." *State v. Williams*, 40 W. Va. 268, 21 S. E. 721.

Houses Included within "or Other House" in Statute.—A millhouse is embraced within the meaning of the words "or other house" which follows the enumeration of houses which are subject to burglary in § 3705 of the Virginia Code, 1887. *Cool v. Com.*, 94 Va. 801, 26 S. E. 411.

The words "or other house" in ch. 145, § 12, of the Code of West Virginia, 1899, include a dwelling house. *State v. McDonald*, 9 W. Va. 456; *State v. Williams*, 40 W. Va. 268, 21 S. E. 721.

Unoccupied Dwelling House.—A house built and used for a dwelling house, and ordinarily designated as such to distinguish it from a building of a different kind, and which, up until the time of the offense charged, had been occupied by the owner with his goods and furniture, and in which he occasionally slept is a dwelling house. "It would be drawing the distinction exceedingly fine, and with simply technical precision, to hold that a dwelling house was a building other than a dwelling house for the reason that some one was not staying in it just at the time it was broken into and the occupants' goods were stolen therefrom." *State v. Williams*, 40 W. Va. 268, 21 S. E. 721.

An instruction that "If the jury believe from the evidence that John B. Morrison held the possession of said house at the time alleged in the indictment, and that he used and occupied said house as a dwelling, then, in contemplation of law, said house was the dwelling house of John B. Morrison,

although he may have absented himself therefrom for several months, and although he may have had another dwelling house during the same time" sufficiently describes the house as a dwelling house and was properly given. *State v. Williams*, 40 W. Va. 268, 21 S. E. 721.

Millhouse.—Section 3705 of the Va. Code, 1887, enumerates some of the premises which are subject to burglary and adds "or other house." By the act of February 12, 1894, this section was so amended as to omit the words "or other house;" but these words were again restored by the act of January 9, 1896. During the period between February 12, 1894, when the words "or other house" were omitted, and January 9, 1896, when they were restored, the law punished the breaking and entering of only those houses especially enumerated, and contained no general description of "house," broad enough to cover the breaking and entering of a "millhouse," for a millhouse is neither an office, shop, storehouse, warehouse, or banking house. During that interval to break and enter a "millhouse" with intent to commit larceny was not a felony. *Cool v. Com.*, 94 Va. 801, 26 S. E. 411, wherein it was held, that the indictment was defective in not alleging whether the breaking and entering was prior or subsequent to the amendment.

C. TIME OF BREAKING AND ENTERING.

In burglary the offense must be committed in the night time. *Com. v. Weldon*, 4 Leigh 659; *Clarke v. Com.*, 25 Gratt. 911; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1100.

As to breaking or entering in the daytime, see Va. Code, 1887, §§ 3704-3706; W. Va. Code, 1899, ch. 145, §§ 11-13.

D. INTENT.

In General.—In order to render a

person guilty of the offense of burglary it is necessary that the breaking and entering be done with the intent to commit a felony, and it is essential that the intent be averred and proved in order to sustain a conviction. *Clarke v. Com.*, 25 Gratt. 911; *Vaughn v. Com.*, 10 Gratt. 758; *Speers v. Com.*, 17 Gratt. 573; *State v. Meadows*, 22 W. Va. 770; *State v. McDonald*, 9 W. Va. 460; *State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162; *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098; *State v. Flanagan*, 48 W. Va. 119, 35 S. E. 862; *State v. Shores*, 31 W. Va. 491, 7 S. E. 420.

The intent constitutes an essential part of the crime of burglary and should be both alleged and proved. *Vaughn v. Com.*, 10 Gratt. 758.

The breaking and entering a storehouse on such a charge is not sufficient, but it must also be shown on the trial of the indictment that charges it was broken and entered with intent to commit larceny and that the intent existed in the mind of the prisoner when he broke and entered the storehouse. *State v. Shores*, 31 W. Va. 491, 7 S. E. 414.

Where the evidence of the intent to steal the goods as charged in the indictment is not sufficient to sustain the charge, and the defendant moves to exclude the state's evidence, such motion should be granted. *State v. Flanagan*, 48 W. Va. 120, 35 S. E. 862.

Property Taken in Presence of Owner.—That property is taken openly in the presence of the owner, affords a strong presumption that it was not taken feloniously but under a bona fide claim of right. *State v. Shores*, 31 W. Va. 491, 7 S. E. 420; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098.

Where it appeared upon a trial for burglary that three persons, much intoxicated, went into a store and called for cider, which they drank and paid for, went out and came in again and

called for more, which was poured out to them and delivered to them in glasses on the counter, and a pistol was discharged in the house, and they all went out leaving the cider in the glasses on the counter, and they returned and found the store lighted, it being about 10 o'clock at night, and pushed against the door which was locked and it broke open, and they went in, followed by other persons against whom there was no charge or suspicion, and there in the light and in the presence of the other persons drank the cider, the refusal of an instruction that tells the jury under these circumstances that if they in good faith believed they had a right to drink the cider, that it was theirs, then they did not have the intent to steal the same, is error. *State v. Shores*, 31 W. Va. 491, 7 S. E. 414.

III. Indictment.

A. ALLEGATIONS.

1. Necessity of Laying Venue.

An indictment for burglary laying the offense as committed in the county of N. in the parish of H., without the words, within the jurisdiction of this court, or within the county, or the district composed of the counties for which the court is held, was bad, after verdict, until the act of January 24, 1804. *Com. v. Richards*, 1 Va. Cas. 1.

2. Ownership of Premises.

Necessity of Allegation of Ownership.—In an indictment for burglary, it is essential to state the ownership of the house entered. *State v. Reece*, 27 W. Va. 377; *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919; *State v. Hill*, 48 W. Va. 132, 35 S. E. 831; *State v. Betsall*, 11 W. Va. 730; *Webster v. Com.*, 80 Va. 598; *Butler v. Com.*, 81 Va. 159; *Wright v. Com.*, 82 Va. 183; *Henderson v. Com.*, 98 Va. 794, 34 S. E. 881; *Speers v. Com.*, 17 Gratt. 570; *Vaughan v. Com.*, 17 Gratt. 576.

The statutory offense of entering a store or house not occupied or in con-

nection with a dwelling house is in its essential ingredients the same as burglary and every reason which would require an indictment to state the ownership of the house in the one case would likewise require it in the other. Such statement is indispensable in either case. *State v. Reece*, 27 W. Va. 377; *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919; *State v. Hill*, 48 W. Va. 132, 35 S. E. 831; *State v. Betsall*, 11 W. Va. 730; *Webster v. Com.*, 80 Va. 598; *Butler v. Com.*, 81 Va. 159; *Wright v. Com.*, 82 Va. 183; *Henderson v. Com.*, 98 Va. 794, 34 S. E. 881; *Speers v. Com.*, 17 Gratt. 570; *Vaughan v. Com.*, 17 Gratt. 576.

An indictment for breaking and entering a storehouse not adjoining a dwelling house with intent to commit larceny, which fails to state the ownership of the storehouse so broken and entered, is fatally defective. *State v. Reece*, 27 W. Va. 375.

Sufficiency of Allegation.—An indictment charging that the defendant on a certain day, a certain millhouse not adjoining to or occupied with the dwelling house of F. in the night time, feloniously did break and enter sufficiently alleges the ownership of the millhouse to be in F., and is sufficient in law. *Webster v. Com.*, 80 Va. 598.

An indictment for the breaking and entering of "a certain storehouse, not adjoining or occupied with the dwelling house of one S.," sufficiently describes the storehouse as the property of S. *Butler v. Com.*, 81 Va. 159; *Speers v. Com.*, 17 Gratt. 570.

An indictment in the usual form for housebreaking need not negative the idea that the barroom, which was broken into and entered, adjoined any dwelling house except that of the owner of the barroom. *Lawrence v. Com.*, 81 Va. 484.

It has been held, that an indictment charging the prisoner with feloniously stealing and carrying away a lot of queensware, is good after verdict,

though it does not specify the articles or state they were the property of L. or any other person. *Vaughan v. Com.*, 17 Gratt. 576. And that an indictment charging that prisoner six labor tickets of the value of six dollars then and there feloniously did steal, take and carry away is good, though it does not specify the articles, or state that they were the property of J., or of any other person. *Wright v. Com.*, 82 Va. 183; *Vaughan v. Com.*, 17 Gratt. 576.

M. rents a barn from W., and for a consideration gives S. the privilege of keeping a horse and feed in the barn; there is but one door thereto, and M. and S. both carry keys to the same, and M. can take the privilege from S. at any moment; the barn is broken open and the furs of M. stolen therefrom. It was held, that it is proper in the indictment for the housebreaking, to describe the barn as the property of M., and not the property of M. and S. *State v. Betsall*, 11 W. Va. 730.

An allegation in the indictment that "the prisoner a certain outhouse and cellar not adjoining to nor occupied with the dwelling house of J. W. Hale, there situated, in the night time feloniously did break and enter, with intent," etc., does not allege the ownership of the outhouse and cellar to be in any one, and the indictment, as an indictment for "housebreaking," is fatally defective. *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919; *State v. Reece*, 27 W. Va. 377.

In *State v. Hupp*, 31 W. Va. 355, 6 S. E. 920, it was said: "In order to charge 'housebreaking,' all the authorities agree that the indictment shall allege the ownership of the house which has been broken into. 1 Whart. Crim. Law, § 816; Webster's Case, 80 Va. 598; Butler's Case, 81 Va. 162. In the last two cases it is held, that an indictment charging that 'the prisoner,' etc., 'a certain millhouse not adjoining to or occupied with the dwelling house of A.,' etc., sufficiently alleges

the ownership of the millhouse to be in A., and is sufficient in law. The indictment in *Speer's Case*, 17 Gratt. 570, is referred to in both the late Virginia cases. But *Speer's Case*, 17 Gratt. 570, is no authority, because the point was not in that case raised or considered."

Variance between Indictment and Proof.—See post, "Variance," V.

3. Time of Commission of Offense.

In every indictment for burglary it must distinctly and plainly appear that the offense was committed in the night time, but an indictment omitting to state such time may still be good as an indictment for larceny. *Com. v. Weldon*, 4 Leigh 652.

In *Cool v. Com.*, 94 Va. 799, 26 S. E. 411, where the indictment was for breaking and entering a "millhouse" with intent to commit larceny therein, the judgment was reversed for failure to state the time of the offense charged. If committed between February 12, 1894, and January 9, 1896, it was a misdemeanor; if before or after that period it was a felony. Time, therefore, was of the essence of the offense and should have been stated. See ante, "Premises Subject to Burglary," II, B.

4. Intent.

An indictment for burglary must allege that the breaking and entering was the intent to commit a felony. *Vaughn v. Com.*, 10 Gratt. 758; *State v. Flanagan*, 48 W. Va. 120, 35 S. E. 862; *State v. Shores*, 31 W. Va. 491, 7 S. E. 414; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098; *State v. McDonald*, 9 W. Va. 456.

An indictment for feloniously breaking and entering a dwelling house in the night time, with intent to commit larceny, is good under the twelfth section of chapter one hundred and forty-five in the W. Va. Code, 1899, and may be punished under the provision of the thirteenth section of same chapter. *State v. McDonald*, 9 W. Va. 456.

An indictment which charges a breaking into a house with intent to steal, and stealing therefrom, is an indictment for housebreaking, and not for larceny, and is good. *Butler v. Com.*, 81 Va. 159; *Speers v. Com.*, 17 Gratt. 570; *Wright v. Com.*, 82 Va. 183; *Vaughan v. Com.*, 17 Gratt. 576.

Use of Words "Burglariously" or "Feloniously."—An indictment for burglary must charge, that the offense was "burglariously" committed; otherwise, it is bad. *State v. Meadows*, 22 W. Va. 766; *State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162; *State v. McClung*, 35 W. Va. 280, 13 S. E. 655.

An indictment for common-law burglary must charge the breaking and entering to have been done "feloniously and burglariously." *State v. McDONALD*, 9 W. Va. 456.

B. JOINDER OF COUNTS OR OFFENSES.

See post, "Verdict and Sentence," VI.

In General.—An indictment may allege both burglary and larceny in the same count, and may join two counts, one for "breaking and entering," and another for "entering without breaking." *State v. Flanagan*, 48 W. Va. 115, 35 S. E. 862.

An indictment charging a breaking into a house of a person named with intent to steal, and stealing therefrom, is good as an indictment for burglary. *Wright v. Com.*, 82 Va. 183; *Butler v. Com.*, 81 Va. 159; *Speers v. Com.*, 17 Gratt. 570; *Vaughan v. Com.*, 17 Gratt. 576.

Where an indictment contained two counts, one for breaking and entering the dwelling house of another, and another for breaking and entering at the same time the storehouse of the same person, it was held, on motion to quash, that the indictment was good; also, that the prosecutor would not be required to elect on which count he would proceed to trial. *State v. Shores*, 31 W. Va. 491, 7 S. E. 413.

Object of Joining Offense of Larceny.—The allegation of actual larceny in an indictment for burglary or housebreaking is simply to show the intent to commit a felony, which intent is an essential part of these crimes. *Speers v. Com.*, 17 Gratt. 573; *Vaughan v. Com.*, 17 Gratt. 579; *Wright v. Com.*, 82 Va. 185; *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098. See the title LARCENY.

Necessity of Formally Setting Out Larceny.—Since the allegation of actual larceny in an indictment for burglary is only to show the intent, such allegation need not be made with the same formality as in an indictment for larceny itself. *Vaughan v. Com.*, 17 Gratt. 579; *Wright v. Com.*, 82 Va. 185; *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Caddle* 35 W. Va. 73, 12 S. E. 1098.

Effect When Indictment Is Bad as to Burglary.—Where an indictment, bad as an indictment for housebreaking, because of failure to state the ownership of the premises, alleged that the prisoner did break and enter the cellar, "and one keg of wine, of the value of fifteen dollars, of the goods and chattels of J. W. Hale in the said house and cellar then and there being found, then and there feloniously did steal," etc., it was held, good as an indictment for petit larceny. *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919.

But in order to support a conviction of larceny, the charge of it in such count must be well laid, as in an indictment for larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654. See generally, the title LARCENY.

C. CONCLUSION.

Each count in an indictment must have the conclusion, "against the peace and dignity of the state," else it is fatally defective. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654.

Advantage of this defect may be taken for the first time on appeal. *State*

v. McClung, 35 W. Va. 280, 13 S. E. 654.

D. INDORSEMENT.

An indictment is for breaking into a house in the daytime and stealing money therefrom. The grand jury indorse it: "An indictment for larceny. A true bill." The prisoner is tried upon it, and there is a general verdict of guilty. It was held no error. *Hall v. Com.*, 3 Gratt. 593. See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

It has been held, that the fact that an indictment is not indorsed "A true bill," and signed by the foreman of the grand jury, is not a fatal defect. *State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

IV. Evidence.

A. PROOF OF VENUE.

An indictment can not be sustained without proof that the offense was committed within the county or corporation where the venue is laid. But a strong presumption thereof raised by the evidence is sufficient. *Butler v. Com.*, 81 Va. 159; *Richardson v. Com.*, 80 Va. 124. See the title VENUE.

B. POSSESSION OF STOLEN GOODS AS EVIDENCE.

See also, the title LARCENY.

The presumption of burglary or housebreaking does not arise from the mere possession of goods recently theretofore stolen from a house that was broken and entered for that purpose. Such possession, however, is a most material circumstance to be considered in connection with other inculpatory circumstances. *Henderson v. Com.*, 98 Va. 794, 34 S. E. 881; *Branch v. Com.*, 100 Va. 837, 41 S. E. 862; *Bundick v. Com.*, 97 Va. 787, 34 S. E. 455; *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Gravely v. Com.*, 86 Va. 400, 10 S. E. 431; *Wright v. Com.*, 82 Va. 188; *Taliaferro v. Com.*, 77 Va. 413; *Walker v. Com.*, 28 Gratt. 969; *Price v. Com.*,

21 Gratt. 846; *Hunt v. Com.*, 13 Gratt. 757; *Hall v. Com.*, 3 Gratt. 593.

"The general rule of the common law with regard to the evidence in cases of larceny, that the possession of goods recently stolen is *prima facie* evidence of guilt, and throws upon the accused the burden of accounting for that possession, has never been held by this court to apply with the same effect in cases of burglary, and the decided weight of authority is that it does not. Still, where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury in connection with other inculpatory circumstances. There must be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary or housebreaking is superadded to that of larceny." *Henderson v. Com.*, 98 Va. 800, 34 S. E. 881.

Where a prisoner was charged with breaking open a house in the daytime and stealing therefrom coins of a particular denomination, and after evidence tending to prove the charge, proof that the prisoner had in his possession a coin of another denomination, which was in the house when it was broken, was held admissible evidence to bring home the breaking of the house to the prisoner. *Hall v. Com.*, 3 Gratt. 593.

But where it appears that the prisoner could only have gotten the goods by taking them from the house feloniously entered, or if he refuses to give any account, or gives a false account, of how he came into possession of the goods, or if other culpatory facts be proved, he may be found guilty of the burglary. *Branch v. Com.*, 100 Va. 837, 41 S. E. 862; *Gravely v. Com.*, 86 Va. 396, 10 S. E. 431.

K.'s dwelling is broken open and her goods stolen therefrom. Next day the goods are found on a bed in a room occupied by prisoner and another woman,

P., whose friend often came and spent the night there. On the second day prisoner sold the goods, worth \$9, for seventy-five cents, and said she got them of P., but made contradictory statements. Prisoner was indicted for burglary, and convicted of housebreaking. It was held, that even in cases of simple larceny, in order to raise the presumption of guilt from the possession of stolen goods, it is necessary that they be found in the exclusive possession and subject to the exclusive control of the accused. Such was not so here. Prisoner's conflicting statements as to how she came by the goods, certainly excite a strong suspicion against her, yet the testimony is insufficient to establish her guilt of burglary or housebreaking. *Taliaferro v. Com.*, 77 Va. 411.

C. WEIGHT AND SUFFICIENCY.

See the titles CIRCUMSTANTIAL EVIDENCE; EVIDENCE; NEW TRIALS; REASONABLE DOUBT.

To warrant the conviction of a person accused of the crime of burglary every fact necessary to establish his guilt must be proved beyond a reasonable doubt; and especially so where the evidence is wholly circumstantial. The accused is entitled to an acquittal unless his guilt is proved to the actual exclusion of every reasonable hypothesis of his innocence. *Bundick v. Com.*, 97 Va. 783, 34 S. E. 455; *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Hite v. Com.*, 88 Va. 882, 14 S. E. 696; *Johnson v. Com.*, 29 Gratt. 796.

Where the circumstances are as consistent with the fact of innocence as with the fact of guilt they do not amount to such degree of proof as to warrant a conviction. *Prather v. Com.*, 85 Va. 126, 7 S. E. 178.

And where the evidence raises merely a suspicion of the prisoner's guilt it is plainly insufficient to sustain the verdict of guilty. *Branch v. Com.*, 100 Va. 837, 41 S. E. 862; *Bun-*

dick v. Com., 97 Va. 783, 34 S. E. 454; *Johnson v. Com.*, 29 Gratt. 796.

Where one of the circumstances relied on by the prosecution was that a portion of a knife blade was found in the barroom the morning after the alleged offense was committed, which it was claimed was part of the blade of a knife shown to have been in the possession of the accused very recently before the commission of the offense charged, and the evidence upon this point, it was claimed by the accused, did not prove its identity with that certainty required by law, and could not therefore be relied upon by the jury in order to convict, it was held, error to refuse to give an instruction to the jury that "unless they believe from the evidence that the portion of the knife blade found in the storeroom has been identified beyond all reasonable doubt as the same blade which was in the possession of the prisoner previous to the offense, they can not consider it or treat it as a circumstance against the accused." *Porterfield v. Com.*, 91 Va. 803, 22 S. E. 352.

In *Bundick v. Com.*, 97 Va. 787, 34 S. E. 455, the evidence was held insufficient to convict the defendant of burglary. The foot prints found were not shown to have been made by the defendant, and a two-dollar bill found in her possession the next day, and about which she made conflicting statements, was not identified as the same note stolen when the house was entered, and other articles found in her possession, belonging to inmates in the house in which she had been a servant, were not shown to have been in the house when entered, and although she knew where the owner of the house kept his money, and also the tool with which the house was broken, all of the employees about the house had the same knowledge.

Proof of Ownership of Premises.—

Upon an indictment charging the prisoner with breaking and entering the

storehouse of A and B, composing the firm of A & B, proof of the breaking and entering the storehouse of A & B is sufficient to sustain a verdict of guilty, without showing the names of the individuals who composed the firm, or other particulars as to the ownership of the storehouse. *Henderson v. Com.*, 98 Va. 794, 34 S. E. 881.

V. Variance.

See the title VARIANCE.

An indictment for the breaking into the house of one person can not be sustained by proof of breaking into the house of another. And an indictment for breaking into the car of a given railroad company can not be sustained by proof of breaking into the car of another company. *State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

An indictment charging that the accused "did break and enter into a sealed box railroad freight car, the property of the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company," is not sustained by proof tending to show that the accused broke and entered a freight car belonging to the "Pittsburg, Cleveland, Chicago & St. Louis Railroad Company," or the "C., C. & St. L.," or the "B. & O. R. R. Company," but the proof of the ownership of the property broken and entered must be charged in the indictment. *State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

VI. Verdict and Sentence.

See ante, "Joinder of Counts or Offenses," III, B. And see the titles VERDICT; SENTENCE AND PUNISHMENT.

Conviction of Both Burglary and Larceny.—To a count in an indictment for housebreaking may be added a count for simple larceny of the same goods, and the jury may find the prisoner guilty on each count, and fix a several punishment for each offense. *Speers v. Com.*, 17 Gratt. 570.

Housebreaking with intent to commit larceny, and grand larceny are distinct offenses under the law, and to each is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either of the offenses, but there can be only one penalty imposed. If it is desired to punish for both offenses in a case of this kind, there must be inserted in the indictment a separate count for the larceny. An acquittal, where there is but one count, is a bar to prosecution for all offenses therein charged. If there is a conviction generally, or of the grand larceny only, and it is submitted to, it is a bar to further prosecution. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *Benton v. Com.*, 91 Va. 788, 21 S. E. 495.

Upon an indictment containing one count properly alleging both burglary and larceny, there may be a conviction of either, but not of both. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654.

Conviction of Larceny and Acquittal of Burglary.—If in an indictment for burglary or housebreaking the actual larceny is properly stated, the prisoner may be found guilty of the larceny, though acquitted of the housebreaking. *Vaughan v. Com.*, 17 Gratt. 576.

Thus where the indictment charges not only the breaking and entering, but the stealing of the trunk and its contents, of a stated value, the defendant though acquitted of the burglary, may be found guilty of the larceny. *Clarke v. Com.*, 25 Gratt. 908.

Verdict for Grand Larceny on Indictment Charging Housebreaking and Petit Larceny.—Where a prisoner was indicted for breaking open a storehouse, and stealing therefrom goods to the value of more than four dollars, and the verdict found him guilty of grand larceny, and fixed his imprison-

ment at seven years, it was held, that the judgment ought not to be arrested, but the verdict was too imperfect, and uncertain to render any judgment on it. *Com. v. Smith*, 2 Va. Cas. 327.

Effect of General Finding on Indictment Charging Both Burglary and Larceny.—Where an indictment charges both burglary and larceny, the jury could find the accused guilty of either, but a general finding is considered to cover the burglary, and not the larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Williams*, 40 W. Va. 268, 21 S. E. 722.

Upon a general verdict of guilty on a count alleging both burglary and larceny the sentence would be for burglary, not for both larceny and burglary, or for larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654.

Effect of Verdict on Insufficient Count for Burglary.—A person found

guilty by the verdict of a jury, under a bad count for burglary, can not be sentenced for housebreaking, although the indictment contain a good count, charging the latter offense. *State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162.

On the trial of the issue on an indictment, containing two charges, one for burglary and the other of larceny, which was insufficient as an indictment for burglary, but good as an indictment for petit larceny, the jury returned a verdict of "guilty as charged in the indictment." The prisoner moved in arrest of judgment, which the court overruled, and sentenced the prisoner to the penitentiary. It was held, that judgment for felony could not be rendered on the verdict, and the court should, on the verdict, have rendered a proper judgment for petit larceny. *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919.

Burial.

See the titles CEMETERIES; DEAD BODIES; EXECUTORS AND ADMINISTRATORS.

Burial Expenses.

See the title EXECUTORS AND ADMINISTRATORS.

Burying Grounds.

See the title CEMETERIES.

BUSINESS.—In *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 576, it is said: "The statute says no one shall without a license 'practice the **business** of a stock or other broker by buying or selling for other stocks, securities or other property for commission or reward.' W. Va. Code, ch. 32, § 2. If a person sell one drink of liquor without a license, he violates the statute on that subject, as it says he shall not sell; but here the word 'practice' is used, meaning to exercise or follow a profession or calling as one's usual **business** to gain a livelihood; and the word **business** is used as the object of the verb 'practice,' and there is hardly to be found a word more strongly conveying the idea of a permanent calling for a support. If one should undertake or profess to follow that **business**, no doubt one sale would be sufficient to bring him within the letter and spirit of the statute; but one is not within its letter or spirit who, without any manifestation of carrying on such vocation, merely makes one sale."

BUSINESS PAPER.—In *Berkeley v. Tinsley*, 88 Va. 1003, 14 S. E. 842, it is said: "This is not what is termed **business paper** with successive indorsers, but accommodation paper offered by the maker for discount for his benefit; and the indorser is bound as his surety so far as his indorsement binds him as such, and so long as this indorsement binds him." See the title **BILLS, NOTES AND CHECKS**, ante, p. 401.

BUT.—In *State v. McAllister*, 38 W. Va. 485, 18 S. E. 776, it is said: "In the present constitution it reads: 'No person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of thirty,' etc. The insertion of the word **but** indicates that the convention knew that the first clause expressed a general rule or definition of qualification for office, admitting all voters to the right; and as governor, judges, senators, and attorney general would fall within it, unless excepted, and desiring to except them, it, for safety, inserted the word, to make it more clear than it had been. In other words, it is an exception, the same as if, after allowing all voters to be chosen to office, it had said, 'except that the governor and judges must have attained the age,' etc."

In *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 436, it is said: "The primary meaning of the word **but**, is except; and that is manifestly the sense in which it is here used."

BUTCHERING BUSINESS.—See **CHOSSES IN ACTION**. See also, the title **LICENSES**.

Butter.

See the titles **ADULTERATION**, vol. 1, p. 183; **INSPECTION**.

BY.—In *Hodges v. Seaboard, etc., R. Co.*, 88 Va. 669, 14 S. E. 380, it is said: "It may be stated as the fair conclusion from the authorities, that a grant of land, described as bounded generally, **by**, or 'on' or 'along' a highway, carries the fee to the centre of the highway, if the grantor owned so far."

Where land is conveyed which is bounded **by** a watercourse not navigable, such conveyance carries with it the title to a moiety of the bed of the watercourse. *Hayes v. Bowman*, 1 Rand. 417. See also, the title **BOUNDARIES**, ante, p. 579.

Statute of Limitations.—A statute provided as follows: "If any defendant in any of the aforesaid actions shall abscond or conceal himself, or remove from this commonwealth, or **by** any other indirect ways or means defeat or obstruct any person." A later act was as follows: "Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this state, if such person shall, **by** departing without the same, or **by** absconding or concealing himself, or **by** any other indirect ways or means obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted." The court said: "We think it is plain that the change here made, which is simply placing the preposition **by** before the word removing or 'departing' from the state does not alter the meaning of the statute. It means the same thing to declare that 'if he remove' from the state, or **by** other

indirect means he obstruct the prosecution of the suit, as to say 'if, by removal or departing from the state, or other indirect means, he obstruct' the prosecution of the suit, etc. The use of either phrase means in effect the same thing. Rep. of Rev. 746 and note; *Wilkinson v. Holloway*, 7 Leigh 277; *Markle v. Burch*, 11 Gratt. 26." *Ficklin v. Carrington*, 31 Gratt. 225. See generally, the title LIMITATION OF ACTIONS.

By-Laws.

See the titles ASSOCIATIONS, vol. 1, p. 843; BENEFICIAL AND BE-NEVOLENT ASSOCIATIONS, ante, p. 344; BUILDING AND LOAN ASSOCIATIONS, ante, p. 645; CORPORATIONS; MUNICIPAL CORPORATIONS; ORDINANCES.

Bystanders.

Summoning jury from, see the title JURY.

Cable Road.

See the title STREET RAILROADS.

Calendars and Trial Dockets.

See the title COURTS.

CALL.—There is no legal difference between a bond payable when "demanded," or "on demand," and one payable "on call" or "at any time called for." In each case the debt is payable immediately. *Bowman v. McChesney*, 22 Gratt. 609. See also, *Bacon v. Bacon*, 94 Va. 686, 27 S. E. 576; *Moon v. Richardson*, 24 Gratt. 222. See generally, the titles BILLS, NOTES AND CHECKS, ante, p. 401; PAYMENT.

CALLS.—See the titles BOUNDARIES, ante, p. 579; STOCK AND STOCKHOLDERS. And see *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, 533.

CANALS.

CROSS REFERENCES.

See the titles CARRIERS; MILLS AND MILLDAMS; NAVIGABLE WATERS; WATERS AND WATERCOURSES.

Construction of Statutes—Contracts—Water Rates.—The property and franchises of the James River and Kanawha Canal Co. were purchased under an act approved February 27, 1879, by the R. & A. Railroad Co. This act directs that all then existing leases of water privileges along the line of the canal, "shall be respected and maintained at rates not exceeding the present rates." The lessees contended that this act perpetuates, at their option, all

leases of water privileges existing at its passage. Held, this act did not forbid the company to increase the water rates, except only where to do so would violate "existing contracts." *Hurt v. Myers*, 83 Va. 167, 1 S. E. 911.

Failure to Keep Channel Open—Liability.—The James River and Kanawha Company being authorized by law to charge tolls on the Kanawha river not exceeding those allowed to be charged by their predecessors, the James River

Company, are bound to keep the navigation of the river in the condition in which the James River Company was required to keep it, and are liable for any damages sustained by their failure so to keep it. *James River, etc., Co. v. Early*, 13 Gratt. 541.

When Not Liable for Damages for Not Having Improvement Prescribed.

—The James River and Kanawha Company not having completed the improvement of the Kanawha river as prescribed in their charter, and not having charged tolls as authorized by said charter, are not liable for damages occurring in the navigation of the river, for not having such an improvement as the charter prescribes. *James River, etc., Co. v. Early*, 13 Gratt. 541.

Successors—Liability.—The James River Company was only required to improve the Kanawha river in the mode suggested in the report of the principal engineer of the state made in January, 1820, and referred to in the act of February 17, 1820. This did not contemplate a continued line of improvement, but that specified works should be done at specified places. And for damages occurring in consequence of obstructions at other places the present company, the successors of the James River Company, are not responsible. *James River, etc., Co. v. Early*, 13 Gratt. 541.

Power of Railroad Company to Condemn Land of Canal Company.—The general railroad law of 1836-37, ch. 118, authorizes a railroad company to have condemned for its use, lands which a chartered canal company has acquired for its canal, as well as lands of individuals; and if the canal company has only acquired a right of way in the lands occupied by the canal, the railroad company may have the lands condemned for its use, as the lands of the original proprietor, subject to such right of way. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

When Proceeding of Railroad Company Can Not Be Enjoined.—By § 13 of the general railroad law, the court of chancery is deprived of jurisdiction to enjoin a railroad company from proceeding to prosecute its work at its peril, upon the application of an elder canal company, whose canal the road is projected to cross; the railroad company not thereby transcending its authority, and the injury if any to the canal company being such as may be adequately compensated in damages. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

Power of Junior Company to Cross an Elder—Liability for Damages.—A navigable canal being constructed by a chartered company along the valley of a stream, a company is afterwards chartered to construct a railroad along the same valley; if the termini given for the railroad be such that it may cross the canal, the railroad company is authorized to lay out its road so as to cross the canal; but in such case, the railroad must be so constructed as nowise to obstruct or impair the navigation, the railroad company being liable to the canal company for all damages which may result therefrom. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

What Grant of Charter Does Not Create a Monopoly.—Where the legislature granted a charter to a company to construct a navigable canal along the valley of a stream, and in consideration of the work to take the profits, without any provision against the exercise of power to charter other and rival companies, the legislature was nowise constrained from chartering a company to construct a railroad along the same valley, though the railroad shall afford the same public accommodation as the canal, and may in effect impair or annihilate its profits. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

A monopoly can not be implied from

the mere grant of a charter to a company to construct a work of public improvement, and to take the profits; to give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival competing works. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

Condemnations—Recordation.—Under the charter of the James River and Kanawha Canal Company, condemnation proceedings were required to be taken in the circuit courts, and the report of the commissioners to be there recorded. The charter did not require such reports to be recorded in the deed books in the county courts as is now required by § 1091, Va. Code, 1887, and the failure to record in such deed books did not give to subsequent purchasers for value without notice title superior to that acquired by the condemnation proceedings. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

Canal Company Has Power to Acquire a Fee Simple Title and Also Title by Accretion.—In the case in judgment, construing as a whole the acts authorizing condemnation or purchase, the James River and Kanawha Canal Company was not limited to the acquisition of a mere easement or right of way, but had power to acquire, and did acquire, a fee simple title to low water mark on James river, with capacity to take by accretion, and the appellant,

which is its successor in title, is the owner of the land in controversy which was created by deposits and accretions to the land condemned; and the water line on James river, no matter how it shifts, remains the boundary of its property. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

Rights of Canal Company as a Mill Owner to Divert Water.—W. being the owner of an island situate in the falls of the Appomattox, a navigable river, applies to the county court for leave to erect a mill on his island, and to condemn an acre of land on the main, belonging to T. for an abutment for his milldam; the acre of land is condemned, and leave is given to W. to build his mill on his island; W. abuts his dam against the condemned acre, but does not build his mill on his island, but builds it on the mainland belonging to T. below the condemned acre, on a canal conducted from a point above the dam, through T.'s land; and he cuts his canal through, and builds his mill on T.'s land, with T.'s consent. Held, this mill is not established according to law, so as to entitle W. and those claiming the mill rights under him, and T.'s land under him, to take the water from the river to work the mill, as against the public right of navigation, and a company incorporated by law to improve the navigation. *Stokes v. Upper Appomattox Co.*, 3 Leigh 318.

CANCEL.—Cancel is to annul, to destroy. *Smith v. Yancey*, 81 Va. 91. See generally, the titles RESCISSION, CANCELLATION AND REFORMATION; WILLS.

Cancellation of Instruments.

See the title RESCISSION, CANCELLATION AND REFORMATION.

CAN NOT BE MADE.—Under Va. Code, 1860, ch. 186, § 15, it is required that the officer shall return upon a writ of fi. fa. "whether the money is or can not be made." A return of "Not levied by reason of the stay law" is a return substantially that the money can not be made. *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. 724. See also, the title EXECUTIONS

CAN RECOVER.—See *Carrico v. West Virginia, etc., R. Co.*, 39 W. Va. 86, 19 S. E. 577.

CAPACITY.—See the titles **BILLS, NOTES AND CHECKS**, ante, p. 401; **BONDS**, ante, p. 507; **CONTRACTS; DEEDS; HUSBAND AND WIFE; INFANTS; INSANITY; TESTAMENTARY CAPACITY**. In *Allison v. Allison*, 101 Va. 566, 44 S. E. 904, quoting Washburn on Real Property, 3d edition, § 1, pars 17, 18, pp. 507, 510, it is said: "The present **capacity** of taking effect in possession, if the possession were now to become vacant, and not the **certainty** that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. By **capacity**, as thus applied, is not meant simply that there is a person in esse, interested in the estate, who has a natural **capacity** to take and hold the estate, but that there is, further, no intervening circumstances, in the nature of a precedent condition, which is to happen before such person can take. As, for instance, if the limitation be to A for life, remainder to B, B has a **capacity** to take this at any moment when A may die. But if it had been to A for life, remainder to B after the death of J. S., and J. S. is still alive, B can have no **capacity** to take until J. S. dies. When J. S. dies, if A is still living, the remainder becomes vested, but not before." See also, *Howbert v. Cauthorn*, 100 Va. 655, 42 S. E. 683.

Capias ad Respondendum.

See the title **EXECUTIONS AGAINST THE BODY**.

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See the titles **ARREST**, vol. 1, p. 720; **DISCOVERY; EXECUTIONS AGAINST THE BODY; IMPRISONMENT FOR DEBT**.

Capias Pro Fine.

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Capias to Answer Indictment.

See the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**.

Capita.

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CAPITAL—CAPITAL STOCK.—See generally, the titles **BANKS AND BANKING**, ante, p. 254; **CORPORATIONS; STOCK AND STOCKHOLDERS; TAXATION**.

The **capital stock** of a corporation and the shares of a **capital stock** are distinct things. The former belongs to the corporation, and the latter to the individual. *Com. v. Charlottesville, etc., Loan Co.*, 90 Va. 790, 20 S. E. 364; *State Bank v. Richmond*, 79 Va. 113; *Union Bank of Richmond v. Richmond*, 94 Va. 316, 26 S. E. 821.

Acts 1889-90, p. 201, § 8, subs. 2, taxing "**capital**, including moneys, etc.," and subs. 3 thereof, taxing "the value of all **capital** of incorporated joint stock companies not otherwise taxed; held, to authorize the taxation of the **capital stock**

of such companies, not otherwise taxed, as well as the shares in the hands of the stockholders of the companies; as the word **capital** in the former subsection signifies money or other thing invested, including such shares, whilst in the latter it signifies the **capital stock** paid in to conduct the business; and that the words "**capital not otherwise taxed**," in the latter, is not confined to the holdings of nonresident or otherwise inaccessible stockholders. The court said: "Stress, however, was laid in the argument at the bar on the fact that the term **capital** is used as well in the second as in the third subsection, above quoted. But it is a mistake to suppose that it is used synonymously in both. In the second it signifies money or other thing invested, and therefore includes, as we have said, shares of stock in the hands of the stockholders; whereas in the third it signifies the **capital stock** of the company; that is, the aggregate of the mutual subscriptions of the stockholders, paid in as the basis of the business of the concern, and which belongs to the company. This is apparent from the language of the statute." *Com. v. Charlottesville, etc., Loan Co.*, 90 Va. 790, 792, 20 S. E. 364. See also, *Union Bank of Richmond v. Richmond*, 94 Va. 318, 26 S. E. 821.

Partnership.—The word **capital** as used in § 2878, Va. Code, relating to partnership associations, prior to the amendment of that section, means cash or its equivalent; and an attempted organization without such cash or its equivalent is not a valid partnership association under said section prior to its amendment. *Deckert v. Chesapeake Western Co.*, 101 Va. 804, 45 S. E. 799. See generally, the title **PARTNERSHIP**.

Capitation Tax.

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As to caption of pleadings, see the titles **EQUITY**; **PLEADING**. As to caption of depositions, see the title **DEPOSITIONS**. As to caption of indictments, etc., see the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**.

CAPTURE.—In *Merchants' Ins. Co. v. Edmond*, 17 Gratt. 149, it is said: "It will be seen that the word **capture** is not used in this part of the policy; it is, however, sufficiently expressed by equipollent terms, 'men of war,' 'enemies,' 'takings at sea,' 'arrests,' etc." See also, the title **MARINE INSURANCE**.

Card Playing.

See the title **GAMING**

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I. In General.**A. DEFINITION.**

"The term 'common carrier' shall be construed to include any railroad, express or canal company, chartered by this or any other state and doing business in this state, whether incorporated or not, and whether operated or controlled by an individual or partnership." Virginia Acts, 1891-92, p. 965; Pol. Supl. Code, 1900, § 1297a, ch. 18.

B. TELEGRAPH COMPANIES AS PUBLIC CARRIERS.

Telegraph companies are not public carriers in the strict sense of the term,

yet on account of the public nature of their employment, they have in many cases been held to a very similar responsibility. *Western Union Tel. Co. v. Reynolds*, 77 Va. 173. See the title TELEGRAPHS AND TELEPHONES.

C. EXPRESS COMPANIES AS CARRIERS.

An express company is a common carrier. *Southern Express Co. v. McVeigh*, 20 Gratt. 264. See the title EXPRESS COMPANIES.

D. PREFERENCE TO SOLICITORS OF BAGGAGE.

When the construction of a foreign

statute has been settled by a number of decisions, and the legislature enacts that statute in the same words, it must be presumed that the construction placed upon the statute was adopted along with the statute. *Norfolk, etc., R. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784. See generally, the title **STATUTES**.

Hence, adopting the construction placed by the English courts on the English Railway and Canal Traffic Act of 1854, which must control in the interpretation of the act of assembly approved March 3, 1892 (acts, 1891-92, p. 695), railroad companies have the right to exclude from their stations and grounds persons who resort thereto, not for the purpose of using the railroad, nor for the public convenience, but solely for their private gain. *Norfolk, etc., R. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784.

E. RESPONSIBILITY OF RECEIVERS.

A receiver appointed to assume charge of the affairs of a railroad company may be held responsible for the damage actually sustained through the negligence of the receiver's agents and employees, in any case in which the company could be so held. But where the receiver is appointed by a court of equity he can not be sued at law without permission of the appointing court. *Melendy v. Barbour*, 78 Va. 544. See also, the title **RECEIVERS**.

II. Governmental Control.

A. STATE GOVERNMENT.

1. Right to Control a Sovereign Power.

The right to regulate and fix at their pleasure the charges of railroad companies for transportation of freight and passengers is one of the powers of sovereignty inherent in every state, to be exercised by the legislature from time to time at its pleasure. A legislature can not, however, by a charter granted to one company, make stipula-

tions as to charges which will be binding on future legislatures. *Laurel Fork, etc., R. Co. v. Transportation Co.*, 25 W. Va. 324; *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434; *Richmond, etc., R. Co. v. Patterson, etc., Co.*, 92 Va. 670, 24 S. E. 261, 1 Va. Law Reg. 917.

Thus, the W. Va. act, 1873, ch. 227, establishing a reasonable maximum rate of charges for the transportation of passengers and freight, and providing relative to unjust discrimination and extortion in the rates to be charged by different railroads in the state, is applicable to all railroads in the state, whether the charters were granted before or after the act. Furthermore the act is constitutional. *Laurel Fork, etc., R. Co. v. Transportation Co.*, 25 W. Va. 324; *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434.

Notwithstanding the constitutional authority of congress to regulate interstate and foreign commerce, the states have power to enact laws designated to secure the safety and comfort of passengers, employees, persons crossing railway tracks and adjacent property owners, and to make other regulations intended to promote the welfare and convenience of its citizens, although in their operation such laws may incidentally affect interstate traffic. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

2. Authority Exercisable by Corporation Commission.

The state corporation commission has no authority to make any rule or regulation in conflict with the federal constitution. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911. See the title **CONSTITUTIONAL LAW**.

The rules and regulations established by the state corporation commission for the government of transportation companies and shippers doing business in this state are reasonable, just and valid, except in so far as they may in

their operation directly trench upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected by that instrument; and objections on the latter account may be raised and determined in any case in which that question could be raised and determined if the rules and regulations had been enacted as statutes by the general assembly, except as prohibited by subs. d, § 156, Va. Constitution. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

Whether the rules and regulations adopted by the state corporation commission directly infringe upon the commerce clause of the federal constitution, or violate any right of transportation companies can only be properly determined as the questions arise in concrete cases, and upon the particular facts of each case, and can not be properly decided on an appeal where only abstract questions are raised. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

If any rule or regulation is made by the commission which in its application to the facts of a particular case, violates any right of a defendant protected by the constitution of the United States, he may have its validity tested by an appeal to the state supreme court. *Atlantic, etc., R. Co. v. Com.*, 102 Va. 599, 46 S. E. 911.

3. Control of Connecting Carriers.

The act of March 3, 1892, § 4, requires common carriers to afford all reasonable, proper and equal facilities for traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property to and from their several lines and connecting lines. Under this act it is held, that a railroad so changing its time card that a connection with a connecting road, which is of general convenience, is discontinued, in order to furnish better facilities to several towns, is in violation of the statute. *Southern R. Co.*

v. Com., 98 Va. 758, 37 S. E. 294. See *Pol. Supl. Code*, 1900, § 1297a.

B. FEDERAL GOVERNMENT.

1. In General.

Congress has power under the constitution of the United States, to regulate commerce among the states, and this power embraces the power to regulate all the various agencies by which that commerce is conducted. State laws which undertake, in any form, to enforce a tax on such commerce, or to impose a burden or hinderance thereon, or to embarrass commercial intercourse and transactions, or to give citizens of one state any advantage over citizens of another state engaged in interstate commerce, are regulations of commerce among the states, and therefore void. This power, when exercised by congress, is exclusive in its character, and the omission to exercise it is equivalent to a declaration of the will of congress that it shall remain free and uncontrolled in those respects in which the subject is capable of being dealt with by general regulations. *Richmond, etc., R. Co. v. Patterson, etc., Co.*, 92 Va. 670, 24 S. E. 261, 1 Va. Law Reg. 917. See also, *Southern R. Co. v. Com.*, 98 Va. 758, 37 S. E. 294; *Virginia, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310; *State v. Baltimore, etc., R. Co.*, 24 W. Va. 783, construing W. Va. Code, 1891, §§ 16, 17, ch. 149, relating to Sunday laws, these sections being held not to be in conflict with the constitution of the United States, art. 1, § 8, ch. 3; *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 13 S. E. 340, construing Va. Code, 1887, § 3801, relating to Sunday laws, in which case the statute was held void and inoperative being in conflict with the constitution of the United States, art. 1, § 8, providing that congress shall have power to regulate commerce among the several states. See also, the title SUNDAYS AND HOLIDAYS.

2. Interstate Commerce Act.

See the titles CORPORATIONS; INTERSTATE COMMERCE.

Filing Joint Rates—Connecting Carriers.—Under the interstate commerce act (24 Stat. 379), as amended by act March 2, 1889, ch. 382 (25 Stat. 855), requiring the filing with the commission of established joint rates by connecting carriers, and making it unlawful for any such carrier to receive a greater or less compensation for the transportation of freight, a contract for the shipment of freight beyond the line of a receiving carrier, at a rate which it has furnished the commission, and which is less than the aggregate of the rates charged by the connecting carriers, is not invalid, where the receiving carrier, without intending to violate the act, fixed such rate on quotations made to it by the connecting line, and by mistake fixed the rate for such connecting line at less than it charged. And the failure of the other connecting carriers to give publicity to the rate does not invalidate a contract for the shipment of freight over such connecting lines; as violative of the interstate commerce law, which is otherwise valid. *Virginia, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310.

And lowering a freight rate in the manner required by the Interstate Commerce Act (July 22, 1897, November 16, 1897), after a contract has been made in violation of that act, does not render the contract valid and binding on the carrier, and, if under no legal obligation to lower the rate, the carrier may restore the rate so lowered. *Southern Railway Co. v. Willcox*, 98 Va. 222, 35 S. E. 355.

III. Carriers of Goods.

A. CONTRACT OF TRANSPORTATION AND DELIVERY.

1. Scope of Contract Implied by Law.

When a common carrier undertakes to convey goods, the law implies a contract that they shall be carried and de-

livered at the place of destination safely and within a reasonable time. *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361; *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293; *Murphy v. Staton*, 3 Munf. 239.

What is a reasonable time in which goods are to be delivered can not be defined by any general rule, but must depend upon the circumstances of each particular case. Thus the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are matters properly entering into the consideration of what is reasonable time. *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361.

2. Contract for Through Transportation.

The fact that a car is waybilled to a particular place is no evidence of a contract of through transportation, but merely shows the destination of the car. *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778, 45 S. E. 322. See also, *McDonald v. Norfolk, etc., Co.*, 95 Va. 98, 27 S. E. 821.

3. Consideration to Support the Contract.

And the mutual obligation of a shipper to ship, and of a carrier to carry, furnish sufficient consideration for a contract to carry at a specified rate; but if the shipper fails to accept the carrier's offer, and is not bound to furnish the goods for carriage, the carrier's offer or promise to carry for a particular rate becomes a mere nudum pactum, the breach of which will not support an action. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144, 7 Va. Law Reg. 381. See also, post, "Consideration for Freight," III, D, 2. See generally, the title CONTRACTS.

4. Construction of Contract.

In *White v. Toncray*, 9 Leigh 347, there was a covenant between a carrier and a manufacturer of salt,

whereby the carrier agreed to transport from 1,200 to 5,000 barrels of salt annually for three years, from the manufacturer's salt works, for certain specified prices, for a stipulated reward per barrel transported. It was held, that the manufacturer, and not the carrier, had the right to elect what quantity of salt, not less than 1,200 nor more than 5,000 barrels, should be transported by the carrier annually.

5. Bills of Lading.

Nature.—Bills of lading are held, in *Pollard v. Vinton*, 105 U. S. 1, to be both a receipt and a contract. So far as they acknowledge the delivery and acceptance of the goods, they are mere receipts. As to the rest, they are contracts.

Issuing Duplicate Bills — Statutory Requirement.—As to the issuance of duplicate bills to shippers, Va. acts, 1891-92, p. 965, Pol. Supl. Code, § 1297a, ch. 7, has the following provision: "All common carriers doing business in this state shall on demand issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped and the freight charges over the road giving the receipt."

Construction of Words "At the Owner's Risk," Appearing in the Bill of Lading.—The term, "at the owner's risk," in a bill of lading, which is declared to be a special contract, taken in connection with other stipulations therein, limits the carrier to such loss or damages only as might result from ordinary neglect, which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87.

Property in Goods Acquired by Bill of Lading.—And a party discounting a draft, and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold

them as security for the acceptance and payment of the draft. *Neill v. Rogers, etc., Co.*, 41 W. Va. 37, 23 S. E. 702.

Effect of Notice of Claim, When Bill Omits Name of Claim Agent's Office.

—And it should be noted, that where a bill of lading does not state the location of a claim agent's office, a stipulation that notice of a claim must be given within five days is unreasonable and void. *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

Liability under Bill of Lading.—In *Lewis v. Chesapeake, etc., R. Co.*, 47 W. Va. 656, 35 S. E. 908, a carrier received lumber for shipment to Europe. Subsequently, it was held liable under its bill of lading for the lumber, which was lost after placing it on the pier of the railway company under its exclusive control. See post, "Liability," III, B.

6. Notice to Consignee of Readiness to Deliver.

It is provided by statute, acts, 1891-92, p. 965, Pol. Supl. Code, § 1297a, that it shall be the duty of every company upon the arrival of freight shipped to any of its depots or stations to notify the consignee, by mail or otherwise, when such freight is ready for delivery, and give a reasonable time for the removal of the same, making due allowance for its class and for bad weather and holidays.

7. Disposition When Delivery Prevented.

Furthermore, if access to the assignee, and delivery of the goods at the end of the route, is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor, and notify him within a reasonable time of his inability to make the delivery, after which his liability is only that of the bailee. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293.

8. Acceptance after Breach.

Acceptance of goods which a car-

rier has contracted to deliver at a certain time and which it has failed to deliver until a later date is no waiver of the consignee's right of action for the delay. *Norfolk, etc., R. Co. v. Shippers' Comp. Co.*, 83 Va. 272, 2 S. E. 139.

B. LIABILITY.

1. In General.

a. Responsibility for Goods and Exceptions to Liability.

The law imposes upon the common carrier of goods an unusual and extraordinary liability. The foundation for this requirement rests upon consideration of public policy and convenience. The carrier is regarded as a practical insurer of the goods entrusted to him, and is liable for all losses, except such as arise by the act of God, the public enemy, or the conduct of the owner, unless the loss or damage arises from the nature and inherent character of the property carried, such as the natural decay of perishable articles, or the fermentation or evaporation of articles liable to these effects, or the natural and necessary wear of certain articles, or from defects in the packages in which they are shipped, or in the case of live stock where the loss arises from their own vitality, or where vicious and unruly animals injure and destroy themselves by refusing food, or die of fright or heat, provided the carrier has used foresight, diligence and care to avoid such loss and damage. *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361; *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293; *Murphy v. Staton*, 3 Munf. 239; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 784, 45 S. E. 322.

And the onus is upon the carrier to show that the loss was such as he could not have prevented. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293.

As to exceptions in transporting live animals, see post, "Carriers of Live Stock," IV.

It is held by some authorities upon

the common law, that the rule rendering common carriers liable for every loss, except that which is caused by the act of God or the public enemy, was not a part of the ancient common law. It is a comparatively modern innovation, introduced in consequence of the growing commercial relations of the country, an imperfect police, imperfect protection from the government, and frequent losses by robbery. "The first case in which the principle was recognized and settled is that of *Woodliffe and Curtis* in the thirty-eighth year of the reign of Elizabeth. And the reason of the rule is not, as stated by Sir Edward Coke, solely or principally because the carrier hath his hire; for other bailees for hire and private carriers for hire are not liable in the same manner and to the same extent." Per Bockee, Sen., in *Van Santvoord v. St. John*, 6 Hill 157.

If this be the true doctrine other innovations upon the liability of the carrier have been added in more recent times. Thus by some authorities a carrier is not liable when the loss occurs by reason of acts of public authority, as for instance, destruction under the police power. *Mugler v. Kansas*, 123 U. S. 623; *Railroad Co. v. Husen*, 95 U. S. 465. Or loss arising from the nature and inherent character of the property in custody. *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361. The doctrine as to the latter has been also declared in Mississippi, Illinois, Massachusetts, New York, England, and doubtless other states. Another exception is when the loss occurs by reason of the act of the owner of the goods. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293; *Murphy v. Staton*, 3 Munf. 239; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361.

b. Act of God.

As a general rule, it is held, that the act of God, which excuses the common carrier, must be a direct and violent

act of nature. Thus "such an accident as could not happen by the intervention of man, as storms, lightning and tempest;" "those losses that are occasioned by the violence of nature by that kind of force of the elements, which human ability could not have foreseen or prevented, such as lightning, tornadoes, sudden squalls of wind;" "an extraordinary convulsion of nature;" "a direct visitation of the elements, against which the aids of science and skill are of no avail;" "physical causes which are irresistible, which human foresight and prudence can not anticipate, nor human skill and diligence prevent, such as loss by lightning, storms, inundations and earthquakes, and the unknown dangers to navigation, which are suddenly produced by their violence." See *Friend v. Woods*, 6 Gratt. 195; *Maslin v. Baltimore*, etc., R. Co., 14 W. Va. 189; *McGraw v. Baltimore*, etc., R. Co., 18 W. Va. 361.

Freezing Weather.—In *McGraw v. Baltimore*, etc., R. Co., 18 W. Va. 361, potatoes were shipped by the plaintiff, and upon arrival at their destination, it was discovered that they were frozen to such an extent as to be worthless. The carrier failed to ship on the day agreed, delaying the shipment to a subsequent day at which time the weather was cold, a sudden change having taken place in the conditions of the atmosphere. The defense set up by the carrier was, that the freezing weather caused the loss, and this brought the loss within the exception "act of God."

The court answering this defense, in the course of its argument, said: "If the question in this case depended solely on the question, whether the plaintiff in error (carrier) was liable for the loss of the property from freezing, because that was an act of God, I should have no hesitation in saying that the liability existed. But on the other hand, if the question of liability rested simply upon the question, whether they were liable for the freez-

ing of the property, having been guilty of no negligence or misconduct, by which that injury resulted, I would have as little hesitation in saying, that they were not liable; not because the freezing was an act of God, or an inevitable accident, but because of the exception to that principal, on account of the nature and inherent character of the property and its liability to freeze."

Bar in River.—And in *Friend v. Woods*, 6 Gratt. 189, a common carrier on the Kanawha river stranded his boat upon a bar which had been formed in the river a few days before the boat had proceeded on its voyage, the bar resulting from a rise of the Elk river, a tributary of the Kanawha, causing the ice to gorge at its mouth, and a bar of sand and gravel to form in the channel along which the boat had to pass. The officers and crew of the boat were ignorant of the bar, when the boat stranded upon it. The defense interposed was that the accident which caused the loss was due to the act of God. The court in *arguendo* said: "Among the strongest authorities stated in behalf of the plaintiffs in error are the cases of *Smyrl v. Nolon*, 2 Bailey 421, 23 Am. Dec. 146; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235. In the former it was held, that a loss occasioned by boats running on an unknown 'snag' in the usual channel of the river, is referable to the act of God, and that the carrier will be excused; and in the latter it was said that striking upon a rock in the sea not generally known to navigators, and not known to the master of the ship, is the act of God. And other authorities go so far as to assert that if an obstruction be secretly sunk in the stream, and, not being known to the carrier, his boat founder, he will be excused. The last proposition stands condemned by the leading cases both in England and America. In the case of *Forward v. Pittard*, 1 T. R. 27, Lord Mansfield says, that 'to pre-

vent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows that it was done by the king's enemies, or by such an accident as could not happen by the intervention of man, as storms, lightning and tempest.' The same doctrine is strongly stated in *McArthur v. Sears*, 21 Wend. 196, where it is said that 'no matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome, be inevitable; yet if it be the result of human means, the carrier is responsible.' These cases clearly restrict excuse of the carrier for losses occasioned by obstructions in the stream to such obstructions as are wholly the result of natural causes. * * * The rule, it is insisted, is a harsh one upon the carrier, and it is argued that the court should be slow to extend it further than it is fully sustained by the cases. However harsh the rule may at first appear to be, it has been long established, and is well founded on maxims of policy and convenience, and viewing the carrier in the light of an insurer, it is of the utmost importance to him, as well as to the public who deal with him, that the acts for which he is to be excused should have a plain and well-defined meaning. When it is understood that no act is within the exception, except such a violent act of nature as implies the entire exclusion of all human agencies, the liabilities of the carrier are plainly marked out, and a standard is fixed by which the extent of the compensation to indemnify him for his risks can be readily measured and ascertained." In view of these principles the carrier was held liable for the damages done to the freight on board his boat. For instances where these principles have been applied in connection with losses or injuries suf-

fered by passengers, see post, "Carriers of Passengers," V.

Effect When Negligence Is the Proximate Cause.—But whenever the common carrier is exempted from liability, either because of the act of God or because of the nature and inherent character of the property and its liability to loss and damage, he must be free from any previous neglect or misconduct, by which that loss or damage may have been occasioned. For though the immediate and proximate cause of the loss in any given instance may have been what is termed the act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. And the previous neglect or misconduct, which makes the carrier liable for loss to property, must be immediately or proximately connected with the accident or loss. If it is remotely the occasion of the loss or damage the carrier is not liable. He is answerable for the ordinary and proximate consequence of his negligence, and not for those that are remote and extraordinary, and his liability includes all those consequences, which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight is bound to anticipate. Thus, a shipper delivered potatoes to a carrier on the 13th day of the month to be shipped to a point between which and the shipping station there were daily trains. The 13th was fair and the weather moderate, and upon this day the carrier agreed to ship. As a matter of fact they did not reach their destination until the 16th, and upon their arrival they were found to be frozen and worthless, a decided change having taken place in the condition of the weather after the 13th, the day upon which they should have been shipped. The carrier defended on the

ground that the loss was caused by the freezing, which was due to an act of God. The court held that freezing weather, causing a loss to goods, could not be deemed an act of God, and did not come within the definition of that term. It further held, however, that if the question of liability rested solely upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct, by which that injury resulted, they would not be liable, not because the freezing was an act of God or an inevitable accident, but because of the exception to that principle on account of the nature and inherent character of the property and its liability to freeze. But it was shown by the evidence that the carrier was negligent in having failed to ship on the 13th day of the month as agreed, by doing which the cold weather would have been avoided, consequently no loss would have resulted from the goods being frozen; therefore, the carrier was liable for the damage accruing by reason of its default which was the proximate cause of the loss, even though in the absence of misconduct on its part, it would have been relieved from the liability under the exception "loss due to the nature and inherent character of the goods." *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 189. See post, "Carriers of Passengers," V. See also, the title NEGLIGENCE.

c. Delay.

Liability for Delay.—In *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, potatoes were delivered at the defendant's depot on the 13th day of February, 1866, to be shipped on the 14th. There was a daily train between the two points of shipment; the weather was mild and so continued on the 14th; but the potatoes did not reach Grafton, their destination, until the 16th, and arrived so frozen as to be worthless,

the weather of the 15th and 16th having become cold. Under the circumstances the company was held liable in damages for the delay.

Where there has been a delay in the transportation of goods causing a breach of the carrier's contract to deliver at a specified time, by reason of which loss ensues to the consignee, such consignee's right of action for the delay is not waived by a mere acceptance of the goods upon arrival at a later date than that specified in the contract. *Norfolk, etc., R. Co. v. Shippers' Comp. Co.*, 83 Va. 272, 2 S. E. 139.

Delay as Constituting a Conversion.

—The owner can not charge the carrier with a conversion, or the value of the goods, for a delay, however long, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused. Delay on the part of a carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, the plaintiff can recover from the carrier only the damages which he has sustained by the delay. *Ryland v. Chesapeake, etc., R. Co.*, 55 W. Va. 181, 46 S. E. 923.

2. Beginning and Ending of Liability.

As a general rule a carrier's liability as a common carrier, for the safety of the goods tendered to it for transportation, commences at the time of the delivery of such goods to it for immediate transportation. Acceptance may be either actual or constructive. And in order to charge a railroad company or other carrier with liability for the loss of, or injury to, goods which had been tendered for carriage and delivery by the shipper or his agent, an actual or implied acceptance by the carrier must be shown. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

The delivery must be such as to place the goods in the custody and

under the control of the carrier, and not merely in his vehicle, or other conveyance; so that if they are really in charge of the owner's servants, although they may be in the carrier's wagon or vessel, the carrier is not answerable. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

And as the liability of a common carrier thus begins with the delivery of the goods to it, so it continues until a proper delivery of the goods by it; for it is bound, not only to carry them to their destined place, but also to deliver them there to the bailee or as he may direct, else he must deposit them in a reasonably safe warehouse after the consignee has had a reasonable time in which to call for them and take them away. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293. And as to the duty of notifying the consignee upon the arrival of the goods at the end of their destination, it is held in *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293, that it is the duty of the carrier to tender delivery, or at least to notify the consignee of his readiness to deliver; and if the place of destination can not be reached so as to make the delivery, the carrier should not only take care of the goods, but also notify the consignor or owner within a reasonable time, of his inability to make the delivery, and thereafter it will be liable only as a bailee.

Yet in *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143, it is held, that the railroad company is not required to give notice to the consignee of the arrival of the goods, but he must look out for their arrival.

The duty of the carrier to notify the consignee upon the arrival of the goods which was decided in the affirmative in *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293, was urged in the case of *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143, and Balti-

more, etc., *R. Co. v. Morehead* was cited as authority for the status of the law in West Virginia.

The court in the *Berry Case*, reviewing the former decision, said: "*Railroad Co. v. Morehead*, 5 W. Va. 293, seems to hold that notice is necessary, but it seems against the better authorities, and based on exceptional circumstances on account of inability to deliver at the point of destination." In Virginia, however, this question is set at rest by statute. It is provided by the Virginia Code, acts 1891-'92, p. 965, Pol. Supl., § 1297a, that it shall be the duty of every company upon the arrival of freight shipped to any of its depots or stations to notify the consignee by mail or otherwise when such freight is ready for delivery and give a reasonable time for the removal of the same, and make due allowance for its class and for bad weather and holidays. In West Virginia it is held, that the removal by the consignee must be made without regard to the distance to the depot, or the means of removal or convenience of the consignee. If not made promptly, the carrier will cease to be liable as such. And what is a reasonable time for the removal of the goods by the consignee from the railroad warehouse is a question of fact, under all the circumstances for the jury; but, where the facts are clear and undisputed, it is a question of law for the court. *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143.

However, a railroad company is still under liability for a reasonable time as a common carrier while the goods are in the warehouse, but after a reasonable time elapses it is only under liability as a warehouseman. *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143.

And a carrier receiving lumber for shipment to Europe was held liable on its bill of lading for lumber lost after placing it on the pier of the rail-

way company and under its exclusive control. *Lewis v. Chesapeake, etc., R. Co.*, 47 W. Va. 656, 35 S. E. 908.

A drayman authorized to haul a merchant's goods from the depot is not, from that consideration merely, an agent whose knowledge of arrival of goods will be notice to the merchant. *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143.

When an Express Company Accepts in Capacity of Carrier.—When goods are delivered to parties to be forwarded and transported, and these parties are expressmen, and receive compensation for forwarding and transporting the goods are in their custody as carriers. Thus, the owner of certain goods about to arrive at the depot of a railroad station in Charlotte, North Carolina, wished them to be carried from thence to Richmond, Virginia, and an express company, by their agent at Charlotte, undertook to remove and deposit the goods in their warehouse as soon as possible on the arrival of the goods at the depot in Charlotte, and to carry them from Charlotte to Richmond within a reasonable time for the reward paid. The goods arrived at the depot, and the express company had notice of their arrival. It was held, that it was a delivery to the express company as a common carrier. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

3. Loss or Damage on Line of Connecting Carrier.

The rule established by the federal and many of the state courts regarding the common-law liability of the carrier for goods which are delivered and transported over and beyond its own lines is, that the liability of the common carrier is restricted to its own route, unless it contracts to carry the goods to the ultimate point of destination, which is beyond its own line; and such contract is not established by proof that the carrier accepted the goods with the knowledge of their

destination and named the rate for the same; and in the absence of special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to the goods after their delivery to the connecting carrier. *Hadd v. U. S. & C. Exp. Co.*, 36 Am. Rep. 557; *Railroad Co. v. Pratt*, 22 Wall. 123; *McConnell v. Norfolk, etc., R. Co.*, 86 Va. 248, 9 S. E. 1006. However, at the revision of the Virginia Code in 1887, the revisors proposed to the legislature the following provision which was adopted and incorporated into the Code of 1887, § 1295: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of its own line or route, it shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge." Under this section of the Code when a carrier accepts anything for transportation beyond the terminus of its own line, it assumes an obligation for its safe carriage to such destination, unless it is released from such liability by written contract signed by the owner; and it is liable to such owner for an excess of freight charged over the rate agreed to by the receiving carrier, and paid to the connecting carrier at destination, though the bill of lading issued by the receiving carrier stipulated that it should not be accountable for any damage after the freight received for by the connect-

ing carrier. *Virginia, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310. And this is true though the shipment be an interstate shipment and the carrier issues to the shipper a printed bill of lading, signed by the carrier only, in which it is stated that "it is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier." *Richmond, etc., R. Co. v. Patterson Tob. Co.*, 92 Va. 670, 24 S. E. 261.

The constitutionality of § 1295, Va. Code, 1887, was raised in *Richmond, etc., R. Co. v. Patterson Tob. Co.*, 92 Va. 670, 24 S. E. 261. The provision is that the company shall be liable for injuries happening on their lines to goods which the receiving carrier has accepted for transportation beyond its own line unless there be a written contract, signed by the shipper, exempting the carrier from such liability. The point made by the defense was that it was a regulation of commerce among the states, and being a provision made by a state government, was therefore in conflict with the constitution of the United States, art. 1, § 8, ch. 3, which provides that "the congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." After a full discussion the court of appeals of Virginia held, that the provision was constitutional. And on an appeal to the supreme court of the United States the decision was affirmed.

See 1 Va. Law Reg. 924, 3 Va. Law Reg. 907, for editorial comments upon the common law regulating this subject; the present Virginia doctrine under § 1295, and remarks upon the case above referred to in which this statute was construed by the Virginia court of appeals, and the opinion therein delivered, which was affirmed, and the view adopted by the supreme

court of the United States. See also, *Virginia, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310; *Va. & Tenn. R. Co. v. Sayers*, 26 Gratt. 328; *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

4. Warehouseman.

When Liable as Such, and Extent of Liability.—If a carrier be a warehouseman, or have a place of deposit for goods which he has transported, and he place them therein without instruction from the owner, either express, or implied from established usage or otherwise, he is still liable as carrier; but where they are so deposited in pursuance of express instructions, or in accordance with known and established usage, or where, notice having been given of their arrival, they are not removed within a reasonable time, the party's duty and obligation as carrier is at an end, and he becomes subject to the far less rigorous responsibility of a warehouseman; that is, he is answerable for ordinary or for gross neglect, according as he is not paid for such storage. And if access to the assignee, and delivery of the goods at the end of the route, is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor, and notify him within a reasonable time of his inability to make the delivery, after which his liability is only that of a bailee. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293. See the title WAREHOUSES AND WAREHOUSEMEN.

Where goods stored in a railroad warehouse are called for by the consignee, and he is informed by an agent that they have not arrived, which prevents their removal, and they are destroyed by the burning of the warehouse, the company is liable. *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143.

5. Forwarder.

If goods are under the control of

parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse without any fault or negligence on their part, they are not liable, unless they had agreed for compensation paid, to insure them, and had failed to do so. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

6. When Privilege Is Extended to Other Companies or Corporations to Carry Articles on Train.

Whenever any such corporation, company, association, or person, as is mentioned in Va. Code, 1887, ch. 51, shall obtain from a railroad company the right or privilege of carrying articles upon the trains of such railroad company, and shall comply with the provisions of § 1216 relative to terms upon which foreign express companies may do business in this state, such railroad company shall not in any manner be liable, as a common carrier, for any articles thereafter delivered to such corporation, company, association or person, for carriage as aforesaid. Va. Code, 1887, § 1217. See, in this connection, *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

7. When Cars Are Hired.

It is settled that a railroad company can not escape responsibility for damages resulting from its failure to provide cars reasonably fit for conveyance of the particular class of goods it undertakes to carry, by alleging that the cars used for the purpose of its own transit are the property of another, who undertook to provide the necessary material to insure the fitness of the cars for such transportation. The owners of the cars will be deemed to be the agents and servants of the railroad company, and it will be held to the same liability as if it owned the cars. Thus, a railroad company which uses the cars of a refrigerator company for the transportation of fruit is under the same obligation

to care for the fruit that it would have been, had the cars belonged to it. *N. Y., P. & N. R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444.

8. As Agent for Connecting Carrier.

Where a carrier undertakes to carry for the whole distance, on and beyond its line, and then has a contract with a connecting carrier by which it is to accept and transport from the end of the initial carrier's line to point of final destination, the initial carrier will be liable as principal for loss of goods on the line of the connecting carrier, and the latter will be regarded as agent of the receiving carrier. *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

By the terms of Va. Code, 1887, § 1295, connecting carriers become the agents of the initial carrier, and the latter is liable for their default in failing to transport the goods safely, or for charging a greater rate of freight than that agreed on. In Virginia, etc., *Co. v. Louisville, etc., R. Co.*, 98 Va. 776, 37 S. E. 310, there was no such release, and the initial carrier was bound to make good the rate of freight it had guaranteed.

Where a contract for transportation of goods over connecting lines of railway is made with one railway company as agent of the other, and the latter transports the goods and at the end of the trip presents a bill for the charges, it can not, when sued for injury to the goods by its servants, deny the agency. *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, 12 S. E. 395.

C. CONTRACTS OF EXEMPTION AND LIMITATION.

The general principles which regulate and govern the common-law liability of the common carrier have been more broadly and extensively treated in another part of this title. See ante, "In General," III, B, 1. In brief, the common law holds the carrier of goods liable for any loss or

damage to the goods occurring while in his care or under his control as carrier, except, as at first held, for such losses as occur by reason of the act of God, the public enemy, some default or misconduct on the part of the owner, or unless the loss be due to the nature and inherent character of the goods. In other words the common law regards the common carrier as a practical insurer of the goods, saving only a limited number of exceptions. However, it is held, that the carrier may, by a valid contract, make a caution for itself, and, to a degree limit the strictness and rigor of the terms imposed by the common law.

Thus in *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, it is held, that a valid contract to limit the liability of the carrier to a certain agreed valuation of the property even though less than actual value, may be made by the carrier, where it is just and reasonable in its terms, and a reduced rate of freight is made a consideration for it. *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556; *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87; *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

Where such contract is entered into the consignor is estopped from claiming or recovering another and higher valuation after the loss occurs, although the loss may be the result of negligence on the part of the carrier, provided the same is not gross, wanton or willful. *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185.

And it seems to be a well-settled principle that a railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as an insurer of freight or for money or valuable articles liable to be stolen or damaged, un-

less apprized of their character and value, or for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or animals become injured without the fault or negligence of the company or its agents. However, it can not, by express contract, though upon the consideration of a reduced charge upon the freight, relieve itself from its liability, as carrier of the freight, for injury to or loss of the freight resulting in any degree from the want of care or faithfulness of themselves or their agents. *Va. & Tenn. R. Co. v. Sayers*, 26 Gratt. 328; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143. The latter part of the proposition is confirmed in Virginia by statute, *Va. Code*, 1887, § 1296, providing that "no agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid."

Still, it is of importance, that upon the terms and conditions set forth in § 1295, *Va. Code*, 1887, a common carrier may limit its liability for freight to such damages as result from its negligence prior to delivery to its connecting carrier. When such contract has been made, it is for the jury to determine from the evidence, under proper instructions from the court, whether or not the damage or injury complained of occurred while the freight was in its possession or upon its line of road. *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 285, 33 S. E. 606.

In West Virginia, however, the authorities conflict regarding the proposition that a common carrier can by special contract exempt itself from loss caused by its negligence. Thus in the first case involving the point, *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, it was held, that a common carrier could diminish and restrict its

common-law liability by special contract; and could absolve itself in this manner from all liability resulting from every degree of negligence however gross, if it falls short of misfeasance or fraud, provided the terms and language of the contract are so clear and definite as to leave no doubt as to the intention of the parties.

But in the subsequent case of *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, the Rathbone Case was directly overruled, the court holding that a common carrier can not exempt itself from loss and damage, which has in any degree been caused by the negligence or misfeasance of itself or its servants. Commenting upon the Rathbone Case, Green, J., said: "I have reviewed the authorities at some length, because there is a decision of the supreme court of appeals of the state of West Virginia, which is in conflict with the views I have expressed and with the great weight of authority. In the case of the *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87, the court decides: 'That it is competent for a common carrier to diminish and restrict his common-law liabilities by special contract; and that he may, by express stipulations, absolve himself from all liability resulting from any and every degree of negligence however gross, if it fall short of misfeasance or fraud, provided that the terms and language of the contract are so clear and definite as to leave no doubt, that such was the understanding and intent of the parties.'"

"This case was decided during the war. It was argued at some length, and no doubt all the authorities then accessible were examined by the counsel and court; yet few authorities were then accessible. The authorities referred to on this point by counsel were only the English and New York cases and the decisions of the supreme court of the United States up to that time. The court in its opinion cites but a single case. We have seen, that the

recent New York and English cases are in conflict with the great weight of authority. A decision of such importance rendered by a court under such disadvantageous circumstances, and in conflict with both reason and the great weight of authority, though it be our own court, we can not follow." *Berry v. West Virginia, etc., R. Co.*, 44 W. Va. 538, 30 S. E. 143; *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185.

Where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering any other and higher valuation after the loss occurs, although the loss may be a result of negligence on the part of the carrier, provided the same is not gross, wanton or willful. But such a contract will not be upheld as exempting the carrier from all liability but as limiting the liability in case of loss to the amount fixed by agreement. *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185.

As to the construction of the contract, the term, "at the owner's risk," in a bill of lading which is declared to be a special contract, taken in connection with other stipulations therein, limits the carrier to such loss or damage only as might result from ordinary neglect; which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87.

A common carrier can not limit its common-law responsibility by any general notice, though knowledge of such general notice may be brought home to the consignor before or at the time he applied to have his goods transported. *Brown v. Adams Express Co.*, 15 W. Va. 813.

Where a common carrier relies on a contract of exemption, it must not only bring itself within the exemption

but show that its negligence did not contribute to the result. *Brown v. Adams Express Co.*, 15 W. Va. 813.

A common carrier does not by limiting its common-law liability by special contract thereby become a private carrier; and if loss is sustained, the burden of proof is on the carrier to show, not only that such loss arose from a cause from which it was exempted from responsibility by the terms of its special contract, but also that it arose from no negligence or misfeasance of itself or its servants. *Brown v. Adams Express Co.*, 15 W. Va. 812; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180.

D. FREIGHT, DEMURRAGE AND OTHER CHARGES.

1. Statutory Regulations.

Long and Short Haul.—It is unlawful for any common carrier doing business in this state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. But this is not to be construed as authorizing any common carrier to charge and receive as great compensation for a short as for a long distance; provided, however, that upon application to the railroad commissioner such common carrier may in special cases, after investigation by the railroad commissioner, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the commissioner may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this act. Va. Code, 1887, § 1297; Pol. Supl., 1900, § 1297a.

Special Rates—Rebates—Drawbacks—Discrimination.—If any common car-

rier subject to the provisions of the act of the legislature, ch. 55, Va. Code, 1887, Pol. Supl., 1900, § 1297a, shall directly or indirectly, by any special rate, rebate, drawback, or other device, change, demand, collect, or receive from any other person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Validity of Charges for Detention after a Reasonable Time.—Va. Code, 1887, §§ 1202, 1203, allows railroad companies to make a certain charge for the shipment of produce and other articles; and for the weighing, storage, and delivery of articles at any depot or warehouse of the company; a charge may also be made, not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated; but they forbid a railroad company to charge or receive any fee or commission other than the regular transportation fees, storage, and other charges authorized by law for manifesting, receiving, or shipping any goods or other articles for transportation on such railroad. Construing these sections, it was held, in *Norfolk, etc., R. Co. v. Adams*, 90 Va. 393, 18 S. E. 673, that the statutes do not forbid a charge of \$1 per day for the detention of a car more than 72 hours after notice to the consignee of its arrival. *Lacy and Hinton, JJ.*, dissenting.

2. Consideration for Freight.

In certain cases the performance of the voyage with the goods shipped is

the consideration for the freight. *Love v. Ross*, 4 Call 590.

The mutual obligations of a shipper to ship, and of a carrier to carry, furnish sufficient consideration for a contract to carry at a specified rate, but if the shipper fails to accept the carrier's offer, and is not bound to furnish the goods for carriage, the carrier's offer or promise to carry for a particular rate becomes a mere nudum pactum, the breach of which will not support an action. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

3. Preferences.

And it shall be unlawful for any common carrier, subject to the provisions of the act regulating common carriers to make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Va. Code, 1887, ch. 55, Pol. Supl., ch. 55. See these references for general provisions relating to common carriers.

4. When Entitled to Freight and Demurrage.

Contract for Freight and Demurrage Distinct and Independent.—By charter party of affreightment, a plaintiff engaged their vessel to take a cargo for defendants to a designated port, at a specified freight; and it was agreed that twenty running days should be allowed for unloading and discharging the vessel after her arrival at the port of destination, and that for every additional day's detention, defendants should pay \$50 demurrage. It was held, that the stipulation for payment of demurrage did not affect the contract for freight, and if the consignee failed to unload and discharge the ves-

sel within the lay days allowed, there being no impossibility of his doing so, and afterwards, while the vessel was detained on demurrage, the vessel and cargo be lost without the default of the master or mariners, the plaintiffs were entitled to recover the freight, as well as the demurrage. *Brown v. Ralston*, 9 Leigh 532.

Avoiding Capture—Vessel Stranded.

—And if in order to avoid capture by the enemy, the master before he reaches the port of destination, strands the vessel, which is thereby lost, but the cargo saved, the cargo shall not contribute to repair the loss of the ship, but the owner of the ship is entitled to freight and salvage. *Eppes v. Tucker*, 4 Call 346.

Vessel Condemned by Foreign Tribunal—Fraud of Owner.—But freight, though by the terms of the charter party, payable monthly, if required, is not to be recovered, where the voyage is never completed, but the vessel is condemned, by a foreign tribunal, in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act. *Hadfield v. Jameson*, 2 Munf. 53.

Vessel Goes to Sea without Taking a Cargo Agreed upon.—A shipper of corn having agreed to deliver it on board with no unreasonable delay, the captain of the vessel applied for it on Sunday, and, no person being ready to deliver it, would not wait until Monday, but went to sea without it. The ship owner was not entitled to dead freight on the quantity not shipped; but, on the contrary, was bound to make compensation to the other party, for the loss sustained, in consequence of the captain's not taking the full quantity on board. *Dunbar v. Buck*, 6 Munf. 34.

Merchantman Having Letter of Marque—To What Extent the Enemy May Be Chased—Freight Allowed.—But a

merchantman having a letter of marque, and having taken goods on freight, may chase an enemy in sight, but can not justify going out of her course to cruise. If, in the former case, she engage the enemy, and be so injured as to compel her to put into a port, other than that of her destination, she is entitled to freight. But if the goods be not afterwards sent by the ship owner to the port of delivery, she is entitled only to freight pro rata itineris, unless prevented from doing so by the freighter. *Hoe v. Mason*, 1 Wash. 207. See, in this connection, *Galt v. Archer*, 7 Gratt. 307.

Right to More than Stipulated Freight.—A. the owner of a brig, chartered her to B, to carry a cargo of tobacco from Virginia to Curacao or Eustatia; from thence to Hispaniola; and back to Virginia; the freight to be half the tobacco shipped in Virginia, payable at the port of delivery in the West Indies; and £1,000 paper money on the vessel's arrival in this country. The stipulated freight, in the charter party, was all the freight that A was entitled to; and he had no right to any further freight for bringing back the return cargo. *Love v. Ross*, 4 Call 590.

Excuse for Nonpayment.—If it is impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying freight. By two judges. *Brown v. Ralston*, 4 Rand. 505.

5. When Freight Is Due.

It is a general principle that freight is not due until it is earned by a delivery of the cargo unless the delivery is prevented by default of the shipper or his agents. And if it becomes impossible to deliver the cargo, from causes not arising from the default of either party, the shipper will be excused from paying the freight. *Brown v. Ralston*, 4 Rand. 504.

6. Set-Off.

A consignee can not set off against a carrier's charge the amount of damages sustained by the goods from an act of God. *Galt v. Archer*, 7 Gratt. 307.

7. Recovery.

An action at law may be maintained by a carrier to recover his charges for transportation. The usual form of action at common law is *assumpsit*. Thus, in *Galt v. Archer*, 7 Gratt. 307, a common carrier contracted to deliver a crop of wheat at an agreed price per bushel. A large portion of the crop was delivered in good order; but from the unavoidable effects of a storm, a small part was delivered in a damaged condition, and another small portion was lost. It was held, in an action by the carrier for the freight, that he was entitled to recover under the common *indebitatus* count, the agreed price for the whole quantity so delivered or lost. See post, "Actions," VI.

8. Excessive Charges.

Recovery from Carrier.—Under Va. Code, 1887, § 1295, providing that, when a common carrier accepts anything for transportation beyond the terminus or its own line, it shall assume an obligation for its safe carriage to such destination, unless it is released from such liability by a written contract signed by the owner, a carrier accepting freight for transportation beyond its lines, and who has obtained no such written release signed by the owner, is liable to such owner for an excess of freight charged over the rate agreed to by the receiving carrier, and paid to the connecting carrier at destination, though the bill of lading issued by the receiving carrier stipulated that it was not to be accountable for any damage after the freight was receipted for by a connecting carrier. *Va. Coal, etc., Co. v. Louisville, etc., R. Co.*, 98 Va. 776. 37 S. E. 310.

In *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434, the court

said that where, generally speaking, the only outlets for the transportation of oil is over a certain railroad, and an excess of legal freight appears to have been paid in order to secure transportation over it, though paid after each shipment, it is compulsory, and can be recovered.

And a repayment of freight charges in excess of those lawfully chargeable by a railway company need not be demanded before bringing suit to recover back the excess. *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434.

And in an action against a carrier for charging an illegal freight rate, if the declaration states the weight of the freight, the time and place where delivered to defendant for transportation, and places to which it was to be transported, distance, the amount which was demanded and received by defendant and that it was more than was lawful, contrary to the statute in such case made and provided, it is a sufficient notice of the cause of action to the defendant to enable it to make all just and proper defenses. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336. See post, "Actions," VI.

Penalty for Overcharge.—It seems that a railroad company is not liable for the penalty of \$500 for overcharge of freight rates, under clause 5, ch. 54, p. 569, W. Va. Code, 1891, for the mere charge of it by the conductor, unless the company authorized or approved the act. *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 36, 28 S. E. 754.

9. Change of Rate.

Lowering a freight rate in the manner required by the interstate commerce act, after a contract has been made in violation of that act, does not render the contract valid and binding on the carrier, and, if under no legal obligation to lower the rate, the carrier may restore the rate so lowered. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

IV. Carriers of Live Stock.

A. STATEMENT OF DUTY.

1. Degree of Care and Liability in General.

An exception is made to the strict liability to which a common carrier is held by the common law for the transportation of goods intrusted to it in the case of a shipment of live stock. It would be an unjust and unreasonable imposition to hold a carrier responsible to the same degree for the safety of animate as is done in the case of inanimate property. Carriers of live stock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the vitality of the freight; that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, restiveness, fright, viciousness, kicking, or goring, etc. The carrier is relieved from liability for injury from such causes if he has provided suitable means of transportation and exercised that degree of care which the nature of the property required, or has not otherwise contributed to the injury. *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180. While common carriers are insurers of inanimate goods against all loss and damages except such as is inevitable or caused by the public enemy, or default of the owner, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care. See ante, "Carriers of Goods," III.

A carrier assumes all risks except those occasioned by the act of God or a public enemy, or, as has been held, where a storm is the proximate cause of an injury. Thus it was held, that although a carrier was responsible for delay in the shipment of stock at New Orleans, yet it was liable to the con-

signor in damages resulting from injury to his stock, the proximate cause of which was exposure to a severe storm that began after the stock left New Orleans. *Herring v. Chesapeake, etc.*, R. Co., 101 Va. 778, 45 S. E. 322.

3. Providing Suitable Cars and Appliances.

It is the duty of a common carrier, engaged in the business of carrying live stock, to furnish suitable and safe cars and appliances therefor, and it is entitled to a reasonable time within which to furnish such cars. *Moore v. Baltimore, etc.*, R. Co., 103 Va. 189, 48 S. E. 887. Where no opportunity was given to the carrier to furnish a suitable car, and no order or request beforehand was made that one should be furnished, it was held, that the carrier was not responsible for the damages to the goods transported, because of the failure to furnish a suitable car. *Moore v. Baltimore, etc.*, R. Co., 103 Va. 189, 48 S. E. 887.

3. Confinement and Treatment in Transitu.

What Classes of Animals Included.—Section 4386 of the Revised Statutes of the United States forbidding any railroad company which carries "cattle, sheep, swine, or other animals" from keeping the same confined in its cars for a longer period than twenty-eight consecutive hours without unloading the same, watering, and feeding, for the period of at least five consecutive hours, applies to a shipment of horses, mules, and all animals which may suffer for want of food, water or rest during such transportation. And that the two cars, in which forty-three horses were shipped, were two feet longer than ordinary cars with racks, and troughs in which to feed and water, is insufficient to show that the cars were such that the cattle could have "proper food, water, space, and opportunity for rest," as provided by Rev. Stat., U. S., § 4388, so as to relieve the carrier from the duty of unloading them at stated

intervals to rest, water and feed. *Chesapeake, etc.*, R. Co. *v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935.

Negligence in Allowing Stock to Drink Salt Water.—But where a contract by which lambs were shipped provided that the company should not be liable for injury to the stock until they were "loaded into the car, and the car door fastened by the conductor," it was held, that this did not exempt the carrier from injury caused by its negligence in allowing the lambs to drink salt water before they got on the car. *Norfolk, etc.*, R. Co. *v. Harman*, 91 Va. 601, 22 S. E. 490.

B. LOSS OR DAMAGE CAUSED BY DEFAULT OF OWNER.

In view of these exceptions it was held, that a common carrier will not be liable for injury to a horse occasioned by the improper or unwarrantable interference of the owner or his agent, in the management of the car by the servants or employees of the company. *Roderick v. Railroad Co.*, 7 W Va. 54.

Contributory Negligence.—If the owner's contributory negligence is the proximate cause of the accident and loss of his live stock, the general principles would apply, and his recovery be barred. See the title NEGLIGENCE.

But the fact that a shipper in unloading horses, allowed some of them to go out without leading them, does not show, as a matter of law, that he was guilty of contributory negligence. *Chesapeake, etc.*, R. Co. *v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935.

And in *Norfolk, etc.*, R. Co. *v. Sutherland*, 89 Va. 703, 17 S. E. 127, the plaintiff shipped cattle over the defendant railroad company's line to a point on another line, the bill of lading providing that he should load, unload and transfer them at his own cost. At a point on defendant's line the cattle were unloaded and fed and reloaded by defendant, though the plaintiff was

present and willing to do so, and, in reloading, some of the plaintiff's cattle were placed in the cars of another shipper. It was held, that the mistake was the company's, and that the owner of the stock was not guilty of contributory negligence, though the loss occurred on the line of the connecting carrier, since it was the result of its own negligent act, committed before the cattle were delivered to the connecting carrier. See post, "Negligence," V, E. See also, *Roderick v. Railroad Co.*, 7 W. Va. 54.

C. CONTRACTS OF EXEMPTION AND LIMITATION.

And it seems that a railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as insurer of live animals liable to get unruly from fright and to injure themselves in that state, when such animals become injured without the fault or negligence of the company or its agents. *Va. & Tenn. R. Co. v. Sayers*, 26 Gratt. 328. See ante, "Liability," III, B.

Thus, a common carrier may, by special agreement, just and reasonable in itself, and fairly made between itself and the consignor of a horse at the time of shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value thus ascertained, and may also limit its liability in case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided the negligence be not gross, wanton, or willful; but can not wholly exempt itself from liability for loss resulting from negligence. *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185.

But by the better rule and weight of authority the carrier can not make a valid contract to exempt itself from liability for loss or damage arising from its own negligence. *Va. & Tenn.*

R. Co. v. Sayers, 26 Gratt. 328; *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749; *Johnson v. Richmond, etc., R. Co.*, 86 Va. 975, 11 S. E. 829; *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490; *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935.

B. shipped twenty-four head of cattle at Rollyson station, in Braxton county, over the B. & O. railroad, to Baltimore, Md. On the day of shipment, B. and the company made and signed a contract which, among other things, provided, "that in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage, sustained thereby, the amount actually expended by said shipper, in the purchase of food and water for the said stock while so detained." Held, that the company could not, by the contract, or any of the provisions thereof, exempt itself from any liability for loss or damage occasioned to the plaintiff which was in any degree caused by the negligence or misfeasance of itself or its servants. *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613.

For a fuller discussion of this particular point upon which the West Virginia courts disagree, and the general principles governing the subject of common carriers of goods, which in general apply with equal force to the subject in hand, reference is made to ante, "Carriers of Goods," III. See also, *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 15 S. E. 185; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 193.

V. Carriers of Passengers.

A. IN GENERAL.

Who Is a Common Carrier of Passengers.—A common carrier of passengers is one who undertakes for hire to

carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 143. This definition includes electric railway companies. *Richmond R., etc., Co. v. Bowles*, 92 Va. 738, 24 S. E. 388; *Danville Street Car Co. v. Payne*, 2 Va. Dec. 379; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758. Also, stage coaches. *Farish v. Reigle*, 11 Gratt. 697. See also, *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180.

Duty to Have Passenger Cars Open at the Termini.—It shall be the duty of every railroad company in this state to have at the termini of its road passenger cars open for admission of passengers, and baggage cars for the reception of baggage, at least thirty minutes before the advertised hour of departure of every passenger train. Va. Code, 1877, § 1297, Pol. Supl., § 1297a.

Who Conservator of the Peace on a Train.—The conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train. W. Va. Code, 1900, ch. 145, § 31; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

Section 31, ch. 145, W. Va. Code (1900), which enacts among other things, that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train," does not relieve the carrier of passengers from such liability. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

B. RIGHTS AND DUTIES.

1. Contract for Passage.

When a common carrier undertakes the carriage of a passenger, whether gratuitously or for hire, the contract involves not only their duties and ob-

ligations to each other, but such as are imposed upon them by the public policy of the state. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 726.

2. Who May Become a Passenger.

It is the lawful right of every citizen *prima facie* to become a passenger of a railway train. *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935.

3. Persons Regarded as Passengers.

But neither the purchase of a ticket nor an entry into the car is essential to create the relation of carrier and passenger. Thus, where a person enters a ticket office of a railway company to buy a ticket he is entitled to the protection of a passenger, even though the agent refuses to sell him a ticket. *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935.

And although a railroad company requires fare for all children over five years old, the fact that a father purchases no ticket for his child six years old, will not bar recovery for injury causing his death; and whether or not he knew that a ticket was required is immaterial. *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454.

So a person having a ticket for passage upon a railroad, who boards a freight train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser. *Bogges v. Chesapeake, etc., R. Co.*, 37 W. Va. 297, 16 S. E. 525.

And a mail agent traveling on a passenger train in the discharge of his official duties is a passenger. *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

Where a common carrier transports cattle for hire, and a free pass is given to the shipper so that he can take care of the cattle, the person traveling on the free pass is a passenger, and the carrier can not by special contract exempt itself from liability for its own

negligence or that of its servants. *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180.

And every one riding in a railroad car is presumed *prima facie* to be there lawfully, as a passenger having paid, or being liable when called on to pay, his fare. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

A person intending to enter a street car which has stopped for passengers, and who endeavors to enter the same while it is standing, is a passenger under the care of the street car company, and if, in endeavoring to enter the car, in the exercise of such care as might reasonably be expected of one of his age under the circumstances, he is thrown from the car and injured by the negligent starting of the car, the company is liable. *Norfolk, etc., Co. v. Morris*, 101 Va. 422, 44 S. E. 719. See the title STREET RAILROADS.

4. Treatment and Protection of Passengers.

General Consideration.—A common carrier of passengers is not an insurer of their safety or of their proper treatment. It is the duty of the carrier of passengers to treat his passengers properly and respectfully and to carry them safely. The law enjoins on the conductor as the representative of the carrier the duty of giving to passengers the protection to which they are entitled. The law based upon principles of public policy is strict and exacting in requiring performance of this duty, and public policy is not likely to exact any less stringent rule in this age, when all the world is carried to and fro daily by the instrumentalities vast in power and force, owned by mere corporate entity, and which are almost as dangerous as useful, unless there be constant care and diligence, and greater care and skill employed in their management and disposition. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262; *Gillingham v. Ohio River R. Co.*, 35 W. Va.

588, 14 S. E. 243; *Smith v. Norfolk, etc., R. Co.*, 48 W. Va. 69, 35 S. E. 834.

But, as stated, a common carrier of passengers is not an insurer of their safety or of their proper protection, but is liable for injury or improper treatment, due to the negligence or willful misconduct of it or its servants while engaged in executing the contract. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

However, in order that a passenger may hold a carrier liable to the full measure of its responsibility for safe carriage, he must conform to all the reasonable rules made by the company looking to the safety of its passengers. *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732. This subject is treated more at length, with fuller array of authorities, post, "Injuries to Passengers," V, D.

Treatment Due from Employees.—

A passenger is entitled to protection; and the law enjoins on the conductor, as the representative of the carrier, this duty. Common carriers are liable for the willful, wanton, malicious, or illegal conduct of an employee towards passengers on their trains, when such conduct is a breach of the duty owed to persons entrusting themselves to their care, at their solicitation, for compensation. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798; *Smith v. Norfolk, etc., R. Co.*, 48 W. Va. 69, 35 S. E. 834.

A railroad company is liable to a passenger on one of its trains for a willful assault and battery committed on such passenger by the conductor in charge of such train. Such an assault is a breach of the duty of protection which such company owes to its passengers. *Smith v. Norfolk, etc., R. Co.*, 48 W. Va. 69, 35 S. E. 834.

Physical Condition of Cars, Tracks

and Station.—A railroad company is held by the law to the utmost care,

not only in the management of its trains and cars, but also in the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 433.

It is the duty of a railroad company to keep its depots and platforms in safe condition and free from dangerous defects for the safety of its passengers. *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148.

A person going to a depot to become a passenger has the right to presume that the company has discharged such duty, and is not bound to keep a lookout for defects occasioned by the company's negligence, other than such as ordinary prudence might require for self protection. *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148.

If a person while trying to get her children onto the platform of a railroad station, unconsciously steps back into a hole in the platform of which she had no previous knowledge, she is not guilty of contributory negligence, although if she had been walking forwards, in the direction of such hole, she could have easily seen the same. Her walking backwards or failure to look backwards is not negligence when there is nothing to warn her of the company's negligence, and it is not her duty to presume it or look for it. *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148.

Street railway companies, for the protection of their passengers, are bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, in keeping in repair the necessary appliances used by them in the transportation of passengers, and the slightest negligence on their part renders them liable for all accidents to such passengers occasioned thereby. *Mannon v. Camden Interstate R. Co. (W. Va.)*, 49 S. E. 450.

Protection from Arrest.—A common

carrier is under no obligation to protect a passenger from legal arrest, but only from illegal arrest. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

5. Right to Make Rules and Have Them Obeyed.

A carrier, however, is entitled to make rules for conducting its affairs, if they be reasonable, not conflicting with any legal liability, and not exempting from liability for negligence or improper conduct. If the rules be such as described, they are binding on persons dealing with the carrier when notified thereof. The reasonableness of a rule is a question of law for the courts. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250.

It is a reasonable rule that it will only carry as baggage the passenger's wearing apparel, and upon refusal of a passenger to certify that "his trunk contained nothing except wearing apparel," the passenger is not entitled to damages for the company's refusal to carry such trunk. *Norfolk, etc., R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532. And a passenger in the habit of carrying merchandise in his trunk, against carrier's rules, may be required to prove contents as condition of receiving and checking it. *Norfolk, etc., R. Co. v. Irvine*, 85 Va. 217, 7 S. E. 233.

A passenger upon a railroad train must show his ticket, or "conductor's check" given in the ticket's place, when called upon by the conductor, and, if he fail to do so, whether willfully or because he has forgotten having the ticket or check, and refuses to pay fare, he can not recover damages for his ejection, if unnecessary force is not used. *Price v. Chesapeake, etc., R. Co.*, 46 W. Va. 538, 33 S. E. 255.

C. FARES AND TICKETS.

1. The Ticket.

As Evidencing Right of Passenger.

—As between a passenger and a conductor, the ticket is conclusive evi-

dence of the passenger's rights, and if it does not entitle him to ride he may be ejected from the train without giving him any cause of action in tort, though the company, through mistake of its agent, has given the passenger a wrong ticket, or has taken up his ticket when not entitled to do so. Under such circumstances, his remedy is by an action on the contract for giving him a wrong ticket, or for wrongfully taking up his ticket, and not by an action for his wrongful removal from the train. *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 914.

Limited to What Passage.—A ticket limited on its face to a certain time for passage, is not good after the expiration of such time. *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415, 19 S. E. 563.

And as between a person who buys a ticket bearing a date prior to the purchase, and the company, he is entitled to a passage on the date of purchase, the ticket being limited to one day from date of sale. *Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271, 21 S. E. 1022.

Demand for Ticket or Fare.—A railroad conductor may demand a ticket as evidence of a passenger's right of passage, and on failure to produce it may demand payment of fare; and on failure to pay it may lawfully eject the passenger from the train using no more force than necessary. *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737. See post, "Ejection," V, F; "Actions," VI.

2. Schedules.

Duty of Carrier to Print and Make Public Schedules of Rates and Fares.—Every common carrier subject to the provisions of § 1297, Va. Code, 1887, shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has

established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its route between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers of freight respectively are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. Va. Code, 1887, § 1297; Pol. Supl., 1900, § 1297.

3. Advancements and Reductions.

Public Notice Required.—No advance shall be made in the rates and fares and charges which have been established and published as required by the Code, by any common carrier in compliance with the requirements of § 1297, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the increased rates and fares and charges will go into effect; and the proposed changes shall be shown by printing new schedules in force at the time and kept open for public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given. Va. Code, 1887, § 1297; Pol. Supl., 1900, § 1297.

Effect of Demanding or Receiving a Greater or Less Compensation than Schedule Rate.—And when any common carrier shall have established and

published its rates and fares and charges in compliance with the provisions of the Code, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or for any services in connection therewith than is specified in such published schedules of rates and fares and charges as may at the time be in force. Va. Code, 1887, § 1297; Pol. Supl., 1900, § 1297.

When a Carrier May Reduce or Waive Charges.—But it is provided that nothing in the general act upon carriers shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons and the necessary agents employed in such transportation, or to mileage, excursion, or commutation passenger tickets, or to persons in charge of live stock being shipped from the point of shipment to the point of destination and return; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion or to indigent persons, or to inmates of the Confederate homes or state homes for disabled soldiers, and of disabled soldiers and sailors, including those about to enter and those returning home after discharge, or carrying the same free; nothing in this act shall be construed to prevent common carriers from giving free carriage to their own officers, employees and members of their families, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers, employees and members of their families; and nothing in this act contained shall in any way abridge or alter the

remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies; provided, that no pending litigation shall in any way be affected by the act. Va. Code, 1887, § 1297; Pol. Supl., § 1297a.

4. Opening of Ticket Office.

And it is the duty of every railroad company in this state to have its ticket offices opened and its agents for the sale of tickets in attendance at least thirty minutes before the advertised hour of departure of every passenger train. Va. Code, 1887, § 1297; Pol. Supl., 1900, § 1297.

5. Rights in Connection with Ticket. a. Of Passenger.

Erroneous Statement by Carrier as to Connection.—Where a person purchased a ticket on the statement of the ticket agent that the train she was about to take made close connection at a certain point with another train going to her place of destination, which statement was erroneous, and such person, on arriving at such connecting point, was obliged to wait some time for such connecting train, and thereupon, in the face of a storm, and in her delicate state of health, procured a buggy, and drove over a rough road to her father's house, she could not recover for the injuries resulting from such drive. *Fowlkes v. Southern R. Co.*, 96 Va. 742, 32 S. E. 464.

Passenger Directed into Wrong Car.—But where a passenger who has procured a ticket for himself and family is, by a negligent mistake of one of the employees of the railroad, directed into a car which is cut off and left standing when the train leaves,—one of his children with him being sick at the time, carrying off his baggage, including the child's clothing and medicine, part whereof was lost, the father is entitled to compensatory but not to punitive damages. *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809.

Wrong Date Stamped upon Ticket.

—And where a ticket agent selling a mileage ticket good for one year only, stamps upon it as the date of issue a date one year before the date of issue, the passenger can ride upon such book, and if refused, and rejected for nonpayment of fare, he can recover damages. *Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271, 21 S. E. 1022.

Ticket Sold to Station at Which There Is No Regular Stop.—When a railroad company has sold a passenger a ticket to a particular station it has no right to refuse to stop its train there, and is liable for such refusal. And a ticket from one designated station to another is good for any intermediate station at which, by the regulations of the company, the train regularly stops. *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130.

Ticket Wrongfully Taken Up.

Where a passenger's ticket is wrongfully taken up by one conductor, and another conductor in charge of the train demands his ticket and ejects him, plaintiff can recover whatever damages he shows himself entitled to recover, either on the contract, or ex delicto. *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962.

Detaching Coupons Wrongfully.—In *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250, a plaintiff purchased from the defendant a commutation coupon book, which had attached to it a condition that coupons should be detached by the conductor in collecting fares; and should not be accepted if detached from the book. The condition was known to and accepted by the passenger, but he insisted on tearing out the coupon himself, against the remonstrance of the conductor that such coupons would not be accepted. The conductor refused to accept them, and, on the passenger's refusal to allow the conductor to tear out other coupons, the conductor put him off the train. In an action

for ejectment the jury awarded plaintiff \$550 damages. The court held, that the verdict was for punitive damages, and should have been set aside, there being no evidence of any willful and malicious purpose on the part of the defendant, or any neglect of duty.

Performance of Requirements Concerning Signing and Identification.

But if a railroad ticket provides that when presented to the conductor the passenger shall sign his name thereto and "otherwise identify" himself as the original purchaser, the conductor is not entitled, after the passenger has offered to sign the ticket, to refuse such offer and require the passenger to "identify" himself, and to eject him from the train for refusing to do so, and the carrier, upon ratifying the acts of the conductor is liable to the passenger in exemplary damages. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

b. Of Carrier.

Where a passenger, either willfully or because he has forgotten having a ticket, does not show it, and refuses to pay fare, he can not recover if ejected. *Price v. Chesapeake, etc., R. Co.*, 46 W. Va. 538, 33 S. E. 255. See *N. & W. Ry. Co. v. Wysor*, 82 Va. 250; *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

And a pass issued on a false representation that the person to whom it was issued was connected with a newspaper can be cancelled. *Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 S. E. 539.

A passenger presenting an invalid ticket after having been notified that it was invalid can be ejected. *Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 S. E. 539.

6. Annual Passes.**Application for Renewal Necessary.**

—In *Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 8 S. E. 787, a railway company by contract issued to plaintiff an annual pass. On its expiration plain-

tiff applied for and secured a renewal. On its expiration he did not apply for another. It was held, to be a question for the jury whether it was the duty of the company to issue a renewal without application.

7. Commutation Books.

The rule that coupons of commutation tickets, if detached, will not be accepted for a passage, is reasonable. Thus where a commutation coupon book provides that the coupons must be detached by the conductor, and will not be accepted if otherwise detached, a passenger who, with knowledge of such condition, detaches the coupons, is not entitled to ride thereon. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250.

8. Overcharges.

A railroad company is not liable for the penalties of overcharging, under W. Va. Code, 1891, ch. 54, cl. 5, where the charge was made by a conductor, unless it authorized or ratified the conductor's act. *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 36, 28 S. E. 754.

9. Contract to Furnish Ticket.

In *Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 8 S. E. 787, a railway company contracted with a firm, "in consideration for a ticket entitling either member of the firm, but only one on any train, to a seat on its passenger trains." Held, that the firm was entitled to only one ticket, to be presented when any one member took passage.

An act incorporating a certain electric car line merely conferred vitality and corporate existence on the corporation, and the terms and conditions on which it was to exercise its corporate powers were to be prescribed by another designated authority. Under the terms and conditions prescribed by the designated authority, and agreed to by the corporation, the latter was to transfer passengers, who had paid one fare to and from certain extensions, to cars on its main lines, without charging any extra fare, and such passengers so transferred should have

all the rights of any passenger on the main line to which he was transferred. In mandamus by a passenger to enforce the observance of this agreement, it was held, that the passenger was entitled to a free transfer claimed by him over the line, and that the terms and conditions prescribed by the designated authority became parts of the organic law of the corporation, and could be enforced by mandamus awarded on the application of a private person injured by their violation. *Richmond R., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

The circuit court of the city of Richmond has jurisdiction of a mandamus to compel the plaintiff in error to issue a transfer to a passenger within the limits of the city, although the obligation to perform that duty appear from the record of the county court of Henrico. Section 3218 of the Va. Code, 1887, has no application to the case. *Richmond R., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

D. INJURIES TO PASSENGERS.

1. In General.

a. Statement of Duty as to Care and Safety.

In *Searle v. K. & O. R. Co.*, 32 W. Va. 370, 9 S. E. 251, the court gave among others the following instructions which were held entirely proper: "The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care

of the track and bridges, and all other arrangements necessary to the safety of passengers." *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431. Or as stated in *Va. Cent. R. Co. v. Sanger*, 15 Gratt. 230, the carrier is bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all subsidiary arrangements necessary to the safety of the passenger. *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467. This duty to protect and carry safely is variously expressed as "utmost care," "utmost care and diligence," "utmost care and human foresight," or "greatest possible care and diligence." *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394; *Richmond, etc., R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404. All the authorities seem to have in view one purpose, to throw around the passenger every guard which reason and prudence would suggest as likely to shield him from accident or loss; and in exacting such protection for the person standing in the relation of passenger, the carrier is held liable for the slightest degree of negligence on its own part, or its servants or employees. However, the duty does not extend so far as to make the carrier a practical insurer of a passenger, as it is of goods or property. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

Its duty is to carry them safely, using the utmost care as far as human skill, diligence and foresight can reasonably be required to go. *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578; *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467.

A common carrier is bound to use the utmost care and diligence for the safety of its passengers. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

As between a railroad company and

a trespasser or stranger, contributory negligence on the part of the plaintiff renders the defendant liable only for gross or wanton or willful neglect, where otherwise he would be held liable for ordinary negligence. While this is the general principle, it is necessary to observe that in the transportation of its passengers a railroad company is bound to exercise more than ordinary care and diligence, and is liable for the slightest negligence against which prudence and foresight could have guarded, and is held to the utmost care in the removal of obstructions, repair of bridges and switches, and all other matters properly pertaining to the condition and safety of its track. Consequently the degree of care exacted from the company to a passenger is greater than that to be exercised in respect to a stranger or trespasser. Hence there are cases where contributory negligence on the part of a stranger or a trespasser would entirely defeat a recovery, unless gross or wanton negligence were brought home to the defendant, but, had such person stood in the relation of a passenger, his contributory negligence would relieve the company of the duty to exercise that extreme care ordinarily exacted, but would still leave it liable for the failure to use ordinary precautions for the safety of such passenger after his danger had been discovered, or brought to its notice, if by its use the injury could have been avoided. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

It is the duty of the street railway to use extraordinary care and caution to see that passengers are not injured in getting on or off its cars when stopped at a regular point for stopping. *Richmond Traction Co. v. Williams*, 102 Va. 253, 46 S. E. 292.

It is the duty of a street car company, when its cars have stopped for passengers, to use the highest degree of care to see that all passengers, law-

fully entering its cars, are in a place of safety thereon before starting, and if a passenger is injured from the consequence of starting the car at a time when, by the exercise of such care, it was known or might have been known to the servant of the company that he had not reached a place of safety, the company is liable. *Norfolk, etc., Co. v. Morris*, 101 Va. 422, 44 S. E. 719.

b. Source of Liability for Injuries Occurring to Passengers.

The liability of common carriers of passengers does not flow directly from the injuries sustained, but from their duty to convey their passengers in comfort and safety. They are responsible for injuries if it appears that they knew, or ought to have known that danger existed, or was reasonably to be apprehended, and did not use proper means to avert it. But a sleeping car company is not liable for the death of one of its passengers, at the hands of an assassin, in the night time, who enters its car by stealth, while traveling through a peaceable, lawabiding country. This is not a natural or probable danger, nor one to be anticipated, against which the company is expected to guard and protect its passengers. *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467.

c. Duty to Passenger and Employee Distinguished.

The difference between the degree of care which railroad companies owe to a passenger and to an employee is vast. As to the former, they are held liable for the slightest negligence; as to the latter, they are bound to use only ordinary care. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

d. Illustrative Cases Involving the Nonperformance of Duty to Protect from Injury.

(1) Taking on Passengers.

In *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454, a freight train, with cabooses for passengers, stopped at a cer-

tain station, and the conductor, though he saw several approaching with baggage, ordered the engineer to back the train. Without warning the train violently backed while the passengers were boarding it, fatally injuring a boy between five and six years old, standing on the end of the ties, and about to get on. It was held, that the railroad company was liable.

(2) In Transitu.

Class of Conveyance to Be Provided.—Carriers of passengers are bound to provide such conveyances as will best secure the safety of passengers. *Farish v. Reigle*, 11 Gratt. 697; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394.

What Constitutes Negligence in Running.—The mere speed of motion of the train, or the fact that the train is "behind time," is not, per se evidence of negligence. *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241.

And in an action for injuries to a passenger thrown from the train by a lurch caused by striking a curve, an instruction that defendant is liable if the train was run over the curve "at an unusually rapid rate of speed" is erroneous, since "unusually rapid" is not equivalent to "dangerous." *Chesapeake, etc., R. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833.

Conveyance Upsetting.—If a coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. And the prima facie presumption is, that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach, to show that there was no negligence whatsoever. *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666.

Condition of Premises.

Track—Obstructions.—The duty of a railroad company to employ the ut-

most care and diligence in guarding obstructions on the track is clearly embraced within its warranty to carry their passengers safely, so far as human care and foresight can go; because railroad companies conveying passengers, combining in themselves ownership as well of the road as of the cars and locomotives, are bound to the utmost care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230; *Carrico v. West Virginia, etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571.

If a railroad company, whilst using its track for the carriage of passengers, engages in a work to be done on its road and in immediate proximity to its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, and accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defense to show merely that they had placed the work in the hands of an independent contractor, and that the obstruction was caused by the carelessness of one of his employees. *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230.

Thus, contractors employed by a railroad company to deliver stone on the road and prepare it for ballasting the track (the ballasting not being necessary to the security, but being intended for the preservation of the track), place the stone in ridges so near the rail that it is struck by the step of the baggage car, or the ridge is disturbed and a stone rolled down by the hub of one of the cars, or is rolled down by the jarring of the train as it passes near the ridge, or it is loosened from its place and rolled down by the haste of one of the hands

employed by the contractors in getting off the ridge to avoid the train, and the cars run against it, and are thrown off the track, whereby a passenger is injured; it is for the jury to inquire whether there was not danger in the work, arising from the mode and manner in which it was done; whether the company did not know, or by the exercise of the proper diligence might not have ascertained, the existence of such danger; and whether they had used due care and foresight in guarding against it; and if they have failed in this, the company is responsible to the passenger for the injury he has sustained. *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230. Compare *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. 525.

Light at Stopping Place.—And where there is evidence before the jury that there were no lights at a stopping place, it is proper for the court to charge that if the accident was caused by the defendant company's failure to light the place, it is liable for damages. *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289.

As to placing "safeguards," see *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

(3) Setting Down Passenger.

In *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, an accident occurred at night during a snow storm while it was intensely dark, and the platforms of the cars were covered with snow. The plaintiff, a woman, was unattended, and was incumbered by heavy clothing and parcels. There was no platform at the station, and defendant's servants, though present, rendered plaintiff no assistance. It was not error under these circumstances for the court to charge that, if there was no platform or other proper landing place at the stopping place, and defendant's servants rendered plaintiff no assistance in alighting, and, for want of such land-

ing place and assistance, plaintiff was injured without fault on her part, she could recover.

And when a street railway company stops its car in front of an excavation made by the city, to allow passengers to alight, and neither warns them of the danger nor assists them to alight, it is liable for injuries sustained by a passenger who steps off the car into the excavation. *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

Thus, in an action against a street railway company for personal injuries sustained by plaintiff in stepping off defendant's car, on which he was a passenger, and falling into a ditch made by the city, and along which the car was stopped for plaintiff to alight, a demurrer to the declaration, on the ground that it does not show the condition of the place was such by reason of the absence of proper safeguards, is properly overruled, since the cause of action arises out of the duty of every carrier of passengers not to expose its passengers to any danger in alighting, and not from such failure to provide safeguards. *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404.

e. To Whom Liable, and When.

Trespasser.—In *Virginia, etc., R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175, a former fireman of the railroad accepted an invitation of one of its engineers to ride on the engine with him. The conductor saw him on the engine, and spoke to him there. He neither paid any fare nor had any demanded of him. The rules of the company, which every employee was required to learn, prohibited any one but the engineer and certain employees from riding on the engine. Such former fireman was charged with notice of such rules, and could not derive any authority from the engineer or conductor for his act, and was therefore a mere trespasser, and could not recover for injuries sustained.

Liability for False Imprisonment.—A

common carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

And the mayor of a city is not authorized by law to appoint a special policeman for a railroad company. Thus, a night watchman, in the employ and pay of the company was sworn in by the mayor, at the company's request. He arrested and imprisoned the plaintiff, though possessed of no authority to make arrests as an officer. In so doing, however, he acted within the scope of his employment, and the arrest of the plaintiff was authorized and ratified by the company. The plaintiff in an action against the company for false imprisonment was held entitled to recover. *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935.

Assault by Conductor.—A railroad company is liable to a passenger on one of its trains for willful assault and battery committed on such passenger by the conductor in charge of such train. Such an assault is a breach of the duty of protection which such company owes to its passengers. *Smith v. Norfolk, etc., R. Co.*, 48 W. Va. 69, 35 S. E. 834. See in connection with this general subject, post, "Ejection," V, F; "Actions," VI.

E. NEGLIGENCE.

1. In General.

Defined.—Negligence is the doing of something, which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty, which, under the circumstances, a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damage to another. *Washington v.*

Baltimore, etc., R. Co., 17 W. Va. 190. See the title NEGLIGENCE.

Embraces a Question of Law and Fact.—The question whether a party has been negligent in a particular case, is one of mingled law and fact. It includes two questions, whether a particular act has been performed or omitted; this is a pure question of fact. Whether the performance or omission of this act was a legal duty; this is a pure question of law. The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act. When the facts are disputed, the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. When, however, the direct fact in issue is ascertained by undisputed evidence, and such fact is decisive of the case, a question of law is raised, and the court should decide it. The jury has no duty to perform. The issue of negligence comes within this rule. Questions of care and negligence after the facts are proved must be decided by the court. A judge is not bound to submit to the jury the question of negligence, although there may be a conflict of evidence in relation to some of the facts relied on as proving it, if, rejecting the conflicting evidence, the negligence charged is conclusively proved by the defendant's own witnesses. *Dun v. Seaboard, etc., R. Co.*, 78 Va. 658.

Onus Probandi.—The onus probandi is upon the plaintiff. At least a reasonable presumption of negligence must be raised by the plaintiff. But when a passenger is injured, or damage befalls a passenger, due to the breaking down or overturning of a train, or the falling through of a bridge, the breaking of some part of

the vehicle or apparatus, as a wheel or axle, or by any other accident occurring on the road, there is a prima facie presumption that it occurred by the negligence of the carrier, and the onus is shifted to the carrier to rebut the presumption thus created. Moreover, it rests upon the defendant to show contributory negligence on the plaintiff's part, where the defendant desires to defend on the ground that the contributory negligence of the plaintiff was the proximate cause of the injury. *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Madden v. Railway Co.*, 28 W. Va. 610; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394; *Johnson v. Railroad Co.*, 25 W. Va. 571; *Sheff v. Huntington*, 16 W. Va. 307; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Farley v. Railroad Co.*, 81 Va. 783; *Barton's Law Prac.*, p. 204. See post, "Actions," VI.

Negligence Per Se.—In cases where the common experience of mankind, and a common consensus of prudent persons have recognized that to do or not to do certain acts is prolific of danger, the doing or omission of them is "negligence per se" or "legal negligence." The omission of the duty enjoined by law for the protection and safety of the public by a common carrier, or the doing of an act by such a carrier, which, by the experience and consensus of prudent persons, would create danger to passengers, is legal negligence. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

Thus, it is legal negligence for a passenger to ride in a fast going passenger coach, with his arm protruding from the window, and beyond the line of the body of the car. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645.

But the train's mere speed of motion is not, per se, evidence of negligence, nor is the fact that the train is be-

hind time. *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241.

Specific Application of Principles.

Washout Due to Waterspout—Vis Major.—In an action against a railroad company for the death of a passenger, it appeared that the accident occurred on a dark and rainy night, the rain falling in torrents, flooding the track, which lay alongside a mountain; that the train was stopped at times at exposed places, but met no obstruction until it reached the place of accident, by which time the rain had ceased. This place was an earth fill, provided with a stone culvert thirty-five years old, and no accident had ever happened there. In consequence of a waterspout, the culvert did not carry off the water, and a great pond was formed against the earth embankment, causing it to give away, but leaving the rails and ties unbroken; the train went down into this washout, killing plaintiff's intestate. Held, that defendant was not liable. *Norfolk, etc., R. Co. v. Marshall*, 90 Va. 836, 20 S. E. 823. See ante, "Act of God," III, B, 1, b.

Liability Can Not Be Shifted.—And a carrier of passengers can not relieve itself from liability in regard to the condition and construction of its road by undertaking to confide its duties, which it owes to passengers, to other hands, no matter what precaution it may take in selecting such agencies; as where it confides to a contractor the repairs on its road and the contractor places constructions too close to the track. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

So, if by reason of work done by a company in the neighborhood of their track, a stone rolls onto the track and obstructs it, that work being such that any negligence in its performance would be likely to cause such an obstruction, they are liable to a passenger for an accident caused by the obstruction, although they employed a skill-

ful contractor to perform the work. *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230.

Passenger Injured by a Collision—Instruction.—And in *Shen. Val. R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796, a passenger, who was suffering with rheumatism, was thrown from his seat by a collision of trains and his thigh bone broken. An instruction to the jury that, though they believed the plaintiff was injured as complained of, yet, if they believed that he was in such an infirm state as would have prevented a prudent man from taking the risk of travel, and but for that state he would not have received the injury, he can not recover, is properly refused, because inconsistent with both the evidence and the law.

Carrier's Duty to Invite Intoxicated Passenger to Go Inside.—And where a passenger rides on the platform of a car in such a state of intoxication as to be careless and heedless of the danger to which he is exposed, it is the duty of the railroad company, after the conductor has notice of his condition and exposure to danger, to use the ordinary precautions for his safety, such as calling his attention to the danger, and the rules of the company forbidding such exposure, and inviting him to go inside the car. *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

Servant's Skill and Knowledge.—And servants of an electric street railway company are bound to know the difficulty of controlling a car when there is snow on the rails; and where, at such a time, they approach a heavy down grade at such unusual speed as to cause their car to slide down the track, though the brakes are properly set, the company is liable for injuries to a passenger. *Danville St. Car Co. v. Payne*, 2 Va. Dec. 379.

Coach Upset—Horses Not Controlled—Liability.—Though the proprietors of a coach may show that it

was reasonably strong, with suitable harness, trappings and equipments of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses not likely to endanger the safety of passengers; yet, if the upsetting of the coach is caused by the running off of the horses, and such running off of the horses might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable for the injuries sustained by a passenger. *Farish v. Reigle*, 11 Gratt. 697.

2. Contributory Negligence.

a. In General.

What Constitutes.—By contributory negligence is meant such negligence on the part of the plaintiff as contributes to the injury; that is, directly in part causes it. *Washington v. Baltimore*, etc., R. Co., 17 W. Va. 190; *Dun v. Seaboard R. Co.*, 78 Va. 658; *Baltimore*, etc., R. Co. *v. McKenzie*, 81 Va. 71; *Nash v. Railroad Co.*, 82 Va. 55.

Or, as stated in *Richmond*, etc., R. Co. *v. Pickleseimer*, 85 Va. 798, 10 S. E. 44, it consists in such acts or omissions of plaintiff, as amount to want of ordinary care, as, co-operating with negligent acts of defendant, are the proximate cause of the injury. See also, *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148.

But it is not contributory negligence for a plaintiff to be guilty of a negligent act, which might have produced the injury, if, before it actually results, the defendant is guilty of some negligent act, which was the immediate cause of the injury, even though no damage could have resulted to the plaintiff, had he not been originally negligent. *Washington v. Baltimore*, etc., R. Co., 17 W. Va. 190.

Therefore if the direct cause is defendant's omission, after knowing plaintiff's negligence, to use proper care to prevent its consequences, a re-

covery may be had. *Farley v. Railroad Co.*, 81 Va. 783; *Railroad Co. v. Barksdale*, 82 Va. 330; *Virginia*, etc., R. Co. *v. White*, 84 Va. 498, 5 S. E. 573; *Railroad Co. v. Burge*, 84 Va. 63, 4 S. E. 21; *Coyle v. Baltimore*, etc., R. Co., 11 W. Va. 94; *Rudd v. Richmond*, etc., R. Co., 80 Va. 546; *Downey v. Chesapeake*, etc., R. Co., 28 W. Va. 732; *Johnson v. Railroad Co.*, 25 W. Va. 571.

Theory of Contributory Negligence as a Defense.

—The principle of right that limits responsibility for negligence to the reasonable results that follow therefrom underlies the rule that there is no liability when contributory negligence is shown. For if it appears that an injury has been occasioned by the negligence of the person who is charging a breach of the duty to exercise care upon another, then this person is himself answerable for the damage and he can not recover compensation from any one else. The damage is the reasonable result of the contributory negligence and not of the original wrongdoing. And it is important to observe that in all cases it is necessary that this must be true, and that the contributory negligence must be the proximate cause of the injury, or it will be no defense. The damage must be justly attributable to it to allow the original wrongdoer to escape from the final effect of his act. As is said by an eminent authority, the person who is injured by the negligence of another "is not to lose his remedy merely because he has been negligent at some stage of the business, though without that negligence the subsequent events might not or could not have happened; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is proximately due, to his own want of care and not to the defendants." *Pollock on Torts*, p. 375; *Shearman and Redfield on Neg.*, § 94; *Wharton on*

Neg., § 300; Jones on Neg. of Mun. Corp., § 206; *Washington v. Baltimore, etc., R. Co.*, 17 W. Va. 190; *Dun v. Seaboard R. Co.*, 78 Va. 658; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Nash v. Richmond, etc., R. Co.*, 82 Va. 55; *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241; *Richmond, etc., R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763; *Jammison v. Chesapeake, etc., R. Co.*, 92 Va. 327, 23 S. E. 758; *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587. See also, post, "Cases Illustrative of Principles," V, E, 2, b; "Imputed Negligence," V, E, 3; "Concurrent Negligence," V, E, 4; "Proximate Cause," V, E, 5.

b. Cases Illustrative of Principles.

(1) Entering Conveyance.

In an action for personal injuries, it appeared that plaintiff was traveling as a stock shipper on defendant's freight train; that at the end of a run, on a rainy night, the train stopped just before crossing a bridge, where it was customary to detach the caboose in which plaintiff had been riding, that he could walk across or ride on the rear freight car; that the stop was long enough to enable him to make a change, but he remained in the caboose till it was uncoupled, and the train had started, when he went forward, with a large valise in his hand, and in attempting to climb on the car while in motion fell through the bridge. Held, his own negligence was the cause of his misfortune. *Richmond, etc., R. Co. v. Pickleseimer*, 85 Va. 798, 10 S. E. 44; *Richmond, etc., R. Co. v. Picklesimer*, 89 Va. 389, 16 S. E. 245.

(2) In Transitu.

Riding on Platform.—It is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or other person having charge of the train, when there is standing room inside, and if by reason of such refusal, and by going down on the steps of the car without the knowledge of the conductor or other person

having charge of the train, he loses his balance and falls overboard, and is injured, he is guilty of contributory negligence such as will preclude his recovery for such injury. *Fisher v. West Virginia, etc., R. Co.*, 42 W. Va. 183, 24 S. E. 570.

Passing from One Car to Another.—

But it is not negligence per se for a passenger on a rapidly moving train to attempt to pass out of one car into another, in search of a seat. *Chesapeake, etc., R. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833.

Riding on Pilot of Engine.—However, where a railroad company is in the habit of carrying its shopmen to and from their work as a matter of accommodation and without any agreement or compensation therefor, if its train is so crowded, that one of said shopmen can not get a seat in the cars, that fact will not justify him in sitting on the pilot of the engine; and if he does improperly do so, it is his duty to leave the pilot and go into the cars at his first opportunity. *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732.

Riding in Conductor's Chair in Caboose of Freight Train.—In *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241, a passenger in a freight car who had been drinking, and who, instead of taking a perfectly safe seat designed for passengers, along the sides of the car, sat in the conductor's loose chair tipped up against a box within three inches of the open side door, was thrown out by the jar of the cars running together, because of the train running at thirty-five miles an hour around sharp curves. It was held, that he was guilty of contributory negligence.

Resting Arm on Window Sill—Not Protruding.—Yet to rest the arm upon the window sill of a car, provided it does not protrude, is not negligence per se. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

Arm Protruding beyond Line of Body of the Car.—Nevertheless, the slightest voluntary projection of the limbs of the passenger from the window of a moving car constitutes contributory negligence, preventing a recovery on his part in case of injury, without regard to the question of negligence in the carrier in failing to take precautions against such accidents. *Richmond, etc., R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Dun v. Seaboard R. Co.*, 78 Va. 645, 49 Am. Rep. 388.

Thus, in *Dun v. Seaboard R. Co.*, 78 Va. 645, 49 Am. Rep. 388, it is held, that riding with the arm outside the window of a railway car is fatal contributory negligence, unless it appears that the defendant knew the danger and omitted to warn the passenger.

Jumping from Moving Car to Escape Impending Danger.—Yet, where a passenger, acting with reasonable care, jumps from a moving car in order to escape an impending danger, and is injured thereby, he is not guilty of such contributory negligence as will bar a recovery, even though such injury would not have occurred if he had remained upon the car. *Dimmey v. W. & E. G. R. Co.*, 27 W. Va. 32.

Whether a passenger acted with ordinary prudence in leaping from a car in motion, or from a rash apprehension of danger which did not exist, under circumstances of age, time, place, experience, and other facts, about which reasonable men might differ as a justification for such conduct, is a question of fact for a jury, and not a question of law for the court. *Mannon v. Camden Interstate R. Co. (W. Va.)*, 49 S. E. 450.

Going upon Platform When Train Stops.—And where a passenger, who has been informed that the train will stop at the station for ten or fifteen minutes, goes upon the platform of

the coach to greet a friend while the train stops, it is not negligence. *Southern R. Co. v. Smith*, 95 Va. 187, 28 S. E. 173.

(3) Leaving Conveyance.

Stepping Off Station Platform in Dark.—But in *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587, a passenger, while staying over at a station on the company's road at night, went upon the platform, and walked to the end where she fell off and was injured. The night was dark, and the platform lamp had been temporarily moved to be trimmed. The court held, that the plaintiff was guilty of recklessness, and could not recover.

Passenger by Mistake Jumps Off End of Caboose.—Similarly, a passenger in a caboose of a freight train, was awakened by the conductor, and informed that he had reached his destination; and after the train had passed it a little, and stopped at the frog, the passenger was again awakened by the conductor, and could then have gotten off safely. The conductor soon returned, and woke him a third time, telling him to get off and then went out at the end of the caboose, and, the night being very dark stood on the station platform with the lantern in his hands within three feet of the car platform. There was no chain across the end of the platform in rear of the caboose, and it was not necessary to have any. The train commenced backing. The passenger walked to the end of the car, jumped off, and was severely injured by the cars passing over him. The court held, that although the company was culpably negligent for having insufficient station lights, and for not warning the passenger to wait until the train was still, yet the passenger's contributory negligence precluded him from recovering for the injury. *Richmond, etc., R. Co. v. Morris*, 31 Gratt. 200.

Thrown from Platform by the Jerking of the Cars.—And in *Norfolk, etc.,*

R. Co. v. Prinnell, 1 Va. Dec. 626, when a station had been announced, the train stopped at the accustomed place, and a passenger, who was descending the steps in the act of alighting, was thrown down, either by a sudden jerking of the car or its unexpected motion. The court held, that the plaintiff was not guilty of negligence, as he was on the platform in response to the defendant's invitation to alight; and the defendant, having violated its duty by moving the train when the plaintiff had the legal right to assume that it would remain stationary, was guilty of negligence for which an action would lie.

Leaving Street Car.—In *Richmond Traction Co. v. Williams*, 102 Va. 253, 46 S. E. 292, it was held, that if the plaintiff undertook to get off a street car while in motion, she was guilty of contributory negligence; but if she retained her seat until the car stopped, and reached the platform before it started, and was thrown, while alighting, by the sudden starting of the car, she was not guilty of contributory negligence. See also, *Norfolk, etc., Co. v. Morris*, 101 Va. 422, 44 S. E. 719.

3. Imputed Negligence.

And where by a railroad company's negligence a child of tender age and non sui juris is injured, the contributory negligence of its parents is not to be imputed to the child; and whether the action for damages is brought by the child itself or by its personal representative, the company is liable. *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454. See also, *Trumbo v. Street Car Co.*, 89 Va. 780, 17 S. E. 124.

4. Concurrent Negligence.

Where by the concurrent negligence of a carrier and third person, a passenger is injured, the negligence of the former can not be attributed to the passenger so as to prevent him from recovering damages of the third per-

son. *N. Y., P. & N. R. Co. v. Cooper*, 85 Va. 939, 9 S. E. 321. And where the negligence or carelessness of a passenger concurs with that of the carrier, causing injury to the passenger, the carrier is not liable by default. *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732.

5. Proximate Cause.

The cause of an injury in the contemplation of law is that which immediately produces it as its natural consequence; and therefore if a party be guilty of an act of negligence, which would naturally produce an injury to another, but, before such injury actually results, a third person does some act, which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never have occurred but for his negligence. The causal connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury according to the maxim "In jure non remota causa sed proxima spectatur." *Washington v. Baltimore, etc., R. Co.*, 17 W. Va. 190.

And it is important to observe that in all cases it is necessary that the contributory negligence of the plaintiff must be the proximate cause of the injury, or it will be no defense. *Pollock on Torts*, p. 375; *Wharton on Neg.*, § 300.

Negligence, however, is the proximate cause of an injury when the injury is the natural and probable consequence of the negligence complained of, and the result is such as ought to have been foreseen under the circumstances in the particular case. *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467.

Illustrating the application of these principles, it is held, that a person can not voluntarily incapacitate himself

from liability to exercise ordinary care for his own self protection and then set up such liability as an excuse for his failure to use care, and if intoxication contributed to the injury, as a proximate cause thereof, it is a complete bar to any action for damages sustained in consequence of it. *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

But in order to debar a plaintiff from recovery of damages for an injury from negligence it must be shown that his negligence must be the proximate cause of the injury. When both parties are chargeable with negligence, the plaintiff can not recover if his negligence contributed in any degree to his injury; but, if it did not contribute to it in any degree, he may recover, his negligence not then being contributory, because not the proximate cause of the injury, but only remote from it, or collateral to it; and the defendant's negligence is in such case the proximate cause of the injury. *Carrico v. West Virginia, etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571.

And though the negligence of the plaintiff be in its character contributory, yet, if his injury would have occurred from the defendant's negligence just the same if the plaintiff had been in no wise negligent, the plaintiff is not prevented by his negligence from recovery. *Carrico v. West Virginia, etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571.

Even if a plaintiff be chargeable with negligence contributing to the injury, yet, if the defendant knows of the danger to the plaintiff arising from his negligence, and can by ordinary care avoid the injury, but does not, he is liable for his negligence, notwithstanding the plaintiff's negligence. *Carrico v. West Virginia, etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732.

6. Exemptions and Limitations.

Under the Va. Code, 1899, § 1296, providing that no agreement by a

common carrier for exemption from liability for injury caused by his own negligence or misconduct shall be valid, an agreement with a passenger traveling on a free pass relieving the carrier from the consequences of its negligence or that of its servants, is invalid. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 723.

F. EJECTION.

Conductor's Right to Demand Ticket or Fare—Consequence of Refusal.—A railroad conductor may demand a ticket as evidence of a passenger's right of passage, and on failure to produce it may demand payment of fare; and on failure to pay it may lawfully eject the passenger from the train, using, however, no more force than is necessary. *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737. See also, ante, "Fares and Tickets," V, C; post, "Actions," VI.

Ejection for Not "Otherwise Identifying" than by Signing Ticket.—But where a ticket provides that when it is presented to the conductor the passenger shall sign his name thereto, and "otherwise identify" himself as original purchaser thereof and the passenger offers to sign the ticket, which offer the conductor refuses, and ejects him from the train on account of his refusing to pay fare, the company is liable in damages for the expulsion, as the conductor is not entitled to require a passenger to "otherwise identify" himself. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757.

Right of Carrier to Eject When Ticket Has Expired.—Yet a railroad company is justified in ejecting a passenger trying to ride on a limited ticket

which has expired, and who refuses to pay his fare. *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415, 19 S. E. 563.

Passenger Ejected after Having Been Warned of Ticket's Invalidity.—

And where the holder of a mileage ticket has been warned by the conductor that a ticket is not good, and has been ordered taken up, and the party pays his fare, and neglects to make inquiries at the proper place regarding his ticket, although he has several opportunities of so doing, and again boards the train with the intent of becoming a passenger, and offers the mileage ticket in payment of his fare, the conductor, upon refusal of the party to pay his fare, may take up the ticket and eject him from the car, using no more force than is necessary for that purpose. *Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 S. E. 539.

Ticket to Station Where There Is No Stop.—Nevertheless, where a plaintiff, holding a ticket for a station, at which the train does not stop, is refused the privilege of riding to an intermediate station, and is put off in the rain, against his consent, and from the exposure two months' sickness results, in consequence of which he loses his position, he is entitled to both compensatory and punitive damages. *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130.

Change of Rules—Conductor Not Informed—Ejection.—And where a railroad company fails to inform its conductor of a change in rules as to the sale of tickets and stoppage of train, and such conductor, through want of such information, wrongfully ejects a passenger from the train, the company is liable therefor. *Sheets v. Ohio, etc., Co.*, 39 W. Va. 475, 20 S. E. 566.

Conductor Mistakes Distance Covered by Ticket—Ejection.—In *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367, a conductor put a passenger off the train without violence or abuse

in the belief that the passenger's ticket entitled him to ride no further, and, on discovering his mistake tried to get a conveyance to send for the passenger. It was held, that a verdict against the company for \$1,000 damages for the ejection was excessive.

Agent by Mistake Gives Ticket for Opposite Direction—Conductor Refuses Recognition.—

And if a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that purpose but only in the opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be a ground of action against the company as for a tort, but the action may and must, be based on the breach of a contract to convey the passenger. *MaKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737.

G. BAGGAGE.

Of What It Consists.—"It is impossible to define with accuracy what will be considered baggage within the rule of the carrier's liability. It may be said, generally, that by baggage we are to understand such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not, however, designed for any such use, but for other purposes, such as a sale and the like." *Story on Bail*, § 499.

But "what should constitute necessary baggage for a traveler depends very much upon the circumstances of each particular case. The conveniences required for the journey which has been undertaken, the duration of the absence, as well as the position of the parties, have considerable to do with it, and all these are to be considered as a question of fact for the

decision of the court or jury." Hutchin-son on Carriers, § 680.

Extent of Carrier's Liability.—A railroad company is liable as a common carrier, for the baggage of a passenger, to the same extent, if the passenger is traveling with his baggage, as if it was carried without him. *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654. See ante, "Liability," II, B.

Restricting Liability.—To restrict the liability of a railroad company as a common carrier, for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction, before the cars are started; and an endorsement on the ticket given to the passenger, is not enough, unless it is shown that he knew its purport before the cars started. *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654. See ante, "Contracts of Exemption and Limitation," III, C.

Liability beyond Terminus.—And although a through ticket given to a passenger specifies on its face, that each party to the contract is only liable for losses on his part of the line, the railroad is liable for loss on a stage line, the proprietors of which have contracted with the railroad company to carry passengers and their effects to their destination. Thus, under a contract between stage proprietors and a railroad company, by which the former were to carry passengers from the terminus of the railroad to their destination, it was held, that the proprietors of the stage were agents of the railroad company, and the company was liable for the loss of the baggage of a passenger. *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

Rules and Regulations—Peddler's Baggage.—A railroad company may make all reasonable rules for conducting its affairs. And it is a reasonable rule that it will only carry as baggage the passenger's wearing apparel, and upon refusal of the passenger to certify that

"his trunk contains nothing except wearing apparel," the passenger is not entitled to damage for the company's refusal to carry such trunk. *Norfolk, etc., R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532.

Thus, a passenger in the habit of carrying merchandise in his trunk, against carrier's rules, may be required to prove contents as a condition of receiving and checking it. *Norfolk, etc., R. Co. v. Irvine*, 85 Va. 217, 7 S. E. 233.

Delivery.—And where a through passenger who takes advantage of the privilege to stay all night at the terminus of the road and go on the stage next morning, takes her baggage with her to her hotel where she stays, but brings it out to the stage with her the next morning, and commits it to the agent of the line, and it is lost, the railroad company is liable for the loss. *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

Recovery of Penalty Provided by Statute for Company's Failure to Transfer.—Under Va. Code, 1887, ch. 145, § 5, it is provided that if a statute giving a penalty does not expressly mention that such penalty shall be in lieu of damages, the party injured might recover the actual amount of damages suffered by reason of the breach of such statute. In construing this statute the court held, that a plaintiff, who has been injured by the failure of a railroad company to transfer his baggage, is not limited to a recovery of the penalty prescribed for such failure by Va. Code, 1887, ch. 61, § 17, but may recover the amount of actual damages. *Norfolk, etc., R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532.

VI. Actions.

A. AGAINST CARRIERS OF GOODS.

1. Right of Action.

Demand for Goods as a Condition Precedent.—A shipped by the Chesapeake & Ohio Railway Company a box

of goods on September 14, 1900, from White Sulphur, W. Va., to Newark, N. J. On November 28, 1900, the carrier tendered the box to La Pierre Company, the consignee, who refused to accept the same. A brought his action of assumpsit for the value of the goods, alleging his loss. The plaintiffs proved the tender of the goods to the consignee, and consignee's refusal to accept them. Held, that plaintiffs could not recover the value of the goods in the action, not having first made a demand on the carrier therefor. *Ryland v. Chesapeake, etc., R. Co.*, 55 W. Va. 181, 46 S. E. 923.

Demand of Repayment of Excess before Suit.—And a repayment of freight charges in excess of those lawfully chargeable by a railway company need not be demanded before bringing suit to recover back the excess. *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434.

Assignability of Right of Action.—A right of action against a common carrier for injury to goods while in cars of transportation is assignable. *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, 12 S. E. 395.

Waiver of Right of Action.—Acceptance of goods which a carrier has contracted to deliver at a certain time and which it has failed to deliver until a later date is no waiver of the consignee's right of action for the delay. *Norfolk, etc., R. Co. v. Ship. Comp. Co.*, 83 Va. 272, 2 S. E. 139.

And where a bill of lading does not state the location of a claim agent's office, a stipulation that notice of a claim must be given within five days is unreasonable and void. *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

2. Pleading and Practice.

a. Form and Nature of Action.

Where there is a public employment, from which arises a common-law duty, action may be brought in tort, al-

though the breach of duty assigned is the doing or not-doing something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed. *Southern Express Co. v. McVeigh*, 20 Gratt. 264.

And in *Ferrill v. Brewis*, 25 Gratt. 767, the court said: "In determining the character of the first count in the declaration here, it is proper to bear in mind there is a class of cases (among them that of bailment) in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently in assumpsit, or in case upon tort." See also, *Southern Express Co. v. McVeigh*, 20 Gratt. 264.

And in *Spence v. Norfolk, etc., R. Co.*, 92 Va. 102, 22 S. E. 815, it is held, that where the direction to a carrier is not to deliver the goods until payment shall be made by the consignee the property in the goods continues in the consignor, who can sue for damage caused to the same by delay, either by an action on the case, or in assumpsit. And if a shipper by compulsion, pays a common carrier more than its legal rate of charge for freight, such excess may be recovered in an action for money had and received. See also, *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434; *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87.

But there is a conflict of authority as to the nature of an action to recover a penalty for illegal charges. By some courts it is considered that a penalty creates no contractual liability, and that the action is necessarily one of tort. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

Some courts consider the action one of contract, and approve of either assumpsit or debt to recover the penalty. *Norfolk, etc., R. Co. v. Pendleton*, 88 Va. 350, 13 S. E. 709; *Norfolk, etc., R.*

Co. v. Pendleton, 86 Va. 1004, 11 S. E. 1062.

b. Proper Parties to Proceedings.

Suit against Receiver.—And a receiver appointed to assume charge of the affairs of a railroad company may be held responsible for the damage actually sustained by a shipper of freight, through the negligence of the receiver's agents and employees, in any case in which the company could be so held. But where the receiver is appointed by a court of equity he can not be sued at law without permission of the appointing court. *Melendy v. Barbour*, 78 Va. 544.

Carrier Unincorporated—How Sued.

—And where common carriers are not incorporated, any one or more of them may be sued by his or their name or names only, to recover damages for loss or injury to any person, parcel, or package, and such suit shall not abate for want of joining any of his coproprietors or copartners. Va. Code, 1887, § 1297; W. Va. Code, 1900, ch. 103, § 9.

Connecting Carriers.—Act, March 3, 1892, § 14 (acts 1891-92, p. 965), authorizes the railroad commissioner to commence proceedings against any carrier which fails to make connection with other railroads, after the commissioner has requested such roads to make such connections. Two connecting railroads failed to make connection, and, on the receipt of request from the railroad commissioner suggesting the changes in time which the company should make, the Southern Railroad Co. complied therewith, but the Baltimore and Ohio Co. refused to adopt such time card. Held, that the Southern Railroad Co. was a proper party to proceedings to require the roads to make proper connections, though it had complied with the request of the commissioner, since all the parties should be before the court, so that all the matters in dispute could be determined, and a judgment binding on both corporations, be rendered. *South-*

ern R. Co. v. Com., 98 Va. 758, 37 S. E. 294.

c. Process.

In a case against any common carrier (other than a corporation) for a liability as such, any process against or notice to the carrier, may be served on such carrier, or on any agent, or on the driver, captain, or conductor of any vehicle of such carrier in the county or corporation wherein the case is commenced; and if the carrier be not in said county or corporation and there be no such agent, driver, captain, or conductor therein, the process or notice shall be sufficiently served by the publication thereof once a week for four successive weeks, in a newspaper printed in this state. Va. Code, 1887, § 3228. For service of process on corporations, see Va. Code, 1887, §§ 3220-3227; 13 Va. L. Journal 741.

d. The Declaration.

Averments—Sufficiency.—If a declaration does not allege that the defendant is a common carrier, yet, if the facts set out constitute it such in law, it is sufficient to sustain the action against it as a common carrier. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

And in an action for damages for failure to carry goods at a rate agreed, an averment in the declaration that the plaintiff delivered the goods for shipment as he had agreed to do is a sufficient averment that the goods were furnished within a reasonable time after making the contract. *Southern Railway Co. v. Willcox*, 98 Va. 222, 35 S. E. 355, 7 Va. Law Reg. 381. See also, *Williams v. Baltimore, etc., R. Co.*, 9 W. Va. 36.

In an action against a carrier for charging an illegal freight rate, if the declaration states the weight of the freight, the time and place where delivered to defendant for transportation, and places to which it was to be transported, distance, the amount which was

demand and received by defendant and that it was more than was lawful, contrary to the statute in such case made and provided, it is a sufficient notice of the cause of action to the defendant to enable it to make all just and proper defenses. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

So a declaration is sufficient in law which alleges that certain goods were delivered to and accepted by the defendant to be carried to a certain destination, for reasonable reward, to be delivered to the plaintiff; but by reason of the negligent manner in which the defendant conducted itself in regard thereto, "the goods were wholly lost to the plaintiff." *Williams v. Baltimore, etc., R. Co.*, 9 W. Va. 33.

Similarly, an allegation that "the defendant, before and at the time of the committing of the grievances herein-after mentioned, were the owners and proprietors of a certain railroad, to wit, the Baltimore and Ohio Railroad, and of certain carriages used by it for the carriage and conveyance of goods and chattels in, upon, and along said railway from a certain place, to wit, Parkersburg, Wood county, West Virginia, for hire and reward to it the defendant in that behalf," is a sufficient allegation that the defendant was a common carrier. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293.

e. Variance.

Conditions in a contract limiting a carrier's liability should be stated. If the declaration alleges an unqualified contract to carry, and the contract proved is to carry, the defendant not being answerable for certain risks, there is a variance, and if there are provisions in the contract other than are usually embodied therein it is not necessary to aver the reasons that influenced or the purposes that controlled

shipper or carrier in inserting such allegations add nothing to the legal effect of the contract. *Balti-*

more, etc., R. Co. v. Rathbone, 1 W. Va. 87.

And under counts in a declaration in which there are no counts against the defendant except against him as a carrier, or bailee, of cattle, the plaintiff can not recover for loss resulting from the misrepresentation of the agent, whereby he was induced to ship the cattle on a slow train of the defendant instead of on a fast train. *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180.

f. Set-Off.

A consignee can not set off against a carrier's charges the amount of damages sustained by the goods from an act of God. *Galt v. Archer*, 7 Gratt. 307.

But if a shipper by compulsion, pays a common carrier more than its legal rate of charge for freight, such excess may be recovered in an action for money had and received; or it may be used as an offset in an action of assumpsit brought by the carrier. *W. Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434.

g. Bill of Exceptions.

In an action of trespass on the case against a common carrier, if it appear, by a bill of exceptions, to have been proved at the trial, that the defendant fraudulently opened certain packages and casks, being in his care, and belonging to the plaintiff, and took therefrom a part of their contents, and converted the same to his own use, but not that the said contents were feloniously carried away, such offense is to be considered as amounting to a trespass only. *Cook v. Darby*, 4 Munf. 444.

h. Instructions.

In an action to recover for breach of a contract in failing to transport a quantity of cord wood, by reason of which the wood was washed away by a freshet and was lost, the court properly refused to instruct the jury that "the measure of damages in case of a failure to deliver goods according to

contract, and which are lost, is their market value," etc., defendants not being sued as common carriers, and there being no evidence of a delivery of the wood to them. And a further instruction that plaintiff is entitled to recover as damages whatever he may have expended in the recovery of the wood washed away, if the jury believe that it would not have been washed away if defendants had kept their contract, is also properly refused, in the absence of any evidence to show that such damage can be fairly and reasonably considered as naturally arising from the breach of the contract in question. *Slaughter v. Denmead*, 88 Va. 1019, 14 S. E. 833. See the title INSTRUCTIONS.

In an action of assumpsit brought to recover the value of oil claimed by the plaintiff, the declaration containing no good counts except the common counts, which was in the possession of defendant at the time the action was brought, and which had not been sold or in any way tortiously disposed of by the defendant, and which came into the possession of the defendant as a common carrier, and not wrongfully, it was held, error for the lower court to instruct the jury that if they believed from the evidence that the oil was the property of the plaintiff, it was their duty to find a verdict for the plaintiff for the value of the oil, there not being evidence before the jury tending to prove a sale of the oil by the plaintiff to the defendant, but the evidence clearly proving that there had been no such sale, and that the defendant had only refused to deliver the oil to plaintiff on demand, under the peculiar circumstances shown by the evidence, as stated in the opinion of the court in the cause. In such case, and under such a state of facts, the plaintiff was held, not to be entitled to recover the value of the oil upon the common counts for oil sold and delivered to the defendant by the plaintiff, or for money

had and received by the defendant for the use of the plaintiff, there not being any sufficient and proper special count in the declaration covering the case. *Dresser v. Transportation Co.*, 8 W. Va. 553.

i. Judgment.

In an action for damages the judgment should be for the amount assessed by the jury and interest thereon from the date of the judgment, and not from the date of the verdict. *Fowler v. Baltimore, etc.*, R. Co., 18 W. Va. 579.

And a judgment in proceedings under act, March 3, 1892, authorizing the circuit court to order connecting railroad lines to make connections, which fixes a schedule for certain connecting trains, to be in effect if the companies fail to agree on a schedule making a desired connection, is erroneous, unless it provides that the connecting roads may afterwards agree on a new schedule, not in conflict with the law. *Southern R. Co. v. Com.*, 98 Va. 758, 37 S. E. 294.

3. Evidence.

Onus.—Where a loss occurs, and the carrier attempts to excuse himself from liability by proof that the loss was caused by one of the exceptions to the general rule, the onus probandi lies on the carrier to exempt himself from the liability. And it is not enough for him to prove, where the goods are carried by water, that the navigation is attended with so much danger that the loss may happen notwithstanding the utmost endeavors of the watermen and crew, to prevent it; that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him. *Murphy v. Staton*, 3 Munf. 239; *Baltimore, etc.*, R. Co. v. *Morehead*, 5 W. Va. 293; *McGraw v. Baltimore, etc.*, R. Co., 18 W. Va. 361.

And a common carrier does not by limiting his common-law liabilities by

special contract thereby become a private carrier; and if loss is sustained, the burden of proof is on him to show not only that such loss arose from a cause from which he was exempted from the responsibilities from the terms of his special contract but also that it arose from no negligence or misfeasance of himself or his servants. *Brown v. Adams Express Co.*, 15 W. Va. 812; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180.

But, it should be observed, that in an action by a shipper to recover an excess of payment beyond the legal rates, the plaintiff does not have to prove that he demanded repayment of the excess before instituting his suit. *West Va. Transportation Co. v. Sweetzer*, 25 W. Va. 434.

Admissibility.—In an action against a carrier for an alleged breach of contract to carry goods at an agreed rate, the contracts of sale of goods made by the shipper to third persons, based on the rate agreed, but to which the carrier was not a party, and of which it had no knowledge until after breach, are not admissible in evidence. Such contracts do not tend to prove the making of the contract in suit. *Southern R. Co. v. Wilcox*, 98 Va. 222, 35 S. E. 355, 7 Va. Law Reg. 381.

And in assumpsit against a railroad company to recover goods alleged to have been lost by defendant, who had engaged himself as common carrier to transport them for hire, where the declaration contains only the common counts, without regard to the bill of lading, which contains valid exceptions against loss or damage by fire, etc., the bill is not admissible in evidence, not being applicable to any of the counts. *Baltimore, etc., R. Co. v. Rathbone*, 1 W. Va. 87.

In an action against a carrier for an alleged breach of contract to carry goods at an agreed rate, the contracts for sale of goods made by the shipper to third persons, based on the rate

agreed, but to which the carrier was not a party and of which it had no knowledge until after they were made, are not admissible in evidence. Such contracts do not tend to prove the making of the contract in suit. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

C. sought to recover the value of a trunk and contents, lost from the cars of defendant. On the trial the evidence admitted that B., who was since deceased, a clerk in an office of defendant, declared some time after the loss that he had discovered what had become of the trunk; that it had been put off the cars at a certain point and the contents lost. Held, that there being no effort in the case to fix the liability of the defendant by reason of any act or agreement of the supposed agent B., but a mere attempt to prove by his declarations a fact with which he was not in any way connected, and of which he did not appear to have any personal knowledge, the evidence was improperly admitted. *Baltimore, etc., R. Co. v. Christie*, 5 W. Va. 325.

Sufficiency.—In an action by a shipper against a railroad company for the loss of freight, it appeared that the goods were delivered to defendant at Parkersburg, W. Va., April 18, 1861, sent to a person at Culpeper Courthouse, Va., that the goods were carried as far as Baltimore, and there sold at auction by the carrier in 1864, for a grossly inadequate price. The carrier proposed to justify by showing that the war between the rebels and federal government had begun before the date of the alleged shipment; that troops were marching through Baltimore to Washington previous to that time; and that Fort Sumpter was fired upon April 12th or 13th, 1861; and that the president of the United States had issued his call for 75,000 men on April 15, 1861. It was held, that the evidence only showed that war existed, but did not show that the defendant was

thereby prevented from delivering the freight. *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293.

Evidence that plaintiff delivered a basket to a servant of a defendant railroad company to be shipped over its road, that this servant was the same person who had repeatedly shipped baskets for her, and that on this occasion he said he shipped it, and that neither she nor any one for her ever received the basket, justifies a judgment in favor of the plaintiff for the value of the basket. *Quarrier v. Baltimore, etc., R. Co.*, 20 W. Va. 424.

B. AGAINST CARRIERS OF LIVE STOCK.

1. Pleading and Practice.

Form of Action.—See principles, which apply, with like force, discussed ante, "Form and Nature of Action," VI, A, 2, a.

Who May Be Sued.—See ante, "Against Carriers of Goods," VI, A.

Declaration.—Where a declaration alleges a special contract to carry certain live stock safely, and the evidence adduced by the plaintiff shows that the contract contains a stipulation that the defendant shall not be held liable for any injury thereto, except such as might result from the gross negligence of the defendant's employees, it will be error to refuse to instruct the jury that the variance will warrant them in finding for the defendant. *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556. See ante, "Against Carriers of Goods," VI, A.

Variance.—Where a declaration in assumpsit charges common carriers or bailees for hire, for loss or damage generally, and an agreement is proven, showing that the transportation was at the plaintiff's risk, which imposes a different liability than that charged, and a verdict is rendered against the carrier, it should be set aside and a new trial granted by reason of the variances. *Baltimore, etc., R. Co. v. Rath-*

bone, 1 W. Va. 87. See also, *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556.

Instructions.—If a shipper contract to load and care for live stock at his risk, and the evidence tends to show that the cars were overloaded, and the stock neglected by the shipper, in an action by the shipper for injury to the stock he is not entitled to an instruction that injury to the stock in the custody of a common carrier for shipment raises a presumption of negligence against the carrier, and that the burden is on the carrier to show that the injury arose from a cause for which it is not responsible. Such instruction should be qualified by adding "except such injury as results, or may have resulted, from the negligence of the shipper, or the inherent vice or propensity of the animal." *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606. See the title INSTRUCTIONS.

Verdict.—If in an action for injury to horses through failure of the defendant railroad company to provide suitable means for unloading the same, it appears that the defendant did not furnish the usual gangway for unloading stock leading from the car to the ground, but the horses were unloaded directly upon the depot platform, one side of which was unguarded, and that one horse was injured by either being crowded from or jumping from the unguarded side of the platform, a verdict that defendant failed to furnish suitable means for unloading the stock should not be disturbed. *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935.

And where evidence shows that 147 lambs died because of defendant's negligence; that they averaged 77 pounds each and were worth from seven and one-half to eight cents per pound at the point of destination, a verdict for \$742, with interest from date of injury, is justified. *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490.

Damages.—Where a railroad company agrees to deliver cattle from a point on its own line to a point on the line of another railway company, and the company makes a mistake in re-loading, whereby some of the cattle are sent to another point, and other cattle are mixed with these, by which the loss occurs to the owner, the company is liable for the consequent loss occasioned by such default on its part. *Norfolk, etc., R. Co. v. Sutherland*, 89 Va. 703, 17 S. E. 127.

And where the evidence shows that 117 lambs died because of defendant's negligence; that they averaged 77 pounds each, and were worth from seven and one-half to eight cents per pound at the point of destination, it was held that a verdict for \$742, with interest from date of injury, was justified. *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490. See the title DAMAGES.

2. Evidence.

Admissibility—Hearsay.—In an action against a common carrier to recover for loss on cattle delayed in transit, the testimony of the shipper as to what his commission merchant reported as the amount of the sales of the cattle is hearsay. The amount of such sales should be shown by a witness who has positive knowledge of the transaction, and the defendant should have an opportunity to cross-examine the witness. *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

Sufficiency.—And in an action against a carrier for injuries to animals through its failure to unload them for rest, etc., as required by the Revised Statutes of the United States § 4386, evidence merely that the car was detained by a storm for hours, is insufficient to show that the failure to unload was caused by a "storm or other accidental cause." *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935.

Burden of Proof.—On proof of a de-

lay in the delivery of cattle by the company at the place of their destination, a prima facie case was held to have been made out against it, and the burden of proof then rested upon it to show that it was not responsible for the delay; and the question as to the reasonableness and sufficiency of the excuse which the carrier made for the delay was for the jury. *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613.

C. AGAINST CARRIERS OF PASSENGERS.

1. Pleading and Practice.

a. Form of Action, Parties, Venue.

Form of Action.—An action on the case in tort may be maintained in any case in which trespass will lie. Therefore, if a passenger is wrongfully ejected from a car when he has paid his fare, though no force was used in ejecting him, he may bring an action on the case in tort against the carrier. *Barnum v. Baltimore, etc., R. Co.*, 5 W. Va. 10; *Boster v. Chesapeake, etc., R. Co.*, 36 W. Va. 318, 15 S. E. 158; *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

An action should be regarded as in trespass on the case, and not in assumpsit, where the declaration, after setting out a contract for the transportation of plaintiff as a passenger on defendant's cars, and that plaintiff had taken his seat in one of such cars as such passenger, that the defendant, disregarding its undertaking, did not convey plaintiff as it agreed to do, but instead thereof violently and with force ejected him from the car, and compelled him to walk a long distance to a hotel. *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913.

An action of trespass on the case for violently ejecting a plaintiff from a railway car can not be sustained where the evidence shows that no violence was used toward him, and that he merely got off the car when told by

the conductor that he must do so. The plaintiff's remedy, if any he has, is by an action on the case in assumpsit, based on the breach of the defendant's contract to carry him. *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 914.

Who May Sue or Be Sued.—Where common carriers are not incorporated, any one or more of them may be sued by his or their name or names only, to recover damages for loss or injury to any parcel, package, or person, and such suit shall not abate, for the want of joining any of his coproprietors or copartners. W. Va. Code, 1900, ch. 103, § 9; Va. Code, 1887, § 1297.

As to suit against a receiver appointed by a court of equity, see *Melendy v. Barbour*, 78 Va. 544. See also, ante, "Proper Parties to Proceedings," VI, A, 2, b.

Venue—Removal of Cause.—Where a railroad company, which was incorporated in another state, leases a railroad lying in this state, and operates the same as owner thereof, any person injured may sue the railroad company in the courts of this state, and such company has no right to remove the suit to the federal court. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431.

b. The Declaration.

A declaration against a railroad company for personal injuries alleged that plaintiff had a ticket over defendant's road, and boarded a freight train, which did not carry passengers, in the belief that the ticket was good on such train; that the conductor refused to stop the train, and ordered him to get off while it was running at a high rate of speed; and that the conductor, in violent language, threatened to eject plaintiff from the train if he did not obey the order, and had force at his command to execute such threats; and that upon belief that resistance would result in greater injury than leaving the train, he jumped off and was injured. The

court held, that there was sufficient allegation of compulsion to excuse plaintiff from the charge of contributory negligence in jumping off. *Bog-gess v. Chesapeake, etc., R. Co.*, 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

Where a declaration avers that decedent was killed by the oversetting and throwing down of the railroad car in which he was being carried at the time by the defendant as passenger, and that the oversetting and throwing down of the car were caused by the negligence of the defendant, it is not demurrable on the ground that the allegation is too general. *Searle v. Kan. & O. R. Co.*, 32 W. Va. 370, 9 S. E. 248.

And in *Birckhead v. Chesapeake, etc., R. Co.*, 95 Va. 648, 29 S. E. 678, a declaration alleged that a carrier, disregarding its duties, negligently permitted the train on which the plaintiff was a passenger to stand on a track where it was in danger of a collision; that the carrier negligently permitted another train to collide with the train on which the plaintiff was a passenger; and that the carrier had knowledge of the danger in time to stop the other train, and prevent the collision, but failed to do so; and that the plaintiff was injured. Held, that the declaration described the plaintiff's cause of action with sufficient particularity.

But in an action for being ejected from a railroad car, it is not sufficient to aver generally that the party was wrongfully ejected, but it must be sufficiently set forth that his expulsion was improper, and wrongful; i. e., being rightfully in the car but illegally expelled. *Barnum v. Baltimore, etc., R. Co.*, 5 W. Va. 10.

c. Instructions.

In an action for refusal to receive and check plaintiff's trunk, an instruction is erroneous, which leaves it doubtful whether the occasion alluded to therein as that when plaintiff had not

endeavored to deceive defendant, was the occasion mentioned in the declaration, or some other. *Norfolk, etc., R. Co. v. Irvine*, 85 Va. 217, 7 S. E. 233. See the title INSTRUCTIONS.

And in *Shenandoah Val. R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796, a passenger who had been suffering from rheumatism of the thigh was thrown from his seat in a car by collision of the train, and his leg was broken. In a suit for damages, counsel for the railroad requested the court to instruct the jury that, "Although the jury believe from the evidence that the injury complained of in the declaration was inflicted by the defendant upon the plaintiff, in the manner therein set out, yet the plaintiff is not entitled to recover if they shall further believe from the evidence that he was in a feeble and infirm state of health, and such as would have prevented a prudent man from running the risk of travel; and that but for his diseased and helpless condition the plaintiff would not have suffered the injury so inflicted by the defendant." Such instruction was held, to have been properly refused.

In an action against a railroad company for injuries to passengers caused by the negligence of defendant in allowing stones to be piled so near the track as to strike plaintiff's arm, the defense was contributory negligence on plaintiff's part in allowing his arm to protrude from the window of the car. The court held, that an instruction that plaintiff was entitled to recover if the servants in charge of the train were in a position to see the pile of stone, or might have seen it by the use of ordinary care, and could thereby have prevented the injury by stopping the train, and failed to do so; and that it was immaterial whether the servants did see the stones, it being their duty to do so, was erroneous, since it was for the jury to say whether the servants should have seen the stones; and

for the further reason that it ignored the evidence of contributory negligence. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

d. Damages.

When Amount Governed by the Judgment of the Jury.—In actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of the damages, must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Farish v. Reigle*, 11 Gratt. 697.

When Excessive.—But in *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, \$500 was held excessive compensatory damages to a passenger who was mistakenly assigned a berth in a sleeping car which was cut off from the main train, and who was thus delayed, and temporarily lost his baggage containing medicines which were required for the proper care of his sick child.

Punitive, Penal and Compensatory.

In General.—The terms "punitive," "exemplary," "vindictive," and "penal" damages, are used interchangeably and indiscriminately by some of the several courts, and text writers. Others draw a distinction between damages which are exemplary, and within the discretion of the jury in view of all the circumstances, and "penal" or "vindictive" damages which are defined to be those over and above determinate damages resulting directly, as from a loss of property, or indirectly, as consequential pecuniary loss; and over and above what are termed indeterminate, or those resulting from mental anguish, suffering or humiliation. Determinate damages being in their nature compensatory, the direct and dominant purpose is to make whole the defendant in all respects, as nearly as possible. Yet it is evident that in doing so the

defendant is punished and warned as he must be in all cases where damages are recovered against him. Still this punishment comes as an indirect and consequential result, and is, as it were, disregarded, being overshadowed by the chief object to be effected by the allowance of the recovery; viz., to compensate the person wronged by giving such damages as will be a recompense for actual pecuniary loss, as in case of personal injury, for time lost, medicines and physicians' bills, and in addition his measure of loss resulting from mental anguish, suffering or wounded feelings. Whereas, if the damages are "penal" or "vindictive," in the sense used by some courts, a sum additional to compensatory, in the most comprehensive sense, is allowed, regardless of extenuating circumstances, merely to inflict punishment upon the wrongdoer for his malicious, wanton, vicious or oppressive conduct, and is in no sense compensatory, the chief purpose being to penalize the wrongdoer. In defining these terms, or in applying the principles to particular facts, these discriminations have not been made in the treatment of this subject. The only distinction made is that between compensatory in its restricted sense, and punitive, which is regarded as covering all damages allowed beyond the extent of the amount necessary to reimburse for actual loss. For a well-considered opinion, which defines these terms, and makes careful distinctions between the several classes of damages, see *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485. See also, *Minor's Conflict of Laws*, §§ 10, 74, 198. And see the title DAMAGES.

Compensatory and Punitive Damages Defined and Compared.—Actual or compensatory damages are the measure of the loss or injury sustained, while exemplary or punitive damages are something in addition to full compensation, and something given, not as one's due, but for the protection of the

public. The law awards the former where, in the unlawful act, there is an absence of intentional wrong, fraud, or malice, or the act is not oppressively or recklessly committed; while the latter are given where the wrongful act is done with a bad motive, or with such gross negligence as to amount to positive misconduct, or in a manner so wanton or reckless as to manifest a willful disregard of the rights of others. Punitive damages are damages against a person who has wronged another in a wanton, willful, or oppressive manner, in disregard of his rights, as a warning to him and others to prevent them from committing like offenses in the future. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 542, 22 S. E. 367.

Compensatory Damages—When Awarded.—A master is liable to the extent of compensatory damages for the unlawful act of his agent, committed in the course of his employment, whether ratified or not. Thus, a passenger who is unlawfully expelled from a train by the conductor is entitled to recover damages therefor of the company. If the expulsion, though unlawful, did not proceed from any ill motive, and was not rudely or recklessly done, nor in such manner as to show a conscious disregard of the rights of others, and was simply the result of a mistake, only compensatory damages can be recovered, and, on the evidence certified, the plaintiff's damages should be limited to compensation for the inconvenience, delay, and fatigue to which he was put, and a suitable recompense for the injury done to his feelings, and for being expelled from the train. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367.

"In a civil action for the recovery of money due for damages for a wrong" by a passenger on a railroad train whose ticket was wrongfully taken up by the conductor, it appeared that the passenger was afterwards called on by another conductor of the same train,

then in charge, who demanded his ticket, and, on his failure to produce a ticket and refusal to pay fare ejected him from the train. Held, that the plaintiff could recover whatever he showed himself entitled to recover in the action either *ex contractu* or *ex delicto*. *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962.

Punitive Damages—When Awarded against a Corporation.—Punitive damages belong alone to actions of tort; they do not lie for breaches of contract. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250.

Federal Rule.—The federal court adheres to the rule that a corporation is not liable in punitive damages for injury committed by its servant upon a passenger on the train merely on the ground that the conductor's illegal conduct was wanton and oppressive. In order to recover punitive damages against a corporation it is necessary to show that the company had knowledge that such servant was unsuitable for the position he occupied, or that the company participated in, approved, or ratified his treatment of the passenger. See *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, and cases cited.

The weight of authority in the several state courts is opposed to this view, and in most of the states the rule is laid down, that a corporation is liable in punitive damages for the malicious and wanton wrongs of its servants, done in the course of its employment. See *Spellman v. R. & D. R. Co.*, 28 Am. St. Rep. 858, 870-883, containing an exhaustive note upon the subject, and quoting a full line of authorities. See also, *Lile's Notes on Mun. Corp.*, p. 117 et seq.

West Virginia Rule.—In *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, it is held, that a railroad company can not be made responsible for exemplary damages on account of injuries done by one of its servants,

even though the act was wanton and malicious, unless the act was expressly or impliedly authorized or ratified by the company. See *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732.

Virginia Rule.—The position of the Virginia court is uncertain. In *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, a passenger was ejected by the conductor under the following circumstances: The passenger's ticket provided that when presented to the conductor, the passenger should sign his name thereto, and "otherwise identify" himself as original purchaser thereof. The passenger offered to sign the ticket, but the conductor refused this offer, demanded payment of fare, and ejected him because he refused to comply with such demand. The court held that the passenger was entitled to punitive damages but on the ground that the company subsequently ratified the conductor's acts.

In a later case, *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, a passenger with his wife and two children, one of whom was very sick, bought a ticket at Bristol, Tenn., for Washington, D. C., and was assured by the company's officials that a through sleeper was attached to the train. Entering the train he paid for two berths, and was assured by its conductor that it would go through. Suddenly, without notice to him, the sleeper was cut loose and the train went on carrying the sick child's clothing and medicine, part of which was lost. The sleeper was left on the track at night when it was too late to get into a hotel or drug store. The jury found that the situation was produced by the negligence of the defendant's officials, of whom the conductor was one. The court held, in conformity with the rule laid down in the federal court, that the plaintiff was not entitled to punitive damages. This part of the opinion, however, seems not to have been necessary to the decision.

The federal rule was adopted, as it would seem, unhesitatingly, and without reference to or notice of the great weight of conflicting authority.

In *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367, the rule laid down in the *Lipscomb* case was approved by the court obiter; namely, that to recover exemplary damages of the master for the tortious act of the servant, the act must have been previously authorized, or subsequently ratified, or the company must have had knowledge of the servant's unfitness. The tendency of these decisions would seem to indicate, however, that the supreme court of appeals of Virginia favors the rule laid down in the federal court. See *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, a case in which punitive damages were held proper; 1 Va. Law Reg. 471, 620, for articles bearing upon the subject of punitive damages against corporations. *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394.

2. Evidence.

Presumption and Onus.—The up-setting of a stage coach is *prima facie* evidence of negligence. *Farish v. Reigle*, 11 Gratt. 697. And when injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, *prima facie*, is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by an inevitable casualty, or by some cause which human care and foresight could not prevent. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431. See generally, the title EVIDENCE.

It is the absolute duty of a railroad company to keep its track free from dangerous obstructions of every sort,

and, when a passenger is injured by reason of any such obstruction along the line of its road, the burden devolves upon it to prove that the accident was the result of the plaintiff's own negligence, or that the most thorough and perfect diligence could not have foreseen and prevented the injury. Neither can the company relieve itself from liability in regard to the condition and construction of its road by undertaking to confide these duties which it owes to passengers to other hands, no matter what precaution it may have taken in selecting such agencies. *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

In an action by a passenger for injuries received in alighting from a street car, where the contributory negligence of plaintiff was established, it was held, that the burden of proof was on her to show that defendant could, by reasonable care, have avoided the accident after the peril to the passenger was discovered. *Richmond Power Co. v. Allen*, 101 Va. 200, 43 S. E. 356.

A plaintiff must be presumed to have been without fault; and if defendant relies on the defense of contributory negligence, he must prove it. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71.

Where a train separates, and the separated cars collide so that a passenger is injured, the burden of proof is on the company to show absence of negligence. *Southern R. Co. v. Dawson*, 98 Va. 577, 36 S. E. 996.

Admissibility.

Hearsay.—Declarations of the mother of an injured child passenger immediately after the accident, are mere hearsay and no more binding on the estate of the child than would be declarations of a stranger. *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454.

Competency of Driver.—Where death was caused to a passenger by the

horses attached to a horse car "running away" it was held proper to prove facts tending to show that the driver was incompetent. *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 32.

Dependent on Allegation.—Testimony, that plaintiff, while standing on the footboard, lost his balance, because of the rough condition of the track and consequent jolting of the car, was held inadmissible, where not averred in the declaration. *Richmond R., etc., Co. v. West*, 100 Va. 184, 40 S. E. 643.

When Evidence of Recurring Accidents Admissible.—A street car company, using electricity, is bound to employ the best mechanical contrivances and inventions; and evidence that a particular trolley wire has been the subject of frequently recurring accidents is admissible, as showing that the company had notice of its unsafe condition. *Richmond, R., etc., Co. v. Bowles*, 92 Va. 738, 24 S. E. 388.

Contributory Negligence—Evidence Certified.—But where the evidence, and not the facts, is certified, and the defendant in such action is the exceptor, any evidence it may have adduced, tending to show contributory negligence on the part of the exceptee and contrary to the exceptee's evidence, must be rejected. Va. Code, 1887, § 3484; *Norfolk, etc., R. Co. v. Grose-close*, 88 Va. 267, 13 S. E. 454.

Damages—Condition of Decedent's Family.—And in an action against a railroad corporation for the killing of a person, evidence is admissible to show the condition and circumstances of the family of the deceased, his business qualifications, the condition of his health, the amount he was realizing annually from his employment, the value of his services to his family, and the damage suffered by them in the loss of his care, nurture and instruction. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. 431.

Usual Stopping Place.—Testimony as to what had been the stopping

place at a certain station is admissible in an action for personal injuries, when defendant contends that plaintiff was injured whilst alighting from its train before it reached its usual stopping place, while in motion, and the plaintiff denies such contention. *A. & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289.

Baggage Checks.—Railway baggage checks are admissible in evidence, in an action to recover for a loss of baggage, to show what the company's undertaking was. *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

Weight.

Contributory Negligence—Projection of Arm.—On a question whether plaintiff voluntarily put his arm out of the car window, or whether it was cast out by a lurch of the train, and came in contact with a bridge through which the car was passing, it appeared that the rail on plaintiff's side was one-half inch lower than the other, that neither the plaintiff nor the other passengers were moved from their seats by the lurch complained of, that plaintiff immediately after the injury said that he got his arm hurt by putting it out of the car window, and that the top of the car did not touch the bridge, as it must have done in case of a violent lurch, it was held, insufficient to show involuntary projection of plaintiff's arm from the window, and that the verdict in his favor must be set aside. *Richmond, etc., R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763.

Forcible Ejection.—And in *Bogges v. Chesapeake, etc., R. Co.*, 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777, a person having a ticket for passage upon a railroad, boarded a freight train which did not carry passengers, believing the ticket good on that train. The conductor ordered him to get off the train while it was running at a speed which would endanger him in getting off, and refused to stop the train so that he might get off safely, and in

violent and insulting language threatened to eject the person from the train by force if such order was not obeyed, and he had force at his command to execute the threat, and as a result, the person jumped from the train to avoid ejection by force. The court held, that he was to be treated as a passenger and not as a trespasser; and there was sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train.

Speed of Train.—But the mere speed of a train, or the fact that it was behind time, when the accident occurred, is not evidence of the negligence of the employees having it in charge. *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241.

Allegata and Probata.—A complaint alleged that a motorman negligently permitted plaintiff, a minor, to ride on the footboard from the time he first boarded the car. The testimony of both plaintiff and the motorman showed that plaintiff rode on the front platform until within a square of his home, where it was the motorman's purpose to stop and let him off, at which point he stepped down on the footboard for the purpose of leaving the car. Held, a variance from the declaration. *Richmond, R., etc., Co. v. West*, 100 Va. 184, 40 S. E. 643.

In an action by a passenger against a street car company for personal injuries, where plaintiff testified that the step of the car was slippery from frost or ice, he could not tell which, and the motorman testified that there might have been some frost on the step but he did not think there was any ice, giving as his reason that the car stayed in a shed overnight, an allegation that defendant negligently permitted the step to remain covered with ice was held not to be sustained. *Richmond, R., etc., Co. v. West*, 100 Va. 184, 40 S. E. 643.

Questions for the Jury.—In Virginia, etc., *R. Co. v. Sanger*, 15 Gratt. 230,

contractors were employed by defendant railroad company to deliver stone to be used to preserve the track; they placed it in ridges near the rails, where a train was passing; one of the stones fell upon the track, causing the train to be derailed, and a passenger, the plaintiff in the case, was injured. As to whether the company had used due diligence to guard against danger, was a question, as held by the court, for the jury to determine. See also, *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12.

VII. Criminal Liability.

Violation of Statutory Regulations.—

Any common carrier failing to comply with the provision of ch. 55, Va. Code, 1887, Pol. Supl., ch. 55, or of the general laws of the state relating to the transportation of freight and passengers by common carriers when not otherwise provided for by such act of the general law, shall for each violation be deemed guilty of a misdemeanor, and on conviction thereof in any court of competent jurisdiction shall be fined not less than one hundred nor more than five hundred dollars.

Embezzlement.—If any carrier or other person to whom money or other property which may be the subject of larceny, may be delivered to be carried for hire, or any other person who may be intrusted with such property, embezzle or fraudulently convert to his own use or secrete with intent to do so, any such property, either in mass or otherwise, before delivery thereof at the place at which, or to the person to whom, they were to be delivered, he shall be deemed guilty of larceny thereof. W. Va. Code, 1900, ch. 145, § 20. See, in this connection, *Smith v. Com.*, 4 Gratt. 532; *Com. v. Adcock*, 8 Gratt. 661.

Packages Fraudulently Opened, and Goods Converted.—In an action of trespass on the case against a com-

mon carrier, if it appear, by a bill of exceptions, to have been proved at the trial, that the defendant fraudulently opened certain packages and casks, being in his care, and belonging to the plaintiff, took therefrom a part of their

contents, and converted the same to his own use, but not that the said contents were feloniously carried away, such offense is to be considered as amounting to a trespass only. *Cook v. Darby*, 4 Munf. 444.

Carrying Weapons.

See the title WEAPONS.

CASE.—See the title TRESPASS.

In *Dickey v. Smith*, 42 W. Va. 805, 26 S. E. 375, it is said: "The word **case** has various meanings. In a legal sense it means 'suit,' but in its ordinary usage it means 'event,' 'result,' 'happening,' 'side,' or 'party.' The legislature uses it indiscriminately, sometimes having the technical and sometimes the general meaning." And in that **case** it was held, that a provision that no more than one new trial shall be granted by a justice in any **case**, meant that not more than one new trial should be granted any party in any suit.

In *State v. Harmon*, 15 W. Va. 124, it is said: "When the term **case** is adopted in a statute, or otherwise, an action for a tort, in form *ex delicto*, is generally intended, and not an action in form *ex contractu*."

An assessment of taxes has been held, not to be a **case** within the technical sense of that word. *Mackin v. Taylor County Court*, 38 W. Va. 343, 18 S. E. 632.

Pending Case.—In *Wells v. Graham*, 39 W. Va. 605, 20 S. E. 576, it is said: "It is, however, contended that § 4, ch. 127, Code, 1891, will sustain this *scire facias*, as it enacts that 'in any stage of any **case** a *scire facias* may be sued out for or against * * * the assignee or beneficiary party to show cause why the suit should not proceed in the name of him or them.' This language is in some respects broad; but it uses the words **case** and 'suit,' which we usually interpret to mean a pending suit, and I think an inspection of other sections of this chapter will strengthen this conclusion. When a **case** has terminated in final judgment, it is at an end. It may be said it is for this purpose still a pending **case**. I think not. This would be straining the words pretty far."

Case Agreed.

See the title AGREED CASE, vol. 1, p. 283.

CASE CERTIFIED OR RESERVED.

Adjournment of Questions of Law from Circuit to General Court.—The circuit court law (1 Rev. Va. Code, ch. 69, § 14) provides "That the said [circuit] courts, when a question new or difficult arises, may adjourn any matter of law to the general court; or any party thinking himself aggrieved by the judgment of said court, may appeal

thereupon as of right, or obtain a writ of error thereto from the court of appeals at the discretion of the court. And the said [circuit] courts, in any criminal case, may, with the consent of the party accused, adjourn a question of law to the general court, which may be there argued and decided though such accused person be not

present." *Com. v. Garth*, 3 Leigh 761; *Com. v. Nix*, 11 Leigh 636. See also, *Com. v. Hall*, 2 Va. Cas. 241.

Questions Arising on Motion for Instructions.—Upon the trial of an indictment for felony, prisoner's counsel moves an instruction to the jury, in effect, that the evidence adduced for the prosecution does not prove that the crime charged in the indictment was consummated, and therefore they ought to find for the prisoner; the court, with assent of the prisoner and of the attorney for the commonwealth, adjourns the questions arising on the motion to this court, discharges the

jury, and continues the cause till the next term; held, upon construction of statute 1 Rev. Va. Code, ch. 69, § 14, it was regular to adjourn the questions to the general court, and the court ought to decide them. *Com. v. Nix*, 11 Leigh 636.

Necessity for Record to Show Consent of Accused.—The record of a case adjourned by a circuit court must show that such adjournment was with the consent of the accused. *Com. v. Young*, 9 Leigh 638; *Com. v. Reynolds*, 4 Leigh 662; *Com. v. Guard*, 3 Leigh 761; *Com. v. Pearce*, 6 Gratt. 669.

CASH.—In *Blair v. Wilson*, 28 Gratt. 175, it is said: "Cash is 'money at command; ready money.' Worcester. 'Cash (commerce) is money on hand, which a merchant, trader or other person has to do business with.' Bouv. Law Dic. 240. To receive a check therefore 'as cash' is to receive it as money, ready money, and imports a payment of the debt for which it was given."

In *Taylor v. Nicolson*, 1 Hen. & M. 68, it is said: "The word cash in the submission, necessarily excluded credit. We do not contend that the award is to be void, because that word was omitted; but because in fact, credit was allowed."

Cash Paper.— See *Slifer v. Howell*, 9 W. Va. 397.

Cashiers.

See the title BANKS AND BANKING, ante, p. 254.

Casual Ejector.

See the title EJECTMENT.

Catching Bargains.

See the titles ASSIGNMENTS, vol. 1, p. 75; FRAUD AND DECEIT; ILLEGAL CONTRACTS; UNDUE INFLUENCE; VENDOR AND PURCHASER.

Cattle.

See the title ANIMALS, vol. 1, p. 373.

CATTLE GUARD.—In *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 700, it is said: "A cattle guard is defined to be an appliance to prevent animals from going on land adjoining the right of way, to prevent their passing along a right of way into an improved and fenced field. 7 Am. & Eng. Enc. Law 912; *Hurd v. Railroad Co.*, 25 Vt. 116; *Railroad Co. v. Cunningham*, 13 Am. & Eng. R. Cas. 529." See the titles ANIMALS, vol. 1, p. 378; FENCES.

Causa Mortis

See the title GIFTS.

CAUSA PROXIMA.—In *Snyder v. Philadelphia Co.*, 54 W. Va. 157, 46 S. E. 366, it is said: "The meaning of the maxim, *causa proxima non remota spectatur*, is that the true cause of an injury is that which brings it about either by direct operation or by setting in motion other causes as instruments or agents operating under its dominant influence." See also, PROXIMATE CAUSE. And see the title NEGLIGENCE.

CAUSE.—See the title NEGLIGENCE. And see PROXIMATE CAUSE.

In *State v. Baller*, 26 W. Va. 94, 53 Am. Rep. 66, it is said: "These preliminary acts, if connected with the intended crime only as a condition as distinguished from a **cause**, can never according to the better authorities constitute an indictable attempt to commit such crime. While it is often not difficult to distinguish a condition from a **cause**, yet they frequently approximate so closely, that it becomes exceedingly difficult to distinguish them. By **cause** is meant that condition which determines the final result. As illustrating the difference between a **cause** and a condition I will put the case of the death of a child proceeding from suffocation produced by forcing moss into the child's throat. This would still be considered the **cause**, as the swelling arose from the forcing of the moss into the child's throat, though the immediate occasion of the child's death was the swelling up of the passages of the throat causing suffocation. In this case the swelling of the throat, which occasioned the suffocation, was the condition of the death, while the **cause** of it was the forcing of the moss into the throat." This illustration is found in Wharton's *Crim. Law* (8th Ed.) Book 1, § 154, p. 184.

CAUSE OF ACTION.—See also, the title ACTIONS, vol. 1, p. 122.

In *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 697, it is said: "What shall be called the **cause of action**? It is the ground on which the action may be sustained. Black, *Law Dict.* 182. 'It is the breach of duty by the defendant complained of.' This definition by Judge Holt is very concise and exact. *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580."

Chapter 123, W. Va. Code, 1899, prescribes in what counties of the state suits may be brought, and § 2 reads as follows: "An action may be brought in any county wherein the **cause of action** or any part thereof arose, although none of the defendants may reside therein." The **cause of action** generally means the breach of duty by defendant complained of, but under § 2, ch. 123, it may consist of one or more essential facts, which plaintiff must show to make out his case, and these may be severable. *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.

A supersedeas, while it is a continuation of the original suit, is also a new suit in the sense of the act requiring oaths by suitors; and an error in the judgment of the court below is a **cause of action** within the meaning of the statute on that subject. *Nadenbousch v. Sharer*, 2 W. Va. 285.

Caveat.

See the title PUBLIC LANDS.

Caveat Emptor.

See the titles JUDICIAL SALES; SALES; VENDOR AND PURCHASER; WARRANTY.

CEMETERIES.

CROSS REFERENCES.

See the titles CORONERS; CORPORATIONS; DEDICATION; DEEDS; EMINENT DOMAIN; ESTOPPEL.

Establishment.

Petition for Establishment.—A petition for the establishment of a cemetery should show that the privilege of interment is open to the public, as a cemetery may be private as well as public. It must state, not merely a public use intended, but a public necessity. *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 406. See generally, the title EMINENT DOMAIN.

"The fact that by chapter 44, acts 1872-73, cemetery associations may sell, almost without restriction as to its use, any part of their land, would weaken any legal inference from their corporate capacity that their land is to be devoted to public use. It is not, therefore, sufficient to say, because a corporation says it needs for its use land, that that is necessarily public need or use, or that, in this case, the averment that the association needs it for its use in the burial of the dead makes it sufficient. The application should certainly aver that the land was needed for the public use in the burial of the dead, and that it would be, when condemned, devoted to the public use in the burial of the dead." *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 406.

Within Four Hundred Yards of a Dwelling House.—W. Va. Code, 1887, § 2, ch. 42, while providing that private property may be condemned for cemetery associations, declares, in clause 8: "But no land shall be so taken for cemetery purposes which lies within four hundred yards of a dwelling house, unless to extend the limits of a cemetery already located, and then only so that such limits shall not be extended nearer to any dwelling house which is within four hundred yards."

Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262, 10 S. E. 406.

An application to condemn land for cemetery purposes should show that the land to be taken does not lie within 400 yards of a dwelling house, unless to extend the limits of a cemetery already located, and then, that such limits will not be extended nearer to any dwelling house which is within 400 yards. *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405. See generally, the title EMINENT DOMAIN.

What Constitutes a Dedication.—See generally, the title DEDICATION.

No particular form or ceremony is necessary to dedicate land to public uses; the assent of the owner, and the fact of the land being used for public purposes, are all that is requisite. In 1789, with the consent and approval of the owner, the body of Mary Washington was interred in a burial lot, and forty-two years later a monument was erected over her grave by an association organized for that purpose. The corner stone was laid with civil and military ceremonies by the President of the United States. Since then no one has claimed any private ownership over this spot of ground. It was held, this constituted a complete dedication of the tomb to public uses. *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246.

The deed granting to the defendant certain land, containing within its bounds the said burial ground and monument, reserved both, and defendant never claimed the title thereto, but gave plaintiffs an option agreeing to sell a tract "containing about two acres, with the Mary Washington monument and the marble shaft thereon," in which option he used the language

quoted merely to describe the tract. The evidence, in an action against defendant for breach of contract, showed that the option was procured by the false pretenses of the plaintiffs, for purposes other than those designed by him. It was held, the plaintiffs can not recover. *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246. See also, the title DEEDS.

Effect of Dedication.—When dedication of burial grounds is once made, no title passes to the dedicated ground by subsequent conveyances of the tract out of which the reservation was made, though those conveyances be without reservation. *Benn v. Hatcher*, 81 Va. 25. See also, *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246.

Where land has been reserved and "dedicated" to some public, charitable or pious use, such as a cemetery, an estoppel arises precluding the owner from revoking the dedication; especially is such dedication irrevocable where it was created by agreement. *Benn v. Hatcher*, 81 Va. 25.

Curing of Uncertainty in Reservation.—Uncertainty in reservation, as when in conveyance of land the language is, "reserving to the parties of the first part, three-fourths of an acre as a burying ground for the family and their descendants," may be cured by the election of the grantor; which, however, must be made within a reasonable time, but may be by acts in pais. *Benn v. Hatcher*, 81 Va. 25. See also, the title DEEDS.

Cemetery Companies.—See generally, the title CORPORATIONS.

Power to Make Rules for Management.—A private cemetery company has authority, by the general law, to make reasonable rules and regulations for the management of its affairs and the disposition of its property. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

Power of Equity Court over Cem-

etry Company.—Courts of equity can not substitute their own business discretion and judgment for that of a cemetery company on matters intrusted to the company by its charter. Their visitorial powers have no such scope. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 606, 44 S. E. 769. See generally, the title CORPORATIONS.

Rights of Purchaser of Lot.—A purchaser of a lot from a private incorporated cemetery company acquires no absolute interest in or dominion over such lot, but merely a qualified or usufructuary right for the purposes to which the lots are devoted, and for which they are set apart by the company. The holding is in the nature of an easement, with the exclusive right to bury on the lot, subject to the general proprietorship and control of the company in whom the legal title is lodged. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

Notice of Restriction.—All purchasers of lots from a private cemetery company are affected with notice of the limitations placed upon their holdings by the law of the land and the charter, constitution, and by-laws of the company made in pursuance thereof. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

Effect of Formal Deed.—A formal deed is not essential to confer the exclusive right to the use of a lot in a cemetery on the purchaser for burial purposes; and, on the other hand, if the lot be conveyed by deed absolute in form, such purchaser only acquires the right or privilege of using the lot for the purpose to which it is dedicated. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 610, 44 S. E. 769. See also, the titles DEAD BODIES; DEEDS.

Control of Company Over Grave Fees.—A private cemetery company may fix the rate of "grave fees" to be

charged by its superintendent, and give him a monopoly of such fees. The law against restraints of trade has no application to a private cemetery company conducting its affairs in its own way, and by agents of its own selec-

tion for the bona fide purpose of effectuating the objects for which the company was organized. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 606, 44 S. E. 769. See also, the title CORPORATIONS.

Census.

See the titles ELECTIONS; JUDICIAL NOTICE; JURY; SCHOOLS.

Certainty.

See the titles ARBITRATION AND AWARD, vol. 1, p. 701; CONTRACTS; PLEADING; SPECIFIC PERFORMANCE.

CERTIFICATE.—See the title INDICTMENTS; INFORMATION AND PRESENTMENTS.

In *Matthews v. Com.*, 18 Gratt. 994, it is said: "The nature of this **certificate** is shown by the Code, p. 826, § 16, and in the amended act in the Session Acts, p. 924, § 16, in each of which a provision is made that when a person charged before a justice with a criminal offense is committed or recognized by him for trial in the county or corporation court, 'the justice shall return to the clerk of such court, as soon as may be, a **certificate** of the nature of the offense, showing whether the accused was committed or recognized therefor; and the clerk, as soon as may be, shall inform the attorney of the commonwealth in said court of such **certificate**.' The only object in view in requiring the **certificate** was, to inform the court and commonwealth's attorney for the accusation, in order that it might be put in proper form, and that preparation might be made for the trial. See what is said on this subject in the opinion delivered by Judge Joynes a few days ago in the case of *Kemp et als. v. Com.* The legislature no doubt thought that this **certificate** might safely be made the foundation of an information to be filed therein by the attorney for the commonwealth, and therefore so provided; a function, however, which it had never before performed; but certainly could not have intended to place it on the same footing, in cases of felony, with an indictment found by a grand jury."

Certificate of Acknowledgment.

See the title ACKNOWLEDGMENTS, vol. 1, p. 104.

Certificate of Deposit.

See the title BANKS AND BANKING, ante, p. 254.

Certificate of Election.

See the title ELECTIONS.

Certificate of Marriage.

See the title MARRIAGE.

Certificate of Protest.

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Certificate of Public Debt.

See the titles FACTORS AND COMMISSION MERCHANTS; LOST INSTRUMENTS AND RECORDS; RESCISSION, CANCELLATION AND REFORMATION; SALES; STATE; TAXATION.

Certificate of Stock.

See the title STOCK AND STOCKHOLDERS.

CERTIFICATE OF VERDICT.—Upon a trial at law of issues out of chancery, exceptions are filed to opinions of the court, and made part of the record; the court of law certifies the verdict, but it does not expressly certify, nor is it asked to certify, the exceptions. Held, all the proceedings upon the trial of the issues, spread upon the record thereof, constitute part of the **certificate of the verdict**, and with it become part of the chancery record. *Watkins v. Carlton*, 10 Leigh 560. See also, the title ISSUE OUT OF CHANCERY.

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I. Definition, Nature and Purpose.

A. DEFINITION AND NATURE.

Definition.—Certiorari is an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding. *Poe v. Machine Works*, 24 W. Va. 517. See also, *Meeks v. Windon*, 10 W. Va. 180; *Beasley v. Beckley*, 28 W. Va. 81. And see post, "What Proceedings Reviewable," II, B.

Distinguished from Writ of Error.—See the title APPEAL AND ERROR, vol. 1, p. 436.

"This court in *Meeks v. Windon*, 10 W. Va. 180, decided that 'although it may be possible that the merits of the case have been erroneously decided, the writ of certiorari can not be made a substitute for the inhibited appeal, writ of error or supersedeas, to review the case on its merits.'" *Poe v. Machine Works*, 24 W. Va. 517.

Distinguished from Mandamus.—Mandamus lies to enforce the performance of ministerial duties, while certiorari lies simply to remove from inferior to superior tribunals proceedings, in order that they may be reviewed and errors corrected. In the one case the awarding of the peremptory writ ends the proceeding, while in the other the awarding of the writ is simply an interlocutory part of the proceeding. *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450.

Where the inferior tribunal whose decision is sought to be reviewed has

any discretion, the proper method is by certiorari and not mandamus. *Board of Supervisors v. Minturn*, 4 W. Va. 300. See the title MANDAMUS.

Not a Writ of Right.—The remedy by writ of certiorari, given by ch. 110, W. Va. Code, 1899, to review the judgment of a justice, is not given as a matter of right, but is awarded by the court, or judge, for cause, on proper case shown. *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 926; *Board of Education v. Hopkins*, 19 W. Va. 84; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

In *Parsons v. Aultman, etc., Co.*, 45 W. Va. 473, 31 S. E. 935, it was held, that the certiorari appeal is granted as a matter of sound discretion, and the appeal certiorari is granted as a matter of right. See post, "Hearing and Determination of Application," IV, D.

B. FUNCTIONS AND SCOPE OF WRIT.

1. Original Writ.

a. At Common Law.

In General.—The writ of certiorari lay at common law to examine and reverse or affirm proceedings and judgments in inferior courts, and for the purpose of removing not only legal, but likewise equitable proceedings. *Cooper v. Saunders*, 1 Hen. & M. 413.

The common-law function of the writ was to remove a civil cause from an inferior to a superior court, before judgment, where the superior court had original jurisdiction, and could administer the same justice as the court below, and the case was there retained and tried. *Bee v. Seaman*, 36 W. Va.

381, 15 S. E. 173. See post, "Necessity for Judgment or Order," II, C.

"The ancient original writ of certiorari has in its history been put to diverse uses, and the law touching it is, in some respects, complicated. In England it was used before judgment as a process by which a superior court removed from inferior tribunals causes pending before them, in order that more sure and speedy justice be done. Bacon Abr. tit. 'Certiorari' A; Bouv. Law Dict. tit. 'Certiorari.'" *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

b. Statutory Remedy.

An Appellate Writ.—The statutory remedy of certiorari now in use is in its nature and scope an appellate writ. *Poe v. Machine Works*, 24 W. Va. 517; *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450; *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Parsons v. Aultman, etc., Co.*, 45 W. Va. 473, 31 S. E. 935; *Michaelson v. Cautley*, 45 W. Va. 533, 32 S. E. 170.

"The original writ of certiorari now so extensively used, and performing such important functions, in West Virginia (the common-law original writ of certiorari, enlarged in its functions and efficacy by chapter 110, § 2, Code), is an appellate writ, the counterpart of the writ of error. The writ of error corrects errors of record committed by courts of record proceeding according to the course of the common law, whilst the original writ of certiorari corrects the errors of inferior tribunals in matters where the proceeding is not according to the course of the common law, and where no appeal or writ of error lies. *Mackaboy v. Com.*, 2 Va. Cas. 268; *Wingfield v. Crenshaw*, 3 Hen. & M. 253; *Cunningham v. Squires*, 2 W. Va. 422; *Dryden v. Swinburn*, 15 W. Va. 234, 20 W. Va. 89; *Board of Education v. Hopkins*, 19 W.

Va. 84. (I do not refer to the ancillary writ of certiorari used by appellate courts to bring us more perfect record on suggestion of diminution.)" *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

The statutory remedy of certiorari to judgments of justices in civil cases is merely a form of appeal. *Parsons v. Aultman, etc., Co.*, 45 W. Va. 473, 31 S. E. 935; *Michaelson v. Cautley*, 45 W. Va. 533, 32 S. E. 170.

The two have therefore become, so far as applied to the review of civil cases before justices, synonymous terms, except that the certiorari appeal is granted as a matter of sound discretion, and the appeal certiorari is granted as a matter of right. *Parsons v. Aultman, etc., Co.*, 45 W. Va. 473, 31 S. E. 935.

"This statutory writ of certiorari is intended as a method whereby the rulings of the justice, etc., may be reviewed, especially his rulings granting or refusing to set aside verdicts; and the scope and tenor of the act show plainly that it was intended that the circuit court should be liberal in granting it, so far as it is a substitute for appeal from the judgment of a justice, so that the petitioner may have the judgment of a justice reviewed upon the merits, and such judgment or order made upon the whole matter as law and justice may require. Yet the language of the act does not warrant the construction that the writ is given as matter of right. See Code, ch. 110, § 4." *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 928.

Scope Enlarged by Statute.—The principal use of this writ before 1868 was to bring up records, in whole or in part, in aid of some other proceeding; but the statute of 1882, as now found in W. Va. Code, 1899, p. 742, ch. 110, has very much enlarged its scope, giving power to rehear after judgment on the evidence certified, as well as correct errors in law, and in

a proper case to retain for trial *de novo*, being thus in effect an appeal from the judgment of a justice in a certain class of cases. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *Harbert v. Monongahela River R. Co.*, 50 W. Va. 253, 40 S. E. 377.

By § 2, ch. 153, acts 1882, W. Va., the remedy by certiorari in the circuit court is greatly enlarged, both as to the questions that may be reviewed and the inferior tribunals to which it is made to lie. *Chenoweth v. Commissioners*, 26 W. Va. 230.

"So wide was the scope of the writ before the enactment of § 2, ch. 110, Code (Ed. 1887 and 1891), that though that section retains it as it was aforesaid, and purports to apply it to additional cases, yet it may be questioned whether it made it applicable to any additional cases, though, beyond question, § 3 does widen its remedial agency in enabling it to correct errors in matters or points where before the statute it was ineffectual, as in the instance of review of evidence on matters of fact. Before that statute, the superior court upon certiorari could review all questions of jurisdiction and the regularity of proceeding, and decide all questions of law and fact, and render such judgment, in case of reversal, as the lower tribunal ought to have rendered; but it was at least doubtful whether the court could do what appellate courts can do on writs of error, consider evidence and reverse findings on facts by jury or court in proper cases (*Alderson v. Commissioners*, 32 W. Va. 458, 9 S. E. 863); but now the statute provides for embodying in the record evidence and all questions passed upon on the trial in the tribunal below, and requires the court above to pass upon all questions arising on law and evidence, and render such judgment as the court should have rendered, without remanding." *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

Writ Lies unless Expressly Taken Away.—Appeal being a creature of statute law, does not lie except where given by express terms. The rule in regard to a certiorari is the reverse. It always lies, unless expressly taken away. The reason of this is, that it is an extremely beneficial writ, being the medium through which the court of queen's bench exercise its corrective jurisdiction over the summary proceedings of inferior courts. So far from this common-law writ being taken away, in West Virginia express provision is made therefor by the constitution (art. 8, § 12), and by W. Va. Code, 1899, ch. 110, §§ 2, 3. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

2. Ancillary Writ.

In General.—Certiorari as an auxiliary or ancillary writ is used by appellate courts to bring up a more perfect record on the suggestion of diminution. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Terrell v. Ladd*, 2 Wash. 150.

"Certiorari, as an auxiliary writ, used by appellate courts to present to them for decision of errors assigned the record in the court below as it in truth exists there, is a remedial writ belonging to such courts under the common law." *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935. See post, "Award as Auxiliary Writ for Defects of Record," II, D.

Generally, as to what constitutes the record on appeal, see the title APPEAL AND ERROR, vol. 1, p. 505.

Not Available to Correct Record.—The purpose of the writ of certiorari to the clerk of the court below, is not to cause a record to be made or corrected, but, to have brought before the court of appeals, where part of the record is omitted, the whole or any part of such record. *Seibright v. State*, 2 W. Va. 591.

A writ of certiorari can not be used

to cause a record to be made or corrected. Its office is only to bring the record as already made by the court below. Any amendment of corrections of that record is to be made by that court in a proper proceeding. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935, citing *Vest's Case*, 21 W. Va. 796; *Bias v. Floyd*, 7 Leigh 647; *Seibright's Case*, 2 W. Va. 591.

II. When Proper.

A. PROPRIETY AS DEPENDENT UPON EXISTENCE OF OTHER REMEDIES.

In General.—The original writ of certiorari is generally used in such cases as might otherwise, without its intervention, leave the party remediless. *Poe v. Machine Works*, 24 W. Va. 517. See also, *Beasley v. Town of Beckley*, 28 W. Va. 81; *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298.

"It seems that it has ever been the law that when it is proper to review the proceedings of inferior tribunals, and the law has not provided redress by appeal, writ of error, or other process, resort may be had to this writ of certiorari to prevent a failure of justice. *Meeks v. Windon*, 10 W. Va. 180; *Poe v. Machine Works*, 24 W. Va. 517; *Beasley v. Town of Beckley*, 28 W. Va. 81; *Mackaboy v. Com.*, 2 Va. Cas. 268; *Harris, Cert.*, § 1." *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

"It is clear that the writ of certiorari ought not to issue, but should be denied, where there is other adequate remedy, or if it be a matter of no serious complaint or injury." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

Will Not Lie Where Appeal or Writ of Error Available.—It is well established as a general rule that when the party aggrieved can obtain redress by appeal or writ of error, he will not be allowed this unusual remedy. And in cases where he has

permitted the time for appeal to expire, certiorari will not issue for relief, unless upon a special showing unmixed with any blame or negligence on the part of such party. *Poe v. Machine Works*, 24 W. Va. 517; *Beasley v. Town of Beckley*, 28 W. Va. 81.

If an appeal is authorized by statute no review of a judgment except under extraordinary circumstances can be had by writ of certiorari. *Ridgway v. Hinton*, 25 W. Va. 554; *Parsons v. Aultman, etc., Co.*, 45 W. Va. 473, 31 S. E. 935.

In *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, the court, in holding that an appeal lies from the judgment of a justice rendered upon a verdict of a jury, just as in cases tried by him without a jury, and that the writ of certiorari does not lie in such case, said: "As such appeal is proper in such case a writ of certiorari does not lie, because as shown by cases cited in *Morgan v. Railroad Co.*, 39 W. Va. 17, 19 S. E. 588; *Meeks v. Windon*, 10 W. Va. 180; *Poe v. Machine Works*, 24 W. Va. 517, it does not lie where an appeal lies. Also, § 2, ch. 110, Code, denies the writ of certiorari where an appeal lies."

In *Beasley v. Beckley*, 28 W. Va. 88, the denial of the writ of certiorari to the judgment of a mayor imposing a fine for the violation of a city ordinance was approved by the court of appeals upon writ of error, because the applicant had an adequate remedy by appeal to the circuit court by § 230, ch. 50, W. Va. Code, as amended by ch. 145, acts, 1883.

When Properly Invoked Notwithstanding Existence of Other Remedy.

It has been held, however, that even in cases where the law has provided a remedy by writ of error or appeal, a writ of certiorari may, under special circumstances, be invoked, as, for instance, if by the act of the court, either oppressively or erroneously, the writ of

error or appeal is refused; or, if by the act of the clerk, negligently or willfully caused, the writ of error was defeated; or, if by the contrivance or procurement of the adverse party the same result is affected; or, even, if by inevitable accident, or the misfortune without blame of the party injured he has been prevented from having the benefit of a second investigation of the facts of the cause, by the prescribed mode of a writ of error or appeal, certiorari may be resorted to as a substitute for redress. *Poe v. Machine Works*, 24 W. Va. 517.

B. WHAT PROCEEDINGS REVIEWABLE.

1. General Rule.

a. At Common Law.

At common law the writ of certiorari was employed to review the judgments of inferior jurisdictions, or courts not of record, or where the court acts in a summary mode or in a new course different from the common law. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Poe v. Machine Works*, 24 W. Va. 517.

"Certiorari is the proper writ to revise and reverse the action of inferior courts, boards, or tribunals not of record, proceeding not according to the course of the common law, where no appeal or writ of error lies. *Cunningham v. Squires*, 2 W. Va. 422; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Poe v. Machine Works*, 24 W. Va. 517." *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

Where a new tribunal acts in a cause in a manner different from the common law, no writ of error would lie to its judgments. In such case the common law gave a mode of reviewing such judgments. This mode was by writ of certiorari. *Board of Education v. Hopkins*, 19 W. Va. 84; *Dryden v. Swinburn*, 15 W. Va. 234; *Ridgway v. Hinton*, 25 W. Va. 134; *Cunningham v. Squires*, 2 W. Va. 422; *Meeks*

v. Windon, 10 W. Va. 180; *Burke v. Supervisors*, 4 W. Va. 371.

It was the medium through which the court of queen's bench exercised its corrective jurisdiction over the summary proceedings of inferior courts. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

A certiorari may be awarded in cases before justices of the peace, in orders, summary proceedings and trials, before newly-created jurisdictions, and where the party can not have a writ of error. *Mackaboy v. Com.*, 2 Va. Cas. 268.

"If, in a case not at common law, an appeal be allowed by the terms of a statute, and the appeal be prayed and refused, it would seem to me that the proper course would be to apply for a mandamus to the court to allow the appeal; because, in such a case, no writ of error lies; or, if the appeal be not prayed at the time, that the party grieved may, upon application to a superior court of general jurisdiction at common law (or to the court of chancery), according to the nature of the case, obtain a writ of certiorari, according to the distinction taken by Lord Ch. J. Holt, in 1 Salk. 144, and 263, (d) that wherever a new jurisdiction is created by act of parliament, and the court or judge that exercises this jurisdiction, acts as a court of record, according to the course of the common law, writ of error lies on their judgments; but where they act in a summary method, or in a new course different from the common law, a writ of error does not lie, but a certiorari." *Wingfield v. Crenshaw*, 3 Hen. & M. 253.

A writ of error does not lie at common law to review the proceedings of a court or tribunal not of record. The orders or proceedings of such tribunals are, when reviewable, generally reviewed by writ of certiorari. *P. C.*, etc., *R. Co. v. Board of Public Works*, 28 W. Va. 264. See generally, the

title APPEAL AND ERROR, vol. 1, p. 418.

"As examples of inferior tribunals to which a certiorari lay at the common law, the following may be instanced in England: the court leet, the quarter sessions, the old Bailey, the sessions of the city of Rochester, two justices authorized by statute to appoint overseers of the poor, justices in eyre, justices of jail, justices of a county palatine, the college of physicians having a special power by statute to impose fines, etc., justices of the peace, etc., even in those cases in which they are empowered by statute finally to hear and to determine; commissioners of sewers, the courts of the Cinque ports, the grand sessions and other courts in Wales, the city courts of London and Middlesex, justices of assize, orders of conviction on the conventicle act, 22 Car. 2, chap. 1, and orders on appeal from Scavenger's rate, orders of bastardy, an inquisition taken before the sheriff under a private act of parliament, 2 Bac. Abr. 163. Examples of like inferior tribunals in the several states of the Union are too numerous and diverse to mention, such as commissioners of highways in N. Y., 32 Barb. 132; quarter sessions in Pennsylvania in laying out highways, 5 Bin. 24, 29, 482; the courts of sessions in Maine in laying out roads, 8 Maine 292; the court of common pleas acting under the statute for the support and regulation of mills, 11 Mass. 462; the county court in N. C., Haywood, 303; justices court for trial of negroes for felony under statute in Tennessee, 2 Yerger 173, and justices court under act for punishment of riots, etc., in Virginia, 2 Virginia Cases, 269." *Cunningham v. Squires*, 2 W. Va. 422.

b. Under Statute.

By ch. 110, § 2, W. Va. Code, 1899, it was provided that "in every case, matter or proceeding, in which a certiorari might be issued, as the law heretofore has been, and in every case,

matter or proceeding, before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceeding may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which said judgment was rendered, or order made; except in case where authority is or may be given by law, to the circuit court or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari; but no certiorari shall be issued in civil cases before justices, where the amount in controversy, exclusive of interest and costs, does not exceed \$15." *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. 97; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173; *State v. Larue*, 37 W. Va. 828, 17 S. E. 297; *Wilson v. W. Va.*, etc., R. Co., 38 W. Va. 212, 18 S. E. 577; *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

"There are two distinct classes of cases in which, according to the statutes of this state, certiorari is the proper remedy: (1) All that class of cases in which the writ was proper at common law; (2) Civil cases wherein the writ is made a substitute for the writ of error." *Cushaw v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

"The [W. Va.] constitution, in express terms, gives the circuit court supervision and control over all proceedings before justices and other inferior tribunals by certiorari (see Const. art. 8, § 12); and by section 2 of chapter 110 of the Code (Ed. 1891, p. 761) the common law jurisdiction of the writ is declared, and in every case, matter, or proceeding before a council of a

city, town, or village it is expressly provided that, subject to certain exceptions mentioned, the record or proceeding may, after a judgment or final order therein, be removed by a writ of certiorari to the proper circuit court, and such writ may be awarded by the judge in vacation as well as by the court. For mode of procedure, see section 4, etc., of chapter 110." *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

"It will be noticed that this statute [ch. 110] greatly enlarges the writ of certiorari, and allows it to issue, not only in cases where it could be used according to the common law, but extends it to every case, matter, or proceeding, before a justice or other inferior tribunal, in which the judgment can not be reviewed by appeal, writ of error, supersedeas, or in some manner other than upon certiorari. It in express terms authorizes every judgment or order entered by a justice or other inferior tribunal, except judgments of justices for less than \$15, to be reviewed upon certiorari by the circuit court when there is no other process by which such judgment or order can be reviewed. It completely supplies and fills whatever hiatus may exist in other writs or modes for the review of such judgments or orders, and makes all of them reviewable by the circuit court, with the single exception of justice's judgments for less than \$15, exclusive of interest and costs." *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298.

2. Ex Parte or Administrative Orders or Proceedings of Courts of Record.

In *P. C., etc., R. Co. v. Board of Public Works*, 28 W. Va. 264, it was held, that a writ of error does not lie, even from a court of record, when the order or judgment of such court sought to be reviewed is simply an ex parte or administrative order or proceeding. Such order and such proceedings, when

reviewable, are likewise subjects of a writ of certiorari, and they are never reviewable by a writ of error.

3. Proceedings, Judgments or Orders of Particular Tribunals.

a. Circuit Courts.

In *Dryden v. Swinburn*, 15 W. Va. 234, the court held, both in Virginia and West Virginia, that the proper mode of bringing up a judgment or order of a circuit court in controversy between the parties for review by the supreme court of appeals, where such judgment or order is not in a chancery suit, is by writ of error or supersedeas and not by certiorari.

"Under the Virginia statutes the writ of certiorari was unnecessary to be resorted to, as a general rule, in case of any final judgment or order of either a circuit court or county court, at least in a controversy to which there were parties. * * * And accordingly the Virginia reports show no case of a judgment of a county or circuit court reviewed by writ of certiorari. This mode of review has been attempted in some such cases but it has been disapproved. See *Hay v. Pistor*, 2 Leigh 707; *Tankersley v. Lipscomb*, 3 Leigh 813." *Dryden v. Swinburn*, 15 W. Va. 234.

b. County Courts.

(1) In Virginia.

The Virginia reports show no case of a judgment of a county court reviewed by writ of certiorari. See the opinion of Green, P., in *Dryden v. Swinburn*, 15 W. Va. 234. And see *Hay v. Pistor*, 2 Leigh 707; *Tankersley v. Lipscomb*, 3 Leigh 813.

(2) In West Virginia.

In General.—In West Virginia a judgment of a county court may be brought up for review in a circuit court in a proper case by certiorari. *Dryden v. Swinburn*, 15 W. Va. 234, in which case the court said: "Our statute being silent as to the cases in which the writ of error or supersedeas

may be awarded when a judgment of the county court is to be reviewed, I conclude that the common-law mode of review is in force in this state when a judgment of a county court is to be reviewed; and therefore when a judgment of a county court is reviewed by the circuit court it must be done by writ of certiorari in such cases as by the common law could only be reviewed in that manner." See also, *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702.

Chapter 110, § 2, W. Va. Code, 1899, expressly authorizes a writ of certiorari in every case, matter or proceeding, before a county court, except where authority is given by law to the circuit court to review a judgment or order in some other manner than upon certiorari. *Chenowith v. Commissioners*, 26 W. Va. 230; *Wilson v. W. Va.*, etc., R. Co., 38 W. Va. 212, 18 S. E. 577. And see cases cited ante, "Under Statute," II, B, 1, b.

There are, however, cases of final orders of the county court which can not be reviewed by certiorari, or in any other manner, by the circuit court, because such final orders, or the proceedings in which they were entered, are obviously judicial in their character. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. 97.

The provision of § 12, art. VIII, of the constitution of 1872 of West Virginia which declares that "the circuit courts shall have supervision of all proceedings before the county courts, and other inferior tribunals, by mandamus, prohibition and certiorari," is restrained and limited in civil cases cognizable by a justice, with certain specific exceptions, by § 29 of the same article of the constitution, which provides, that the decision of the county court shall be final in all cases of appeals from the judgment of a justice. By this inhibition it was intended not only that the circuit court should not supervise such cases by appeal or writ

of error, but that all remedy should be denied by that court in such cases. *Poe v. Machine Works*, 24 W. Va. 517.

In *Meeks v. Windon*, 10 W. Va. 180, the court of appeals, while declining to decide whether § 12, art. VIII of the constitution of West Virginia, giving the circuit courts supervision of all proceedings before the county courts, by certiorari, etc., gave the circuit courts power to correct errors appearing on the face of the record, in spite of § 29 of same article making the judgment of the county court final on all appeals from justices except in certain excepted cases, and only made such judgment final on the merits, held that at any rate it had no jurisdiction where no such error is made to appear by the applicant for the writ of certiorari, and a writ of prohibition will be granted to the circuit judge prohibiting him from proceeding with the writ of certiorari.

Although it may be proper for circuit courts, in some cases of decisions upon appeals from judgments of justices by county courts, to exercise the writ of certiorari, "to see whether the limited jurisdiction have exceeded their bounds," but not to try the merits of the question, yet if the court goes beyond its legitimate powers in its attempt to exercise its jurisdiction by certiorari, an appropriate case is presented for interference by prohibition. *Meeks v. Windon*, 10 W. Va. 180.

Action upon Relocation of County Seats.—The action of the county court in ascertaining and declaring the result of a vote on the question of the relocation of a county seat is reviewable by the circuit court by certiorari. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. 97.

"Now, in *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337, this court held, that such a judgment on the question as to the relocation of a county seat, rendered by a county court, could be

reviewed by the circuit court, by a writ of certiorari, thus in effect deciding that this was a proceeding, before the county court, judicial in its character. And, in pronouncing the opinion of the court, I said: 'In ascertaining the result of the vote on the relocation of the county seat, the county court could exercise all the powers of any other court in making any investigation, with possibly the exception of the opening of the sealed ballots, which the statute law seems to forbid, except in case of contested elections, though it may be too liberal a construction of the law to say that they could not be opened by the county court in determining the question whether a county seat had been, by the vote of the qualified voters, relocated.' These views seem to me as sound. I see nothing in the statute we are considering to limit the powers of the county court in this investigation." *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. 97.

Judgment in Election Contests.—A writ of error and supersedeas does not lie to the judgment of a county court in an election contest, but only a certiorari. *Swinburn v. Smith*, 15 W. Va. 483.

"In *Dryden v. Swinburn*, 15 W. Va. 234, and in *Swinburn v. Smith*, 15 W. Va. 483, it was decided, that the supervision of the supervisors in an election can only be exercised by a writ of certiorari, and that no writ of error and supersedeas lies in such a case. These decisions were again approved in *Dryden v. Swinburn*, 20 W. Va. 104. The basis of all these decisions was that, as the board of supervisors in deciding an election case proceed in a summary way prescribed by statute law and not according to the course of common law, and the statute law was silent as to the manner in which their decision and proceedings were to be supervised and reviewed, it could by the common law be done only

by certiorari, and that such proceedings and decisions could not be reviewed by a writ of error." *Ridgway v. Hinton*, 25 W. Va. 554. See also, *Fowler v. Thompson*, 22 W. Va. 106.

The mere fact that the word "control" in the clause of the constitution of 1863 giving the circuit courts "supervision and control of all proceedings before justices and other inferior tribunals by mandamus, prohibition and certiorari" is omitted from the similar clause in the constitution of 1872 does not deprive the circuit court of jurisdiction to review the judgment of the county court in contested election cases, by certiorari. *Dryden v. Swinburne*, 20 W. Va. 89.

The ex parte settlement of a sheriff, confirmed by the county court, being purely statutory and not according to the course of the common law, in the absence of a statute authorizing the reviewal by writ of error, must be reviewed by certiorari. *Board of Education v. Hopkins*, 19 W. Va. 84.

Although the settlement of a sheriff's account before commissioners, when confirmed by the county court, under acts, W. Va., 1872-73, ch. 198, § 2, is only prima facie correct and hence is not final, yet it may be reviewed in the circuit court by certiorari, since by § 3, ch. 15, of the same acts, the circuit courts are expressly given power to supervise all proceedings before the county court, and this proceeding is not excepted. *Board of Education v. Hopkins*, 19 W. Va. 84; *Cunningham v. Squires*, 2 W. Va. 422.

Refusal to Correct Assessed Valuation of Land.—No appeal lies from a judgment of a county court rendered under § 7, ch. 32, acts, 1882, refusing to correct the assessed valuation of land. Such judgment can be reviewed if at all only by certiorari. *Low v. County Court*, 27 W. Va. 785.

"Chapter 32 of the acts of 1882 is the chapter which provides for the appointment of commissioners in each

district in every county of the state, 'to reassess the value of real estate therein.' It does not provide for an appeal from the judgment to the county court under § 7. Neither is there in any other statute any provision for an appeal from such judgment. If, therefore, it could be reviewed at all, it could only be by certiorari. (*Dryden v. Swinburn*, 15 W. Va. 234; *Swinburn v. Smith*, 15 W. Va. 483.) *Low v. County Court*, 27 W. Va. 785.

c. Corporation Courts.

The county and corporation courts being courts of record, the writ of certiorari does not lie to a judgment of a corporation court affirming a judgment of a single magistrate, though his is not a court of record, for a fine imposed by a penal law, or in a civil case; if there be error in the judgment of such court affirming the judgment of a single magistrate for a fine, the writ of error lies. (*Tankersley v. Lipscomb*, 3 Leigh 812.)

"This court is of opinion, and doth decide; 1. That as the judgment which was rendered by the mayor of Richmond was appealed from by Tankersley under the 23d section of the county court law, and the mayor's judgment was affirmed by the hustings court against the said appellant and her surety under the 25th section of that statute, the case was taken out of the jurisdiction of the mayor; and that the court of hustings being a court of record, a certiorari does not lie to a judgment rendered in that court, and that this is true when the prosecution is for the breach of a penal law, as well as in a merely civil case." *Tankersley v. Lipscomb*, 3 Leigh 813.

d. Justices of the Peace.

(1) In Virginia.

A certiorari may be awarded in cases before justices of the peace. *Mackaboy v. Com.*, 2 Va. Cas. 268.

The judges of the superior courts, within their respective jurisdictions,

may award a certiorari to remove proceedings on an inquest of a riot, taken before the justice. *Mackaboy v. Com.*, 2 Va. Cas. 268.

(2) In West Virginia.

By ch. 110, § 2, W. Va. Code, every case, matter or proceeding before a justice might be removed by writ of certiorari to the circuit court except where authority was given to the circuit court or a judge thereof, to review such judgment or order in some manner other than upon certiorari. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Wilson v. W. Va., etc., R. Co.*, 38 W. Va. 212, 18 S. E. 577. And see cases cited ante, "Under Statute," II, B, 1, b.

By § 2, ch. 110, Amended Code, passed in 1882, the circuit court is given power to review by certiorari every case before a justice except where the judgment does not exceed \$15, exclusive of interest and costs. This statute was held constitutional. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173.

Under the West Virginia statute, the writ of certiorari lies after judgment of the justice; and, upon the hearing in the circuit court, such court will review the judgment of the justice upon the merits, determining all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173.

Appeal and Not Certiorari the Proper Remedy.—According to a number of recent decisions, an appeal lies from a judgment of a justice rendered upon the verdict of a jury just as in cases tried by him without a jury, and the writ of certiorari does not lie in such case. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, overruling so far as they hold to the contrary, the case of *Barlow v. Daniels*, 25 W. Va. 512; *Hickman v. Baltimore, etc., R.*

Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; *Vandervort v. Fouse*, 30 W. Va. 326, 4 S. E. 660; *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298. See generally, the title APPEAL AND ERROR, vol. 1, pp. 655, 659.

The writ of certiorari properly so considered does not lie from the judgment of a justice upon the verdict of a jury, but an appeal was always the proper remedy. However, such writ of certiorari, by liberality in mere matter of procedure may be treated as an appeal. *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193.

"The writ of certiorari was awarded and judgment rendered upon it while the case of *Barlow v. Daniels*, 25 W. Va. 512, was still in force before it was overruled by the case of *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653. The former case held, that an appeal would not lie from the judgment of a justice rendered upon the verdict of a jury, but that certiorari was the proper remedy; whereas in the later case it was held, that a writ of certiorari would not lie in such a case, but that an appeal was the proper remedy. Therefore, this case presents this question: Is the writ of certiorari good on the ground that when sued out it was good according to the case of *Barlow v. Daniels*, or is it rendered abortive and ineffectual by the subsequent case of *Richmond v. Henderson* overruling *Barlow v. Daniels*? Has *Simmons* a vested right to his writ of certiorari, so that the later decisions could not effect that writ? A person has no vested right in a particular remedy. The first decision in *Barlow v. Daniels* can not be appealed to, to sustain the writ of certiorari, because when a decision is overruled it is regarded as never having been the law for a moment, but on the contrary the law as given by the later decision is held, to have been the true, sound law at the very moment when the first erroneous decision was pronounced."

Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193.

Where a party, against whom a judgment was rendered by a justice of the peace, on the verdict of a jury, obtained a writ of certiorari and removed the same into the circuit court to be reviewed, before the decision of the case of *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, and said judgment was affirmed by the circuit court and a writ of error awarded by this court, before said decision of *Richmond v. Henderson*, and the plaintiff in error has asked that said certiorari be treated as an appeal, the judgment of the circuit court should be reversed and the case remanded with directions to treat it as being in said circuit court on appeal and proceed with it accordingly. *Harbert v. Monongahela Co.*, 50 W. Va. 253, 40 S. E. 377. See also, *Schafer v. McJunkin*, 54 W. Va. 14, 46 S. E. 153.

e. City, Town or Village Councils.

At common law certiorari was the proper remedy for reviewing contested election cases and other proceedings before municipal councils. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

By ch. 110, § 2, W. Va. Code, 1899, every case, matter or proceeding before the council of a city, town or village may be reviewed on certiorari except where authority is given to review the same in some manner other than upon certiorari. *Wilson v. W. Va.*, etc., R. Co., 38 W. Va. 212, 18 S. E. 577; *Chenowith v. Commissioners*, 26 W. Va. 230. And see cases cited ante, "Under Statute," II, B, 1, b.

Under ch. 47, § 23, W. Va. Code, certiorari is the proper remedy to review the action of the city council in declaring the running of a "merry-go-round" a nuisance, the statute giving no appeal in such cases. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

Where a person accused of maintaining a nuisance feels aggrieved by the

decision of a town council, his remedy, if the statute gives no appeal, and no question is made that the statute is unconstitutional, or that the town authorities did not have jurisdiction of the subject matter, is by certiorari, and not by prohibition. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

Under ch. 47, § 23, W. Va. Code, certiorari, and not mandamus, is the proper remedy to review the proceedings of a municipal council in the matter of contested elections. *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770.

f. Mayor Acting as Justice.

A writ of error does not lie from a judgment of the mayor of a town imposing a fine for the violation of a town ordinance, rendered by him while acting ex officio as a justice without the intervention of a jury and imposing a fine for the violation of a town ordinance. An appeal is generally the proper mode of reviewing such a judgment; but under some peculiar circumstances such a judgment might be reviewed by a writ of certiorari; but under no circumstances will a writ of error lie to such a judgment. *Ridgway v. Hinton*, 25 W. Va. 554.

g. County Boards of Supervisors or Commissioners.

In General.—The supreme court of appeals will not grant a writ of prohibition to a circuit court to prohibit that court from supervising by means of a certiorari the action of a board of supervisors. *Cunningham v. Squires*, 2 W. Va. 422.

"Where such boards act without authority, usurp judicial functions where none are conferred by statute, the courts will control them by prohibition (*Brazie v. Commissioners*, 25 W. Va. 213); and where they decide improperly, and declare a wrong result, that their action will be controlled by certiorari (*Cunningham v. Squires*, 2 W. Va. 422; *Chenowith v. Commis-*

sioners, 26 W. Va. 230). The case of *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97, is not, as supposed by counsel, in conflict with *Chenowith v. Commissioners*." *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274.

A board of supervisors is not a common-law court; does not proceed according to the course of the common law, having a newly created, limited and special jurisdiction from which no appeal is allowed by statute, nor writ of error by the common law, and determining in a summary way the most important rights and franchises both as respects the people and private persons, is and can not be otherwise than, an inferior tribunal in the strict sense of the word, according to § 6, art. 6, of the constitution. *Cunningham v. Squires*, 2 W. Va. 422.

"A tribunal which is not a common-law court, which does not proceed according to the course of the common law, a newly created, limited and special jurisdiction, from which no appeal is allowed by statute, nor writ of error by the common law, yet determining in a summary way the most important rights and franchises, both as respects the people and private persons, is, and can not be otherwise than, an inferior tribunal in the strictest sense of the word. The board of supervisors is just such a jurisdiction, and, therefore, most unquestionably, an inferior tribunal, within the very letter of the constitution; and all the reasons and necessity which exist for the supervision and control of inferior tribunals by the court of king's bench, England, equally exist in this case and is equally within the reason and intent of the constitution, so that the said board is no less within the spirit than the letter of the constitution, giving the supervision and control thereof to the circuit court." *Cunningham v. Squires*, 2 W. Va. 422.

The rulings of the commissioners of

a county sitting as a board of canvassers, after an election, to ascertain the result thereof in the county, are subject to review by the circuit court on writ of certiorari. *Alder. n v. Commissioners*, 31 W. Va. 633, 8 S. E. 274; *Chenowith v. Commissioners*, 26 W. Va. 230.

At common law, if the commissioners of a county acting as a board of canvassers of election returns, having entered upon a count or recount, commit any error, it is to be corrected by certiorari, not mandamus, as mandamus is not an appellate process. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

"The county commissioners thus acting in special session, are an inferior tribunal proceeding in a summary manner and not according to the course of the common law. This tribunal is a creature of, and its proceedings are governed entirely by the statute; and no provision is made for a review of its actions or proceedings upon motion, appeal, writ of error, or supersedeas." *Chenowith v. Commissioners*, 26 W. Va. 230.

h. Rulings of Election Officers.

While mandamus is the proper legal and efficacious remedy provided by statute for the purpose of compelling the election officers to discharge their duties in conformity with the law, when such officers, in violation of their ministerial duties, assume the exercise of judicial functions, certiorari may be resorted to for the purpose of reviewing their erroneous rulings, although mandamus would furnish more speedy, less expensive, and more adequate relief. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956.

"Prior to the enactment of the present election law, it had been established by the decisions of this court—*Brazie v. Commissioners*, 25 W. Va. 213; *Chenowith v. Commissioners*, supra; *Fleming v. Commissioners*, 31 W. Va. 609, 8 S. E. 267; *Alderson v.*

Commissioners, 31 W. Va. 633, 8 S. E. 274—that election officers had conferred upon them both ministerial and judicial powers, and that certiorari, and not mandamus, was the proper remedy to review their proceedings." *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956.

"The remedies of mandamus and certiorari would be concurrent with the right to the litigant to make choice between them. A right choice in all election controversies arising under the election law would render the writ of certiorari obsolete in such cases, for the reason that certiorari is subject to all the law's delays, and is inadequate, and highly expensive, compared with the more direct and efficacious remedy afforded by mandamus." *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956. See the title ELECTIONS.

C. NECESSITY FOR JUDGMENT OR ORDER.

At Common Law.—At common law the writ of certiorari lay in all civil actions before judgment, and was used before judgment as a process by which a superior court removed from inferior tribunals causes pending before them, in order that more speedy justice might be done. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

"It lay at common law in all civil actions, before judgment, where the courts of king's bench and common pleas had jurisdiction, and could administer the same justice to the parties as the court below, and was there retained and tried." *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173.

"The certiorari may be awarded after verdict, and before judgment, as declared by Lord Holt, and as was done in a case of a special verdict on an indictment for murder. And, although in some cases in the English courts, it has been held, that the certiorari would not lie after verdict, and before judgment, it may be remarked, that those were cases of proceedings in courts of

record, and the reason for refusing the writ in those cases was, that if the cases were removed, the court before whom they would be brought, not being acquainted with the facts proved, could not correctly assess the fine, which reason does not exist here, where the fine is assessed by the jury. It would seem, therefore, that in our courts a certiorari may be awarded after verdict, and before judgment." *Mackaboy v. Com.*, 2 Va. Cas. 268.

Under Statute.—By ch. 110, § 2, W. Va. Code, 1899, it is provided that "in every case, matter or proceeding, * * * the record or proceeding may after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari," etc. *Wilson v. W. Va.*, etc., R. Co., 38 W. Va. 212, 18 S. E. 577. And see cases cited ante, "Under Statute," II, B, 1, b.

"Under our statute, it lies after judgment, and the circuit court, after reversing the judgment complained of, retains it for final disposition if the amount in controversy is more than \$15." *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010.

"In the absence of any restriction by the legislature the circuit courts would properly supervise the county courts in those cases, in which by the common law it was proper in this manner to exercise this supervision. Now the original mode of exercising this supervision by the writ of certiorari was to issue it, whenever such supervision was needed, and it was constantly issued during the progress of the proceedings in the inferior court. It is very true, that this practice does not prevail in the United States except to a limited extent; and it is here but rarely used till after the determination of the proceedings in the inferior tribunal. But this is not our invariable practice; thus in *Mackaboy v. Com.*, 2 Va. Cas. 268, Judge Smith, in delivering the opinion of the court says: 'It

would seem, therefore, that in our courts a certiorari may be awarded after verdict and before judgment.'" *Board of Education v. Hopkins*, 19 W. Va. 84.

"It was used after verdict and before judgment in *Mackaboy v. Com.*, 2 Va. Cas. 268; but its use to transfer cases before judgment from an inferior to a superior court has been exceedingly limited in the Virginias, and I may say it is not at all so used in this state. This use is condemned in the *Dryden Case*, 20 W. Va. 105, 15 W. Va. 270. In such a case it would be properly said that any order pending the proceeding, made by the superior court, would be interlocutory." *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

Decision Need Not Be Final.—It is not necessary that the decision be final, in order to be reviewed by a writ of certiorari. *Board of Education v. Hopkins*, 19 W. Va. 84.

D. AWARD AS AUXILIARY WRIT FOR DEFECTS OF RECORD.

In General.—Certiorari, as an auxiliary writ is used by appellate courts to present to them for decision of errors assigned the record in the court below, as it in truth exists there. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

"Section 8 of chapter 182, Code of Virginia, provides that, 'the appellate court or judge thereof may, when a case has before been in such court, inspect the record upon the former appeal, writ of error or supersedeas. And such court may, in any case, award a writ of certiorari to the clerk of the court below and have brought before it, when part of a record is omitted, the whole or any part of such record.'" *Seibright v. State*, 2 W. Va. 591.

By § 3463, Va. Code, 1904, "The appellate court, or a judge thereof, may, when a case has before been in such court, inspect the record upon the for-

mer appeal, writ of error, or supersedeas; and such court, or any judge thereof, in vacation, may, in any case, after reasonable notice to the adverse party, award a writ of certiorari to the clerk of the court below and have brought before it, when a part of a record is omitted, the whole or any part of such record." *Shifflet v. Com.*, 14 Gratt. 652.

By ch. 135, § 7, W. Va. Code, 1899, "the appellate court or the judge thereof, may, when a case has before been in such court, inspect the record upon the former appeal, writ of error or supersedeas. And such court may, in any case, award a writ of certiorari to the clerk of the court below, and have brought before it, where part of the record is omitted, the whole or any part of such record." See *Sims v. Bank*, 8 W. Va. 274; *Seibright v. State*, 2 W. Va. 591; *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

A certiorari ought not to be granted to bring up a record, unless the court have some reason to believe that a better record can be had. *Humphreys v. West*, 3 Rand. 516.

In *Seibright v. State*, 2 W. Va. 591, where after signing a bill of exceptions the judge during the term had interpolated certain words, and the defendant asked a certiorari, with the intent to have the bill certified as it was before the interpolation of those words, the facts being agreed, the court of appeals held, that the court had the right to insert those words, and refused the writ, the real point of the decision being that the record as already before the court was correct and true. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

On Suggestion of Diminution.—A writ of certiorari is effectual on suggestion in the court of appeals of diminution of the record to bring to this court the true and correct record as it is in the court below, no matter in what respect the transcript, as cer-

tified in the first instance, may vary from or misrepresent such record. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935; *Terrell v. Ladd* 2 Wash. 150.

"If a record is defective or incorrect, the errors or omissions should be suggested in this court, and a certiorari moved to bring up a correct record. *Hudgins v. Kemp*, 18 How. 530. 'Where the clerk's certificate to the transcript is, in point of fact, not true, the remedy is by certiorari to supply deficiencies,' says Waite, C. J., in *Railroad Co. v. Dinsmore*, 108 U. S. 30, 2 Sup. Ct. Rep. 9." *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

By § 4054, Va. Code, 1904, "Any party for whom a writ of error lies may apply therefor on petition which shall assign error. With the petition there shall be a transcript of the record of so much of the case wherein the judgment complained of is, as will enable the court or judge to whom the petition is to be presented, properly to decide the questions that may arise before it. Upon a suggestion of the diminution of the record a writ of certiorari may be awarded by the court, or a judge in vacation." *Spurgeon's Case*, 86 Va. 652, 10 S. E. 979.

Award by Court on Its Own Motion.

—Under some circumstances the court of appeals will, on its own motion award a certiorari, where it affirmatively appears that important parts of the record have been omitted from the transcript; but as a general rule the court will not do so, where by failure or neglect of the appellant, the transcript is too imperfect to show affirmatively the facts constituting the grounds of the errors in his petition. *Fisher v. McNulty*, 30 W. Va. 186, 3 S. E. 593. See *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863.

Illustrations of Proper Use of Writ.

—Where the clerk in copying the record substitutes one word for another, the transcript may be corrected by cer-

tiorari from the original record below. *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

"If the clerk has omitted papers from the record he should have copied, a certiorari will lie to bring up such omitted portions, or if the clerk has copied papers in the record that are not properly parts of it, if such fact appears from the record, the court will disregard them, otherwise the clerk's certificate must be obtained showing why he copied such papers." *James v. Gott*, 55 W. Va. 223, 47 S. E. 649.

Where there is an omission in the transcript of the finding of the indictment, certiorari may be used to obtain a complete copy from the record below. *State v. Williams*, 14 W. Va. 851; *Shifflet v. Com.*, 14 Gratt. 652; *State v. Tingler*, 32 W. Va. 546, 9 S. E. 935.

Where, upon the motion of the prisoner, the venue is changed, and the record sent by the clerk of the court from whence the trial is removed, to the court to which it is sent, does not show that the indictment was found by the grand jury, but the prisoner is tried and convicted; upon a writ of error to the court of appeals, that court may direct a certiorari to the court from whence the case was sent, for a better record. And if it appears from the record returned, that the indictment was found by the grand jury, the judgment will not be reversed. *Shifflet v. Com.*, 14 Gratt. 652.

When the record, as certified, does not contain all the depositions read by the court at the hearing of the cause, generally, the deficiency may be supplied in the appellate court by certiorari before the hearing of the cause in such court. *Sims v. Bank*, 8 W. Va. 274.

If the right judgment be rendered in the county court, and, upon an appeal to the district court, the clerk sends up an erroneous record, on which

the judgment is affirmed, the court of appeals will, upon a view of the record of the county court, reverse that of the district court, and direct them to issue a writ of certiorari for the true record, so that the right judgment may be given. *Williams v. Strickler*, 3 Call 230.

In a suit in chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same court," and the answer having admitted that such a suit was brought, and such a decree as stated in the bill, existed, the court of appeals will award a writ of certiorari for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer. *Hooper v. Royster*, 1 Munf. 119.

If the return to the exigent in a prosecution to outlawry, does not show that judgment of outlawry has been pronounced by the proper coroner, a certiorari may be awarded by the court, directed to the sheriff and coroner, requiring them to certify the judgment of outlawry more fully. *Com. v. Hale*, 2 Va. Cas. 241.

Necessity for Certification of Transcript.—A writ of certiorari, for defect of the record, is proper where the transcript has been certified by the proper officer, and is suggested to be defective; but not where it is not authenticated at all. In such case, even after the cause has been argued, the supersedeas will be quashed, as having been improvidently granted. *Scott v. Hall*, 2 Munf. 229.

Expense of Copying Record Borne by Party Suggesting Diminution.—A litigant suggesting a diminution of the record, and obtaining from the court of appeals a writ of certiorari, must have the alleged omitted portions of the record copied at his own expense, and the certiorari will be regarded as abandoned on his refusal to do so. *Springston v. Morris*, 47 W. Va. 50, 34 S. E. 766.

III. Jurisdiction.

A. ORIGINAL JURISDICTION.

1. In Whom Vested.

By § 3058, Va. Code, 1904, it is provided that the circuit court shall have jurisdiction to issue writs of certiorari to all inferior tribunals created or existing under the laws of the state.

By art. 8, § 12, constitution of West Virginia, "The circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition and certiorari." *Wilson v. W. Va., etc., R. Co.*, 38 W. Va. 212, 18 S. E. 577; *Meeks v. Windon*, 10 W. Va. 180; *Brazie v. Commissioners*, 25 W. Va. 213; *Dryden v. Swinburn*, 15 W. Va. 234; *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296, 7 S. E. 455; *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

By ch. 123, § 7, subd. 3, W. Va. Code, 1899, "Jurisdiction of writs of mandamus, prohibition, quo warranto and certiorari (except such as may be issued from the supreme court of appeals, or a judge thereof in vacation), shall be in the circuit court of the county in which the record or proceedings is, to which the writ relates. Any such writ may be awarded either by the circuit court or (in vacation) by the judge thereof."

West Virginia act, 1872-73, ch. 15, § 3, p. 43, declares, that "the circuit court shall have the supervision and control of all proceedings before the county courts by certiorari." *Board of Education v. Hopkins*, 19 W. Va. 84.

By ch. 110, § 2, W. Va. Code, 1899, "in every case, matter or proceeding, * * * the record or proceeding may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which said judgment was rendered, or order made; except in cases where authority

is or may be given by law, to the circuit court or the judge thereof in vacation, to review such judgment or order * * * in some manner other than upon certiorari." *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. 97; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173; *State v. Larue*, 37 W. Va. 828, 17 S. E. 397; *Wilson v. W. Va., etc., R. Co.*, 38 W. Va. 212, 18 S. E. 577; *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

2. As Dependent on Amount in Controversy.

In Virginia.—"The circuit court law, 1 Rev. Va. Code, ch. 69, § 9, p. 230, limits the jurisdiction of these courts to 'causes, matters and things, which shall amount to one hundred dollars, whether brought before them, by original process, habeas corpus, appeal, writ of error, supersedeas, mandamus, certiorari to remove proceedings for any purpose, or by any other legal ways and means whatever.'" *Hay v. Pistor*, 2 Leigh 707.

In West Virginia.—"There are two distinct classes of cases in which, according to the statutes of this state, certiorari is the proper remedy: (1) All that class of cases in which the writ was proper at common law; (2) civil cases wherein the writ is made a substitute for the writ of error. In the latter class this court has no jurisdiction unless the amount in controversy exceed \$100, while in the former class jurisdiction is general, without regard to the amount in controversy, by express provision of the constitution, as amended in 1879, after the decision of the case of *Dryden v. Swinburn*, 15 W. Va. 234, was rendered. The law has been so settled by the holdings of this court in the cases of *Cunningham v. Squires*, 2 W. Va. 422; *Dryden v. Swin-*

burn, 15 W. Va. 234; Board of Education *v. Hopkins*, 19 W. Va. 84; Farnsworth *v. Baltimore*, etc., R. Co., 28 W. Va. 815; Wilson *v. Railway Co.*, 38 W. Va. 212, 18 S. E. 577; Town of Davis *v. Davis*, 40 W. Va. 464, 21 S. E. 906." Cushwa *v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

By ch. 110, § 2, W. Va. Code, 1899, it is provided that no certiorari shall be issued in civil cases before justices, where the amount in controversy, exclusive of interest and costs, does not exceed \$15. Wilson *v. W. Va.*, etc., R. Co., 38 W. Va. 212, 18 S. E. 577. And see cases cited ante, "Under Statute," II, B, 1, b.

"The meaning of § 2 of chapter 110 is that the writ of certiorari shall not issue where the suit involves matters merely pecuniary, and the amount in controversy, exclusive of interest and costs, does not exceed \$15. See Love *v. Rickens*, 26 W. Va. 341; Farnsworth *v. Baltimore*, etc., R. Co., 28 W. Va. 815, 816." Wilson *v. W. Va.*, etc., R. Co., 38 W. Va. 212, 18 S. E. 577. See generally, the title APPEAL AND ERROR, vol. 1, p. 656.

3. Award in Vacation.

Award by Judge of General Court in Vacation.—In Mackaboy *v. Com*, 2 Va. Cas. 268, the court was of the opinion that a judge of the general court had the power and authority to award a writ of certiorari in vacation, in a case arising within his jurisdiction. In this case one of the defendants petitioned one of the judges of the general court, in vacation, for a certiorari for the purpose of removing before the superior court of Spotsylvania the record and proceedings on an inquest of a riot taken before the justices.

Award by Circuit Judge.—By ch. 123, § 7, subd. 3, W. Va. Code, 1899, the writ of certiorari may be awarded either by the circuit court or (in vacation) by the judge thereof.

By ch. 110, § 4, W. Va. Code, 1899, it is provided that writs of certiorari

"may be awarded by the judge of such circuit in vacation, and in case of an order abridging the freedom of a person, may be returned and heard and determined by the judge of such circuit court in vacation if reasonable notice of such hearing shall have been given the other party," etc. Chenowith *v. Commissioners*, 26 W. Va. 230. See also, Harrow *v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 928; Town of Davis *v. Davis*, 40 W. Va. 464, 21 S. E. 906.

The writ of certiorari lies in West Virginia from a circuit court or a judge thereof in vacation to the county court commissioners convened in special sessions to ascertain the result of an election. Chenowith *v. Commissioners*, 26 W. Va. 230.

B. APPELLATE JURISDICTION.

See post, "Review of Decision on Certiorari," VIII.

IV. Application.

A. TIME OF APPLICATION.

1. In General.

A party praying for the extraordinary remedy of certiorari must pursue it in proper time. Poe *v. Machine Works*, 24 W. Va. 517.

"Time has always been considered an important circumstance in the application of this writ, and redress by this means should be sought as soon as possible after the happening of the event which rendered it necessary to resort to it." Poe *v. Machine Works*, 24 W. Va. 517.

In all cases, if it appears that the proceeding complained of is chargeable to the negligence of the party invoking the writ, or that he has acquiesced for an unreasonable time, he can not obtain relief by certiorari. Poe *v. Machine Works*, 24 W. Va. 517.

"'It should not be granted where the party seeking it has been guilty of laches, and generally, and in analogy to the writ of error' (or appeal), not

where the time within which these latter could be brought has expired. See 3 Amer. & Eng. Enc. Law, p. 64, and authorities cited; *Poe v. Machine Works*, 24 W. Va. 517, 521, where the general doctrine of the writ as at common law, and as modified by our recent statute, is stated and discussed. See also, 1 Tidd. Pr. 399. And, in cases where the party has permitted the time for appeal to expire, certiorari will not issue for relief unless upon a special showing unmixed with any blame on the part of such party. *Poe v. Machine Works*, 24 W. Va. 517." *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010.

2. Application for Writ to Justice's Judgment.

General Rule as to Time for Application.—In applying to the circuit court for a writ of certiorari to the judgment of a justice, under ch. 110 of the Code of West Virginia, 1899, the general rule is that the petitioner must present his petition within ten days after the judgment complained of is rendered, according to the analogy of appeals in § 164, ch. 50, Code. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *State v. Larue*, 37 W. Va. 828, 17 S. E. 397; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Womer v. Ravenswood, etc., R. Co.*, 37 W. Va. 287, 16 S. E. 488; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173.

Generally, as to the time of taking appeals from judgment of justices, see the title APPEAL AND ERROR, vol. 1, p. 656.

When Time Begins to Run.—Where a justice renders judgment on a verdict on one day, and the next day a motion for a new trial is made and overruled, the ten days allowed for a certiorari begins to run on the latter day. A motion for a new trial suspends the finality of a judgment already entered, until the date of the denial of the new trial, for the purposes of limitation of

a writ of certiorari or appeal. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. 359.

No Relation to Beginning of Term.

—Although judgments and decrees relate back to the first day of the term at which they were rendered, yet there is an exception where the case was not ready for hearing on the first day of the term, so that even if the rule applied to a petition to the circuit court for a writ of certiorari, such a case would come within the exception, where on the first day of the term it was not in a condition to be heard, there being in fact no such case until the petition was filed. Hence the decision in such a case will not relate back to the first day of the term of the circuit court so as to bring the presentation of the petition within the ten days' limit. *Womer v. Ravenswood, etc., R. Co.*, 37 W. Va. 287, 16 S. E. 488.

Effect of Failure to Apply within Prescribed Time.—Where the petition for and the writ of certiorari to the judgment of a justice show that it was not applied for within ten days after the judgment was entered, it should not be granted, unless good cause be shown why the writ was not applied for within ten days; and, if so issued after the time without such showing, it should be quashed as improvidently awarded. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. 476.

Where such writ is not applied for within ten days but within ninety days after the judgment, and the record shows no excuse for not sooner applying, no presumption arises from the mere grant of the writ that good excuse was otherwise shown. The excuse or cause for not applying for the writ within ten days must always appear in writing as part of the record. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

But a judgment on a certiorari granted more than ten days after a

judgment is not void so that it may be vacated at any time, however erroneous it is. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

Waiver of Objection.—The defendant in a writ of certiorari to a justice's decision does not waive the objection that it was not taken within ten days, by appearing to the writ, without a motion to quash or dismiss, or even by consenting to a continuance. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

Where a writ of certiorari is not taken within ten days after the judgment, the defendant to it will be given the benefit of that defense in the court of appeals, though the record merely shows that the case was heard in the circuit court on the record and proceedings, without showing any motion to quash or dismiss. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

Excuse for Failure to Apply within Prescribed Time.—But such writ may, and in a proper case should, be granted after the expiration of ten days, and within ninety days after the date of the judgment, when the party otherwise entitled to the writ shall show, by his own oath or otherwise, good cause for his not having applied for such writ within the ten days. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *State v. Larue*, 37 W. Va. 828, 17 S. E. 397.

When a party is prevented, by some adventitious circumstance beyond his control, from applying for a writ of certiorari to a judgment of a justice within ten days after such judgment is rendered, the writ may be awarded after the expiration of the ten days and within ninety days. *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

It was held, in *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588, that the "good cause" must be shown by written evidence on a writ of certiorari from a justice as well as on an appeal.

B. WHO MAY APPLY.

In General.—In all cases the party praying for the extraordinary remedy of certiorari must have merits on his side. *Poe v. Machine Works*, 24 W. Va. 517.

Strangers to Proceedings Not Entitled to Writ.—Private citizens who have no special property or interest to be affected, acting on their own behalf, and that of other citizens who have not made themselves litigants, nor submitted any motion, nor taken any exceptions, before the county court, when the latter is conducting proceedings to alter the location of and rebuild a county bridge, can not review the action of said county court by certiorari, and a judge of the circuit court has no jurisdiction or authority to issue any such writ in such a case. *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747.

"Clearly and obviously the circuit court could not entertain jurisdiction of appeal, writ of error, or certiorari by parties who, so far as the record discloses, had never appeared in the inferior court, either in person or by attorney, and who stood in no other relation to the matter in hand than as representative men, who differed from the proper authorities upon a question committed by the twenty-fourth section of the eighth article of the constitution to the arbitrament of such authorities. *Supervisors v. Gorrell*, 20 Gratt. 512. I conclude, therefore, that the judge below had no authority or jurisdiction to issue this writ, because the six representative private citizens and taxpayers had not made themselves litigants, nor submitted any motion for relief, nor taken any exception in the inferior court, and had no standing and no especial property or interest to be affected, nor any pretext to interfere with the legitimate duties of the county court. See *Keystone Bridge Co. v. Summers*, 13 W. Va. 476." *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747.

Necessity for Injury to Applicant.—

A party applying for a writ of certiorari must have been injured by the action complained of. *Fleming v. Commissioners*, 32 W. Va. 639, 9 S. E. 867. See post, "Form and Requisites of Application," IV, C.

C. FORM AND REQUISITES OF APPLICATION.

The petition for the writ should disclose a proper case upon its face, and when issued it may be dismissed without a hearing, when improvidently awarded. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010.

Allegation as to Violation of Petitioner's Right.—A petition for a writ of certiorari to bring to the circuit court, for review, proceedings of the commissioners of a county court in the canvass of the returns of an election, filed by a candidate, which fails to show that he was prejudiced by the errors complained of, is not sufficient to justify the award of such writ, and will be held bad without demurrer at the hearing; and a judgment of a circuit court reversing the action of the commissioners upon a certiorari based on such petition will be reversed here, with costs in this court against the party who filed such petition. *Fleming v. Commissioners*, 32 W. Va. 639, 9 S. E. 867.

"The petition on which the certiorari was awarded is so defective that no writ of certiorari or judgment thereon could properly have been awarded or rendered. A pleading must show that the party has a right, and that such right has been violated so as to call for redress. It must show a cause of action. It must show just what right the plaintiff has, and just how and wherein it has been violated. A petition for a writ of certiorari must show a right in the petitioner, and that he is injured by the action complained of, and wherein the inferior tribunal has erred to the prejudice of that right. It will not be enough to say generally

a party has been aggrieved." *Fleming v. Commissioners*, 32 W. Va. 639, 9 S. E. 867.

Necessity for Copy of Record to Accompany Application.—In *Triplett v. Tyler*, 4 Hen. & M. 413, it was held, that a copy of the record must accompany every application for a certiorari.

In this, and three other cases counsel moved for a certiorari to move each cause into the appellate court; the notice of the motions, and the facts stated as the ground of each, were admitted by the opposite counsel; but in neither case was there a copy of the record. By the chancellor. "As the counsel opposed to the motion is in court, and does not call for the records, the court will dispense with them; but if this were not the case, they should be produced. Let a certiorari go in each case." *Triplett v. Tyler*, 4 Hen. & M. 413.

D. HEARING AND DETERMINATION OF APPLICATION.**1. Necessity for Notice to Opposite Party.**

It is not necessary for the court granting a writ of certiorari to give notice to the opposite party or to issue a rule against him to show cause against its being granted, but it is a matter within their discretion, and if they think it unnecessary and not tending to any useful purpose, they need not do so. But the other party, though not a formal party, must be notified of the pending of the proceeding before the court acts upon the writ after its return. *Dryden v. Swinburn*, 15 W. Va. 234.

"The more general rule adopted seems to be that it is discretionary with the court to whom an application for the writ of certiorari is made, to require notice to the parties interested, or to have a rule issued to show cause against the issuing of the writ, as in a particular case it may or may not be deemed necessary." *Dryden v. Swinburn*, 15 W. Va. 234. In this case

the circuit court properly granted the certiorari on a petition accompanied by a copy of the record and sworn to, though no previous notice had been given to the opposite party and no rule to show cause why the writ should not be awarded had been given.

2. Discretion of Court in Awarding.

In General.—The writ of certiorari is not a writ of right except at the suit of the commonwealth, but its allowance is a matter of discretion. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337; *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 926; *Board of Education v. Hopkins*, 19 W. Va. 84; *Parsons v. Aultman, etc., Co.*, 45 W. Va. 473, 31 S. E. 935.

The writ of certiorari, when awarded in civil cases before justices, under §§ 2, 3, ch. 110, Code, 1899, is an appellate process, designed to affect the ends of justice; and the circuit court has a large discretion in awarding the same, reviewing judgments, and granting new trials thereunder, and, unless such discretion is plainly abused, the court of appeals can not interfere therewith. *Michaelson v. Cautley*, 45 W. Va. 533, 32 S. E. 170.

"It is clear the writ of certiorari ought not to issue, but should be denied, where there is other adequate remedy, or if it be a matter of no serious complaint or injury; but it is equally clear, that the allowance of a writ of certiorari is a matter of sound judicial discretion, and the issuing of such writ is not a matter of pure arbitrary discretion." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

"There can be no question but that, while the writ of certiorari is discretionary in the sense above explained, and not a writ of right, still the discretion to be exercised is not a pure or arbitrary discretion, but one to be regulated by precedents and established principles; and therefore, whatever may be the law elsewhere, in Vir-

ginia and West Virginia a decision would be reversed, which awarded the writ of certiorari, when, according to the precedents and principles laid down as governing in such cases, no writ should have been awarded; and, on the other hand, if a writ had properly been awarded, and was afterwards quashed as improvidently awarded, the appellate court would reverse such decision; and we will presently see that the decision would be reversed also, if the court below had improperly refused to grant such writ of certiorari, when the applicant had a right to have it awarded in accordance with the precedents and principles laid down as regulating the issuing of such writ, and he had no other redress except such a review and reversal of such decision." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337. See post, "Review of Decision on Certiorari," VIII.

As to refusal on ground of laches in making application, see ante, "Time of Application," IV, A.

3. Examination of Transcript on Application.

Upon the presentation to the circuit court of a petition for a writ of certiorari to remove into said court the proceedings in a civil action before a justice, an agreement between the parties that said petitioner's application for said writ should be argued and discussed by them before said circuit court as if the writ of certiorari had been in fact issued, and due return had been made thereto, the record, proceedings and judgment in said civil action before said justice having been transmitted to and removed into the circuit court in pursuance of such agreement, will not bring the case before the circuit court for review on its merits, but brings up the transcript for the purpose of determining whether the application should be granted. *State v. Larue*, 37 W. Va. 828, 17 S. E. 397.

"As I understand this agreement, it

simply placed the parties thereto in the precise attitude they would have occupied if the writ of certiorari had been awarded, and, in pursuance of its mandate, the justice had sent and certified into the circuit court of Ohio county a transcript of the proceedings had before him in this action, and, with this transcript before the court, it was agreed that the petitioners' application for said writ should be argued and discussed. It was not agreed that the transcript should be considered in court for review, but that the papers might be examined, and the transcript examined, upon the application for said writ, as if the writ was then being applied for, as it in fact was, as is shown by the oruer stating that the petition was then presented for that purpose. If it was to be heard and discussed upon the application for the writ, it certainly was not intended to waive all objections to the legality and propriety of awarding the writ. If so, why should the agreement provide for argument and discussion of the application for the writ?" *State v. Larue*, 37 W. Va. 828, 17 S. E. 397.

V. The Writ.

A. FORM AND REQUISITES.

Direction.—Generally, as to the tribunals to which the writ will lie and to which it should be directed, see ante, "What Proceedings Reviewable," II, B.

Direction to Clerk of Lower Court.

—The writ of certiorari is directed to the clerk of the court below, and not to the judge; and the purpose of the writ is not to cause a record to be made or corrected, but to have brought before the appellate tribunal, when part of the record is omitted, the whole or any part of such record. *Seibright v. State*, 2 W. Va. 591.

For form of writ to municipal council in a contested election case, see *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

For the form of a writ to the county

court in an election contest, see the case of *Dryden v. Swinburn*, 15 W. Va. 234.

Waiver of Objections to Form.

Where a rule is asked in the circuit court against the board of supervisors, in the nature of a writ of certiorari, and also to show cause why a mandamus should not be awarded, the former to revise the proceedings and reverse its order setting aside an election at which the petitioners claim to have been duly elected to certain county offices, and the latter to compel it to declare the election of said officers, as shown by the returns certified by the officer conducting the election, and grant them certificates of election, and no objection is made to the process in the circuit court, it is too late to claim in the appellate court that it is not proceeding by certiorari in due form; and the rule awarded for the mandamus must be regarded as only ancillary to the writ prayed for, which was the writ of certiorari. *Burke v. Supervisors*, 4 W. Va. 371.

B. SERVICE.

See generally, the title SERVICE OF PROCESS.

C. RETURN.

1. Necessity For.

In General.—Before hearing a case, matter, or proceeding removed by certiorari from an inferior tribunal the circuit court should require a formal legal return thereto to be made by the officers to whom the same is directed, unless such return is waived by the parties to such case, matter, or proceeding. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

Service of New Writ Where Return Not by Proper Officer.—The fact that the return of the writ of certiorari is made by one of the justices of the county court and not by the president is no ground for the dismissal of the case by the circuit court, but that court should order a

new writ to be served on the president and require him to make a return. *Board of Education v. Hopkins*, 19 W. Va. 84.

2. Requisites and Sufficiency.

a. Record to Be Sent as Writ Finds It.

When a writ of certiorari under the statute is awarded to a justice to review his judgment, in order to respond to the exigency of the writ, he must certify and send the record as the writ finds it. As the record is when the writ reaches him, so it must be certified and sent. It is then too late to make contemplated or intended certificates of facts and bills of exception parts of such record, but it must be sent up as it is, without increase or diminution. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173.

"In the case of *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173, this court held that the record must be certified as it was at the time the writ was served. 'It is then too late to make contemplated or intended certificates of fact and bills of exception part of such record, but it must be sent up as it is, without increase or diminution.' If the lower tribunal can not add to or take from its record after the writ issues, neither can the circuit court, by receiving and considering papers which are no part of such record. From this it clearly follows that the return can never be made or amended so as to give the circuit court jurisdiction to hear the case on its merits, for the reason that proper bills of exception, making the evidence and other papers parts of the record, were not prepared and properly authenticated." *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

b. Certificate of Evidence and Bill of Exceptions.

In General.—By ch. 110, § 3, W. Va. Code, 1899, it is provided that "in every case, matter or proceeding before a county clerk, council, justice or inferior tribunal, in which a writ of cer-

tiorari will lie according to the provisions of the preceding section, the majority of the commissioners composing a court, or the justice or the officer or officers presiding over such council or other inferior tribunal, shall upon request of either party in a civil case, matter or proceeding, or the defendant in a criminal case, matter or proceeding, certify the evidence, if any, which may have been heard, and sign bills of exceptions setting forth any rulings or orders which may not otherwise appear of record. Such certificate of evidence and bill of exceptions shall be part of the record and as such be removed and returned to the circuit court." *Chenoweth v. Commissioners, etc.*, 26 W. Va. 230; *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. 97; *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863; *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688; *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 733, 34 S. E. 921.

Evidence of witnesses heard by such inferior tribunal is not part of the record, unless made so by a proper order or bill of exceptions showing such evidence duly certified and authenticated. Where such is not the case, the circuit court can not review the action of the inferior tribunal on its merits. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

Loss of Bill or Death of Justice Before Signature as Ground for Equitable Relief.—Where a case is tried before a justice, and a bill of exceptions essential to enable a party to obtain a writ of certiorari is lost, if signed, or, if not signed, the justice sickened and died without signing it, and there appears probable ground for a writ of certiorari, it is a proper case for equity

relief against the judgment, and for retrial. *Grafton, etc., R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028. See the titles **INJUNCTIONS; JUDGMENTS AND DECREES**.

3. Conclusiveness of Return.

Generally, the return to the writ is conclusive and no extrinsic evidence will be received either to support or overthrow the proceeding, order or judgment which is sought to be reversed. *Poe v. Machine Works*, 24 W. Va. 517.

D. QUASHAL OR DISMISSAL OF WRIT.

In a proper case the writ may, on motion, be superseded before its return, as on the ground that it was improvidently awarded; and by motion to quash, it may be quashed on any proper ground after the return. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010.

Where the petition for, and the writ of certiorari to, the judgment of a justice shows that it was not applied for within ten days after the judgment was entered, it should not be granted, unless good cause be shown why the writ was not applied for within ten days; and, if so issued after the time without such showing, it should be quashed as improvidently awarded. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. 476.

The petition for the writ should disclose a proper case upon its face, and when issued it may be dismissed without a hearing, when improvidently awarded. *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010.

"The language of the motion is not material, so that it give notice of the thing asked to be done, nor the language of the order of the court, if it properly directs that it be done." *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010.

E. EFFECT OF WRIT AS SUPERSEDEAS.

See post, "Bond," VI.

VI. Bond.

By W. Va. Code, 1899, ch. 110, § 5, "A writ of certiorari shall not operate to suspend the judgment or order, removed thereby, or proceedings on such judgment or order, except in a criminal case, until the party applying therefor, or some one for him, shall file in the office of the clerk of the circuit court, a bond payable to the state of West Virginia, with security approved by such clerk, in a penalty to be prescribed by the court or judge awarding the writ, conditioned to perform and satisfy such judgment or order as may be renewed or made by the circuit court, and to pay all such damages and costs as may be awarded to any party by such court or judge, and with any further condition which such court or judge may prescribe."

By the Code, W. Va., 1899, ch. 110, § 6, "When such bond as is mentioned in the next preceding section is filed, the writ of certiorari shall operate to stay all proceedings upon the judgment or order removed by the writ, and all further proceedings before the county court, justice or other inferior tribunal in the case, matter or proceeding in which it was awarded, until the final determination of the matter by the circuit court, except as to any order or sentence abridging the freedom of a person; but the court or judge may let such party to bail, as in other cases."

In *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193, the court said: "As to the subject that the bond is not such as the law requires upon an appeal, but is such as the statute requires in cases of certiorari, it is only necessary to say that both bonds are identical in the provision under the law that the party shall perform and satisfy such judgment or order as may be rendered by the circuit court. The law makes the bonds identical in this respect."

Generally, as to the necessity, form

and requisites of appeal bonds, see the title APPEAL AND ERROR, vol. 1, p. 518.

VII. Proceedings in Reviewing Court.

A. NECESSITY FOR ALL CONTESTING PARTIES TO BE BEFORE THE COURT.

Where the writ of certiorari as enlarged by the W. Va. statutes is the equivalent of a writ of error, it is indispensable that the real contestants should be before the court. By such writ it is the duty of the circuit court to review the action of the judgment of the inferior court, and render such verdict as the inferior court should have rendered. This could not be done without having all the contesting parties before the court of review. *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450.

B. FILING AND DOCKETING CASE IN CIRCUIT COURT.

Where a record and judgment of an inferior tribunal is removed and returned to the circuit court on writ of certiorari it is the duty of the clerk, upon receiving it, to file the same and docket the case in the same manner that other cases are docketed. Code, W. Va., ch. 110, § 3, 1899. See cases cited ante, "Certificate of Evidence and Bill of Exceptions," V, C, 2, b.

C. HEARING AND DETERMINATION.

1. Time of Hearing.

Return and Hearing in Vacation.—By ch. 110, § 4, W. Va. Code, 1899, it is provided that a writ of certiorari "in case of an order abridging the freedom of a person, may be returned and heard and determined by the judge of such circuit court in vacation, if reasonable notice of such hearing shall have been given the other party, and such court or judge may grant a writ of habeas corpus in aid of such certiorari." *Chenowith v. Commissioners*, 26 W. Va. 230.

See also, *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 928; *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

Hearing of Appeal and Certiorari Together.—If the superior court of chancery grants a certiorari to remove a cause, and the county court proceeds to a decree; upon appeal from that decree, the superior court of chancery may hear the appeal and certiorari together, and make the proper decree upon the whole cause. *Anthony v. Oldacre*, 4 Call 489.

2. Scope of Review.

a. In General.

The general rule is that upon certiorari to an inferior court the court awarding the writ will only inquire into errors and defects which go to the jurisdiction of the court below. But in West Virginia if the inferior tribunal proceeds in a summary manner, and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions. *Poe v. Machine Works*, 24 W. Va. 517; *Chenowith v. Commissioners*, 26 W. Va. 230; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

b. Prior to Provisions of W. Va. Code, Ch. 110.

Before the statute now embodied in ch. 110, W. Va. Code, 1899, §§ 2, 3, the superior court, upon certiorari could review all questions of jurisdiction and the regularity of proceeding and decide all questions of law and fact, and render such judgment, in case of reversal, as the lower tribunal ought to have rendered; but it was at least doubtful whether the court could do what appellate courts could do on writs of error, consider evidence and reverse findings on facts by jury or court in proper cases. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

"In *Poe v. Machine Works*, 24 W. Va. 517, the syllabus says: 'The general rule is that upon certiorari to an inferior court the court awarding the writ will only inquire into errors and defects which go to the jurisdiction of the court below. But in this state, if the inferior tribunal proceeds in a summary manner, and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions.' This case does not decide how far beyond jurisdictional questions the court will go. By these decisions it has been held, that on certiorari all questions of jurisdiction or regularity of proceeding in the inferior court could be decided, and also all questions of law arising on the record. But it has not been held that all the facts of the case involved in the evidence could be decided; that the superior court could take the place of a jury or the inferior tribunal, and weigh the evidence, and find and determine from it whether a proper finding of the facts had been made in the court below on the merits. Certainly it may be said to be doubtful whether our courts have gone so far." *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

In the case of *Dryden v. Swinburne*, 20 W. Va. 89, which was a writ of error to a judgment of the circuit court of Kanawha county, rendered December 19, 1879, before the powers of the circuit court upon a writ of certiorari were so materially enlarged by the acts passed March 27, 1882, Judge Green, in delivering the opinion of the court (page 107), says: "Upon a review of the authorities I conclude that a writ of certiorari issued by a superior court after final judgment of the inferior court brings up for review and correction not only errors and defects which affect the jurisdiction of the inferior tribunal, but all errors of law in the record, including all action taken on

evidence before it, and on erroneous principles, or any action taken by it in the absence of all evidence to justify such action. This conclusion is sustained both by reason and the overwhelming weight of authority." Quoted in *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56.

c. Under Present W. Va. Code.

By § 3, ch. 110, W. Va. Code, 1899, it is provided that, "upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence," etc. *Chenoweth v. Commissioners, etc.*, 26 W. Va. 230; *Poteet v. County Commissioners*, 30 W. Va. 58, 3 S. E. 97; *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863; *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56; *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173; *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. 476; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688; *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 733, 34 S. E. 921; *Harbert v. Monongahela River R. Co.*, 50 W. Va. 253, 40 S. E. 377.

3. Judgment or Order.

a. Prior to Ch. 153, W. Va. Acts, 1882.

Before ch. 153, W. Va. Acts, 1882, upon reversal under a writ of certiorari, the reversing court could simply reverse and remand the case to the lower court, or could itself render a proper judgment. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588, citing *Dryden v. Swinburn*, 15 W. Va. 234; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

Upon a writ of certiorari used as an appellate proceeding to bring to the circuit court for review a judgment or order of an inferior tribunal, the circuit court should decide all matters of law and fact, including those to the merits fairly arising on the record, either affirming such judgment or order, or reversing or modifying it, and render such judgment as the inferior tribunal should have rendered, or remand it to that tribunal where further proceedings are necessary, with distinct decision on the points involved in the latter event. *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

The circuit court, where such further proceedings outside the record before it are necessary, can not retain and try the cause, but must remand to the inferior tribunal for such proceedings. *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

In the case of a contested election of a county or district officer, or of any or all of the commissioners composing the county court, the proper mode of bringing the proceedings before the circuit court for review, is by writ of certiorari, upon the hearing of which the circuit court, if there be no error, will affirm the same, but if they be erroneous, will reverse the judgment and remand the cause to the county court for further proceedings. *Fowler v. Thompson*, 22 W. Va. 106.

In all cases of certiorari, when used as an appellate proceeding, the superior court has a right to affirm the judgment of the inferior court, or to set aside and annul it and enter up such judgment as the inferior court ought to have done, or remand the cause to it as in a case brought up on writ of error. *Dryden v. Swinburn*, 15 W. Va. 234.

In *Dryden v. Swinburn*, 15 W. Va. 234, it was held, by Green, P., that reason and authority both sustain the position that when a case is brought before a superior court by certiorari from

the judgment of an inferior court of record, the judgment of the superior court should not be confined simply to an affirmance or reversal of the decision of the inferior court of record but in such case the superior court ought in cases of a reversal of an inferior court, either to remand the cause to be further proceeded with or enter such judgment as the court below ought to have done in a case brought before it by a writ of error. He further held, that § 26, ch. 17, acts, 1872-73, W. Va., does not apply, since that chapter applies only to writs of error and not to writs of certiorari. *Fowler v. Thompson*, 22 W. Va. 106.

b. Under Present W. Va. Code.

(1) General Rule.

Code Provision.—By the act of 1882, ch. 153, now embodied in ch. 110, § 3, W. Va. Code, 1899, it is provided that upon the hearing the circuit court shall “determine all questions arising on the law and evidence, or render such judgment, or make such order upon the whole matter, as law and justice may require.” See cases cited ante, “Under Present W. Va. Code,” VII, C, 2, c.

Amendment of Return on Summons Issued by Justice.—Upon a writ of certiorari from a judgment of a justice, the circuit court may allow the return on the summons issued by the justice to be amended. *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921. See the title AMENDMENTS, vol. 1, p. 356.

“Code, ch. 110, § 3, says that on certiorari the court shall hear the case on the merits, deciding not only what at common law it could do upon certiorari, review the proceedings below, and ‘make such order as law and justice [both words used] may require.’ What does this mean? I shall not say; it is hard to say; but it authorizes a liberality to cure such a defect as a defective or untruthful return. That is as far as we need say. I shall not say it allows new pleadings or evi-

dence, or that the case must not be tried on the record; but we think there is no error in the action of the circuit court as to this point. See Judge Dent's opinion in *Michaelson v. Cautley*, 45 W. Va. 533, 32 S. E. 170." *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921.

(3) Retention for Trial De Novo.

Before the enactment of 1889 upon reversal, there could be no trial de novo in the circuit court, but where further proceedings were necessary beyond what the judgment rendered on the record could effect, it must be remanded. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588, citing *Dryden v. Swinburn*, 15 W. Va. 234, 20 W. Va. 105; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

In 1889 the legislature added the provision that if the certiorari is from a justice's judgment and the amount in controversy exceeds \$15, if the judgment is set aside the case shall be retained in the circuit court and disposed of as if originally brought therein; that is, tried de novo. Code, W. Va., 1899, ch. 110, § 3. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588. And see cases cited ante, "Under Present W. Va. Code," VII, C, 2, c.

Where a cause is removed after verdict and judgment from a justice's court on a writ of certiorari to the circuit court, under § 3, ch. 153, acts, 1882, upon the hearing, such circuit court will, where there is a certificate of the evidence incorporated in a bill of exceptions signed by the justice, review the judgment of the justice upon the merits, and if of opinion to reverse the judgment will direct a new trial before a jury, unless neither party requires a jury. *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56.

This statute has not changed the law as to retaining the cause in the circuit court except as to certiorari from a justice's judgment. A disposal of the

whole case spoken of in the statute only refers to the case as made by the record as brought upon certiorari, and does not authorize a trial de novo on other evidence, except in cases of judgment of justices. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

(3) Nature and Finality of Judgment.

The act of 1882, requiring the circuit court to render judgment without remanding does not change the nature of its judgment. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

A judgment of a circuit court upon a writ of certiorari reversing a judgment of a justice, setting aside the verdict of a jury on which the judgment was based, and granting a new trial, is a final judgment though it retain the case for retrial, and can not be set aside on mere motion at a subsequent term. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

After such judgment, the objection that the certiorari was not applied for within ten days after the judgment comes too late to avail. *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

"The statute as to certiorari from justices' judgments only fixes the place for the new trial of the original case, and by no means detracts from or affects the character of finality of the judgment of reversal. If there is any color for saying that a judgment of the circuit court reversing for cause shown in the record the judgment of the lower court is not final, but only interlocutory, it lies in the fact that the case is retained in the circuit court for new trial; but that fact will not do so. It is no less a final judgment than one of this court reversing a judgment and remanding for a new trial, and all concede that to be final after the close of the term. *Henry v. Davis*, 13 W. Va. 230." *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. 588.

VIII. Review of Decision on Certiorari.

A. IN GENERAL.

By art. 8, § 3, W. Va. Const., it is provided that "the supreme court of appeals shall have appellate jurisdiction * * * in cases of quo warranto, habeas corpus, mandamus, certiorari and prohibition." *Farnsworth v. Baltimore, etc., R. Co.*, 28 W. Va. 815; *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906; *Board of Education v. Hopkins*, 19 W. Va. 84.

The supreme court of appeals has appellate jurisdiction in all cases of certiorari awarded by the circuit court in review of matters and proceedings pending before or determined by a municipal council. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

The action of a circuit court on a writ of certiorari to the proceedings of a board of supervisors, to determine a matter of controversy on its merits, is subject to review by the supreme court of appeals if it errs in the matter. *Cunningham v. Squires*, 2 W. Va. 422.

The sheriff of Boone county made a settlement of his accounts with the commissioners; and they allowed him certain commissions. The board of education of Sherman district appeared before the county court of Boone county and resisted the confirmation of this report, because too much commission was allowed the sheriff; but it filed no formal exceptions to the report. The court overruled these objections and confirmed the report stating in its order, that no objections to its confirmation were urged. Held, the circuit court of Boone county may review this order by writ of certiorari and may, if it find error on the face of the settlement in the allowing of these commissions, correct them. If the circuit court in such case dismiss the certiorari, which it had awarded, for want

of jurisdiction, this court under the amendment of our constitution, art. VIII, § 3, may review this judgment of the circuit court; and the proper mode of reviewing it is by writ of error. *Board of Education v. Hopkins*, 19 W. Va. 84.

B. JURISDICTION AS DEPENDENT UPON AMOUNT IN CONTROVERSY.

In *Farnsworth v. Baltimore, etc., R. Co.*, 28 W. Va. 815, the court held, that the supreme court of appeals could not entertain jurisdiction to review by writ of error the action of the circuit court on petition for certiorari when the amount in controversy was less than \$100. See *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298.

"There are cases, however, which this court is commanded to review, both by the constitution and statute, without regard to the pecuniary value of the matter in controversy. These cases are enumerated in the eighth article, section three of the constitution, and among them we find, 'cases of quo warranto, habeas corpus, mandamus, certiorari and prohibition.' * * *

* The next inquiry is, what class of cases does the term certiorari, as used in the constitution, embrace? This is a common-law writ well defined and understood at the time the constitution was made and adopted, and we must, therefore, presume that it was made with reference and intended to embrace only that class of cases which were then reviewable by certiorari. It was certainly not intended that the legislature should, by simply changing the name, give this court jurisdiction to review cases by certiorari which the constitution expressly prohibits it from reviewing under any writ or proceeding in force at the time of its adoption." *Farnsworth v. Baltimore, etc., R. Co.*, 28 W. Va. 815.

Article 8, § 3, W. Va. Const., giving the supreme court of appeals appellate

jurisdiction of cases of certiorari, and not the clause fixing the court's jurisdiction by the value of the matter in controversy, determines the court's jurisdiction when error is brought on the ground that the circuit court refused defendant a writ of certiorari on a conviction by a town council for maintaining a nuisance. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

Generally, as to the jurisdiction of the appellate court as dependent on the amount in controversy, see the title **APPEAL AND ERROR**, vol. 1, pp. 477, 494.

C. MANNER OF REVIEW.

A final decision on a writ of certiorari is reviewable on writ of error from this court, according to the rules of law and practice in other cases. *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. 476.

There can be no question that the supreme court of appeals has jurisdiction by writ of error to review the action of the circuit court on a petition for certiorari. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298, citing *Chenowith v. Commissioners*, 26 W. Va. 230; *Dryden v. Swinburn*, 15 W. Va. 234; *Poe v. Machine Works*, 24 W. Va. 517; *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. 476. See the title **APPEAL AND ERROR**, vol. 1, p. 451.

A writ of certiorari is not a writ of right;

but the issuing of it is dependent on a sound judicial discretion; and a refusal of a circuit court to award it, on a proper petition to review the proceedings of the county court, in ascertaining and declaring the result of the vote of a relocation of a county seat, may be reviewed by a writ of error issued by the supreme court of appeals. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

"The following are certiorari cases which have been the subject of review in the court of appeals of West Virginia. *Dryden v. Swinburn*, 15 W. Va. 234; *Board of Education v. Hopkins*, 19 W. Va. 84; *Fowler v. Thompson*, 22 W. Va. 106; *Poe v. Machine Works*, 24 W. Va. 517; *Chenowith v. Commissioners*, 26 W. Va. 230. All of these cases have been brought before us by writ of error, that having been decided in the first case to be the only proper way under our statute law to bring such a case before us for review; though it could not have been brought before us in that way but for our statute. But in no case has a doubt as to our right to review such a case, because the writ of certiorari was not a writ of right but a discretionary writ, been even suggested, until the suggestion was made in argument by the counsel for this defendant." *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337. See the title **APPEAL AND ERROR**, vol. 1, p. 451.

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IX. Appeal, 772.

CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 418; CERTIORARI, ante, p. 734; COURTS; GRAND JURY; JUDGES; RECORDS.

As to the taking of depositions during vacation and as to their admissibility, see the title DEPOSITIONS.

I. Definitions.

"We find that there is a like want of uniformity in the meaning attached to the word vacation, and that it is employed indiscriminately in several different senses. Jacobs in his law dictionary (title vacation), defines it as being 'all the time between the end of one term and the beginning of another; and,' he adds, 'it begins the last day of every term as soon as the court rises;' Burrill (title vacation) speaks of it as the 'intermission of judicial proceed-

ings—the recess of courts—the time during which courts are not held.' And he also quotes the definition of Jacobs. Thus, where we look to its own appropriate definition, or seek to deduce its meaning from the use made of its correlative by the law writers, it would seem that there is not attached to the word vacation, a well ascertained, fixed, single, unvarying, technical meaning which is to control the interpretation of a statute in which the word has been employed; but that, on the contrary, there are several well re-

ceived meanings of the word, from which it is our duty to select that, which, looking to the whole scope and true purpose of the law, will most probably carry out the intention of the legislature." *Brown v. Hume*, 16 Gratt. 456.

The word "vacation" as used in § 12, ch. 151, Va. Code, 1860, providing for the dissolution of injunctions by a judge in "vacation," etc., means beyond question the vacation of the circuit court of the county, wherein the case is pending in which an injunction is awarded. *Hayzlett v. McMillan*, 11 W. Va. 464. See post, "To Grant and Dissolve Injunctions," IV, I.

A judgment confessed in the clerk's office on the morning of the first day of the term of the court, before the hour for the opening of the court, is a judgment confessed in vacation. *Brown v. Hume*, 16 Gratt. 456. See the title **CONFESSION OF JUDGMENTS**.

II. Power in Term and in Vacation Distinguished.

"The act for enlarging the right of appeals, in certain cases, declares it shall be lawful for the higher court of chancery upon any interlocutory decree, in its discretion to grant an appeal to this court. The same act § 3, authorizes the judge of that court, in vacation, to discharge writs of ne exeat; thereby clearly distinguishing between the power of the court, in term time, when all parties are supposed to be present, and the power of the judge in vacation, when the application may be altogether ex parte." *President, etc., of W. & M. College v. Hodgson*, 2 Hen. & M. 558. See post, "To Discharge Writ of Ne Exeat," IV, K.

III. Statute Must Be Followed Strictly.

In *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144, it is said that the statute authorizing proceedings in vacation must be followed, if at all, with strictness.

IV. Powers of Judge in Vacation.

See generally, the titles **COURTS; JUDGES**.

A. IN GENERAL.

It is clear that a power given to the court is not necessarily given to the judge in vacation. It is clearly so that he can have no other power in vacation than what is given him by law. *Dawney v. Wright*, 2 Hen. & M. 12; *President, etc., of W. & M. College v. Hodgson*, 2 Hen. & M. 558. See also, *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; *Chase v. Miller*, 88 Va. 791, 14 S. E. 545.

B. TO ISSUE WRITS OF HABEAS CORPUS AND MANDAMUS.

Habeas Corpus.—See generally, the title **HABEAS CORPUS**.

A writ of habeas corpus ad subjiciendum may be ordered issued and return made thereon and the case decided by a judge of the circuit court in vacation. *Rust v. Vanvacter*, 9 W. Va. 600. In this case it was said that by the habeas corpus act in force in this state it is intended to confer jurisdiction upon a judge in vacation to relieve from private restraint as well as in cases of public restraint. Thus where a judge of the circuit court in vacation, upon a writ of habeas corpus, ordered an infant child to be delivered to the custody of her father by her grandmother, the appellate court affirmed the order and judgment.

Mandamus.—See generally, the title **MANDAMUS**.

A judge of a circuit court has power under Va. Code, 1887, § 3012, to issue writs of mandamus in vacation. *Gloucester v. Middlesex County*, 88 Va. 843, 14 S. E. 660.

C. TO APPOINT RECEIVERS.

See generally, the title **RECEIVERS**.

A judge has power in vacation to appoint a receiver. *Smith v. Butcher*, 28 Gratt. 144; *Krohn v. Weinberger*,

47 W. Va. 137, 34 S. E. 746; *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437.

Special receivers in a certain class of cases may be appointed by the judge of a circuit court in vacation. *Monroe v. Barlett*, 6 W. Va. 441.

Receiver of Real Estate, Rents, etc.—Under § 28, ch. 78, acts, 1882 (*Warth's Code*, p. 743), providing for the appointment of receivers of real estate, rents thereof, etc., a judge of the circuit court ought not to appoint a receiver of real property or rents, issues or profits thereof in vacation. But if he should do so the blunder should be corrected by making an order when the court is in session requiring such improperly appointed receiver to pay or pass over to the general receiver or to any special receiver appointed during the session of the court all money or property in his hands. *Kerr v. Hill*, 27 W. Va. 576.

D. TO ORDER AN ACCOUNT.

See generally, the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

A circuit court judge may during vacation direct any proper account to be taken in a cause in a court of his circuit. *Monroe v. Bartlett*, 6 W. Va. 441.

The statute of Virginia authorizes any circuit judge, in vacation to direct any proper account to be taken in a cause in any court of his circuit. *Va. Code*, 1849, ch. 175, § 6. *Gilmer v. Baker*, 24 W. Va. 72.

A judge, having before him bill and exhibits making a prima facie case, may, in vacation, order an account. *Va. Acts*, 1884, p. 57; *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

Notice of Order.—In *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195, it was said that in case an account is ordered, three days' notice is inadequate but the decree will not be reversed unless the party is injured thereby.

E. TO QUASH OR DISMISS ATTACHMENT.

See generally, the title ATTACH-

MENT AND GARNISHMENT, ante p. 70.

Construction of Statute.—The power given any circuit court judge in vacation, under the act of February 28, 1866, amending *Va. Code*, 1860, ch. 151, § 6 (*See Code*, 1873, ch. 148, § 6), to quash or dismiss an attachment, conflicts not with and repeals not any other provision of that chapter, and was intended to give the defendant a speedy and summary remedy where he has a clear defense; and to have the attachment quashed or dismissed if, in the opinion of the judge, it was sued out without sufficient cause. *Dunlap v. Dillard*, 77 Va. 847.

Defense Not Superseded.—The judgment in vacation, under said § 6, *Va. Code*, 1860, ch. 151, refusing to quash or dismiss the attachment, is not final, and does not supersede the defendant's right to make defense, at the trial in term, against the attachment in any respect, under §§ 21, 22, 23 of said chapter. *Dunlap v. Dillard*, 77 Va. 847.

The court's order for the defendant's delivery of the attached and replevied property to the sheriff, should be reasonable as to the time and place of such delivery. *Dunlap v. Dillard*, 77 Va. 847. See post, "Order," VIII.

F. TO CORRECT ERROR IN APPOINTMENT OF COMMISSIONER.

See generally, the title REFERENCES.

It is error to appoint an attorney in a case a commissioner to execute a decree for account therein, because the commissioner acts in a judicial capacity. But, if done, the error may be corrected in vacation. *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 274, 24 S. E. 1016; *Va. Code*, 1904, § 3426.

G. IN REGARD TO DUELLING.

See generally, the titles DUELLING; WITNESSES.

Compelling Witness to Testify.—A

judge in vacation may, when he has reason to suspect a duel is about to take place, commit a witness who refuses to give testimony by affidavit until he shall give testimony; a fortiori such power exists when the party is before the court. Section 3691, Va. Code, 1904. *Com. v. Jones*, 1 Va. Cas. 270.

H. TO RELEASE FROM IMPRISONMENT.

See generally, the title IMPRISONMENT FOR DEBT.

Where the physical condition of a person imprisoned under a *capias* pro fine is such that further imprisonment would be of serious detriment to his health, on application addressed to the court which convicted him or the judge in vacation, if to such court or judge it shall appear proper he may be released from imprisonment without the payment of the money mentioned in such execution. Section 4074, Va. Code, 1904. *Wilkerson v. Allan*, 23 Gratt. 10, 20.

I. TO GRANT AND DISSOLVE INJUNCTIONS.

See generally, the title INJUNCTIONS.

A judge of a circuit court may grant and dissolve injunctions in vacation. *Monroe v. Bartlett*, 6 W. Va. 441. See to the same effect *Johnson v. Young*, 11 W. Va. 673; *Hayzlett v. McMillan*, 11 W. Va. 464; *Muller v. Bayly*, 21 Gratt. 521; *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244; *Goddin v. Vaughn*, 14 Gratt. 102; *Finney v. Clark*, 86 Va. 354, 10 S. E. 569; *Randolph v. Randolph*, 6 Rand. 194; *Hutchinson v. Landcraft*, 4 W. Va. 312; *Mason v. Harpers' Ferry Bridge Co.*, 17 W. Va. 396; *Rollins v. Fisher*, 17 W. Va. 578; *Slack v. Jacob*, 8 W. Va. 612.

An injunction may be granted at chambers or in vacation. *Mayo v. Haines*, 2 Munf. 423.

As to jurisdiction, notice, change of venue, answer, procedure, etc., in grant-

ing and dissolving injunctions, see the title INJUNCTIONS. See also, the title ANSWERS, vol. 1, p. 395.

J. TO DECREE ALIMONY PENDENTE LITE.

As to jurisdiction of judge to enter a decree for alimony *pendente lite*, see the title ALIMONY, vol. 1, p. 302.

K. TO DISCHARGE WRIT OF NE EXEAT.

See generally, the title NE EXEAT.

In *William and Mary College v. Hodgson*, 2 Hen. & M. 557, it is said that the judge of the high court of chancery is authorized to discharge writs of *ne exeat* in vacation.

L. TO REQUIRE BILL OF PARTICULARS.

As to power of judge in vacation, in regard to requiring statement of particulars to be filed in actions on insurance policies, see the title INSURANCE. See also, the title BILL OF PARTICULARS, ante, p. 376.

M. TO RENDER DECREE.

A judge of a circuit court has no power or authority to render a decree in vacation which purports to be final as to any subject embraced by it. *Rollins v. Fisher*, 17 W. Va. 578; *Monroe v. Bartlett*, 6 W. Va. 441.

In *Tyson v. Glaize*, 23 Gratt. 799, it is held, that a circuit court has no authority to make a decree or render a judgment in vacation, except such decrees and orders as are authorized by statute and the consent of parties can not give jurisdiction. See to the same effect *Harris v. Jones*, 96 Va. 658, 32 S. E. 455; *Hockman v. Hockman*, 93 Va. 455, 25 S. E. 534; *Morris v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383. See also, *Johnson v. Young*, 11 W. Va. 673; *Gilmer v. Baker*, 24 W. Va. 72, citing *Tyson v. Glaize*, 23 Gratt. 799; *Monroe v. Bartlett*, 6 W. Va. 441; *Johnson v. Young*, 11 W. Va. 673; *Rollins v. Fisher*, 17 W. Va. 578; *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. 85.

For a complete and exhaustive treatment of decrees entered in vacation, see the title JUDGMENTS AND DECREES.

N. TO GRANT APPEALS AND WRITS OF ERROR.

Criminal or Civil Cases.—A judge can not award a writ of error in a criminal case in vacation. *Jones v. Com.*, 2 Va. Cas. 224; *Baker v. Com.*, 2 Va. Cas. 353. The same rule prevails in civil cases. *Amis v. Koger*, 7 Leigh 221.

Interlocutory Decrees.—The judges of the several superior courts of chancery can not grant appeals from interlocutory decrees in vacation; but in court only. *William & Mary College v. Hodgson*, 2 Hen. & M. 558. See to the same effect *Dawney v. Wright*, 2 Hen. & M. 12; *Allen v. Belches*, 2 Hen. & M. 595; *Tomlinson v. Dilliard*, 3 Hen. & M. 209; *Grymes v. Pendleton*, 1 Call 54; *Fleming v. Bolling*, 8 Gratt. 292; *William & Mary College v. Hodgson*, 2 Hen. & M. 557; *Royall v. Johnson*, 1 Rand. 427; *Cocke v. Gilpin*, 1 Rob. 36; *Manion v. Fahy*, 11 W. Va. 493; *Evans v. Spurgin*, 11 Gratt. 615; *Lee v. Baird*, 4 Hen. & M. 454.

As to time and manner of taking appeals from the judgment of a justice, see the title APPEAL AND ERROR, vol. 1, p. 656.

O. TO SIGN BILL OF EXCEPTIONS.

After final judgment at law and the adjournment of the term, the judge of the court has no power to sign bills of exception to rules made during the trial, although it be done by agreement of council and by leave of court entered of record during the term. *Virginia Development Co. v. Rich. Patch Iron Co.*, 98 Va. 700, 37 S. E. 280; *Winston v. Giles*, 27 Gratt. 530; *Moses v. Cromwell*, 78 Va. 671, 673; *Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606; *Davis v. Poland*, 92 Va. 225, 23 S. E. 292. See the title EXCEPTIONS, BILL OF.

V. Control over Proceedings during Preceding Vacation.

By § 51, ch. 171, Va. Code, 1849, it is declared that "the court shall have control over all proceedings in the (clerk's) office during the preceding vacation. It may reinstate causes discontinued during such vacation, set aside said proceedings or correct any mistakes therein, and make such order concerning the same as may be just." *Brown v. Hume*, 16 Gratt. 458; *Baylor v. B. & O. R. Co.*, 6 W. Va. 270.

VI. Proceeding on Writ of Right.

See generally, the title WRIT OF RIGHT.

A proceeding on a writ of right may be had at rules. *Shaw v. Clements*, 1 Call 429.

VII. Confirmation of Sale—Notice.

Parties.—Testator, owning a storehouse whereon was a vendor's lien, and a farm, devised the latter to his wife and children. Storehouse and lot, in a suit to enforce the lien, were sold for enough to pay the lien. By an account in that suit, it was ascertained that the only debtor was an unsecured one, which with the lien had been assigned to the purchaser. Later, in suit by the devisees to sell the farm, and after paying the debts, to distribute proceeds, sale of the farm was decreed, and the causes consolidated. Sale was made and confirmed in vacation without notice to the creditor. Held, the creditor as purchaser became party to the first suit, and by the consolidation, also to the last suit, and as such party, was, under Va. Code, 1904, § 3426, entitled to notice of the confirmation of the sale made in vacation; but the confirmation will not be set aside unless he was prejudiced by want of notice. *Patterson v. Eakin*, 87 Va. 49, 12 S. E.

144. See generally, the titles CONSOLIDATION OF ACTIONS; JUDICIAL SALES; PARTIES.

VIII. Order.

See generally, the title ORDERS OF COURT.

Disposition of Order.—Chapter 112 of the Code of West Virginia, § 11, provides that "all orders and decrees made by a judge out of court in a cause pending in court shall be certified by him to the clerk of the court in which the same is pending, and be entered by such clerk in the proper order book." *Monroe v. Bartlett*, 6 W. Va. 441.

As to order in quashing or dismissing attachment, see ante, "To Quash or Dismiss Attachment," IV, E. See also, ante, "To Order an Account," IV, D.

An order for the dissolution of an injunction, made in pursuance of § 12, ch. 151, Va. Code, 1860, in vacation, by the judge of the circuit court in which a case is pending, wherein the injunction was awarded, shall be directed to the clerk of said court, who shall record the same in the order book. *Hayzlett v. McMillan*, 11 W. Va. 464.

IX. Appeal.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

From Order in Vacation.—Where the bill of injunction is filed and process issues thereon from the clerk's office it is a case pending in court within the letter and spirit of ch. 136, W. Va. Code, and an appeal will lie to this court from an order of the judge of the circuit court, which made in vacation, in relation thereto. *Hutchinson v. Landcraft*, 4 W. Va. 312.

Appointment of Receiver.—Under § 3454, Va. Code, 1887, an appeal lies to a decree appointing a receiver, whereby a change in possession or control of the property is required, though made in vacation.

Scope of Investigation on Appeal.

It is not proper for the appellate court to determine and decree upon the merits of the cause, as the cause has never been heard or acted upon either by the circuit court of Ritchie county, or the circuit court of Wood county, but only by the judge of the fourth judicial circuit in vacation, who had no authority to render such decree, or decide the cause. *Johnson v. Young*, 11 W. Va. 673.

The judge of the circuit court having acted upon a case prematurely, as well as without proper authority, by rendering a decree in vacation, it is not proper for the appellate court to determine and decree upon the merits of the case, especially where there are infant parties in interest, before the cause is first heard and acted upon at the court below. *Monroe v. Bartlett*, 6 W. Va. 441.

Upon an appeal taken from a decree in vacation which purports to be final as to any subject matter embraced by it, as a matter of right under the provision of ch. 135, §§ 1, 2, 3, 4, W. Va. Code, the appellate court will not dismiss the appeal because the decree was rendered in vacation but will take jurisdiction of the cause and decree, so far, and so far only, as to reverse the decree, and remand the cause to the circuit court, there to be proceeded with, and heard and demanded according to the rules and usages governing courts of equity in this state. *Monroe v. Bartlett*, 6 W. Va. 441; *Johnson v. Young*, 11 W. Va. 673.

Sufficiency of Appeal Bond.—Section 3436 Va. Code, 1887, whereby a circuit judge may in vacation hear and determine upon appeal whether a judgment of the court below is right or wrong, does not authorize the judge in vacation to inquire into the sufficiency of the appeal bond, and to order a new bond or new or additional security; such order is coram non iudice and void. *Chase v. Miller*, 88 Va. 791, 14 S. E. 545.

CHAMPERTY AND MAINTENANCE.

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CROSS REFERENCES.

See the titles ADVERSE POSSESSION, vol. 1, p. 199; ASSIGNMENTS, vol. 1, p. 745; ATTORNEY AND CLIENT, ante, p. 145; CONTRACTS; ILLEGAL CONTRACTS.

As to jurisdiction in matters of title, boundaries and possession of land, see the title JURISDICTION.

I. Definitions.

Champerty.—Blackstone defines champerty as a species of maintenance, "being a bargain with the plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." 4 Blackstone Com. 135; *Anderson v. Caraway*, 27 W. Va. 396; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444; *Nickels v. Kane*, 82 Va. 309. But see *Graham v. Graham*, 10 W. Va. 355-384, in which it is said that the doctrine laid down by 4 Blk. Com. p. 135, on the subject of champerty, has been very much modified by statute in West Virginia.

Bouvier defines champerty to be a bargain with a plaintiff or defendant in a suit for a portion of the land or other

matter sued for, in case of the successful termination of the suit, which the champertor undertakes to carry on at his own expense. 1 Bouvier's Dict., citing *Nickels v. Kane*, 82 Va. 309; *Anderson v. Caraway*, 27 W. Va. 396.

Champerty is the unlawful maintenance of a suit in consideration of a part of the matter in controversy. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 560. In this case it was said that champerty is a species of maintenance.

Maintenance.—At common law maintenance is said to be an officious intermeddling in a suit that in no way belongs to the meddler and signifies an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 560.

Maintenance Malum in Se.—All maintenance of a suit by a stranger was at common law unlawful, and was considered malum in se, as it permitted the wealthy to oppress the poor, and rob them of their small inheritances. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 560.

The reason of the law of champerty and maintenance is that maintenance tended to suppress justice and truth, work delay, and stir up strife. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 560.

II. Law Controlling.

Common Law.—Act of December 8, 1792, and Va. Code, 1819, p. 558, regarding champerty, were repealed by the Code of 1849, and the common law revived. *Nickels v. Kane*, 82 Va. 309. But see *Major v. Gibson*, 1 Pat. & H. 48.

The statute of 33 Edw. I, "against champerty was in substance enacted by the legislature of Virginia in 1792. See Code of 1819, vol. 1, p. 58, ch. 144. But this was omitted in the revisal of 1849, and has never been re-enacted. Our present law on the subject of attorneys is as follows: 'An attorney shall be entitled for his services as such to such sum as he may contract for with the party for whom the service is rendered; and, in the absence of such contract he may recover of such party what his services were reasonably worth.' Code, W. Va., p. 768, ch. 119, § 13." *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444. See generally, the title ATTORNEY AND CLIENT, ante, p. 145.

Maintenance Not Abolished.—While maintenance has not been directly abolished by statutory enactment, it has been so indirectly encroached upon as to render it almost obsolete. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 560.

III. Champertous Contracts.

A. ASSIGNMENTS.

See the title ASSIGNMENTS, vol. 1, pp. 745, 750.

General Rule—Voluntary Gifts.—"It may be stated as the result of all the authorities; that a voluntary gift valid in law or equity, may be made of any property real or personal, legal or equitable, in possession, reversion or remainder, vested or contingent, and including choses in action unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty." *Henry v. Graves*, 16 Gratt. 244.

Choses in actions are commonly assignable even at law, yet, "while large classes of things in action are thus assignable, even at law, there are certain species belonging to a class otherwise assignable, the assignment of which, either at law or in equity, is prohibited from motives of public policy, for example, an assignment which violates the policy of the law against champerty and maintenance. For this reason the assignment of a mere right of action to procure a transaction to be set aside, on the ground of fraud is not permitted." *Pomeroy's Equity*, vol. III, § 1276." *Jeffries v. Southwest Va. Improvement Co.*, 88 Va. 862, 14 S. E. 661. See also, *Graham v. Graham*, 10 W. Va. 384.

B. BETWEEN ATTORNEY AND CLIENT.

See generally, the title ATTORNEY AND CLIENT, ante, p. 165.

Contingent Fee.—In *Major v. Gibson*, 1 Pat. & H. 48, it was held, that a contract by attorneys with their clients, by which it was agreed that they should "have ten per cent. on whatever might be recovered in a certain chancery suit, commenced by them in the year 1834, for their services in the prosecution of it; and if nothing were recovered in it, then no compensation for their said services, in attending before the commissioners to take accounts, or in court, or in taking depositions," was not champertous or

of immoral tendency. It is not such an one as was forbidden by the act in 1 Rev. Stat., Va. Code, 1819, ch. 76, §§ 14, 15, pp. 270, 271, for it comprehends services not embraced by that act, such as taking deposition, appearing before commissioners, etc.

In *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444, it is said: "The case of *Major v. Gibson*, 1 Pat. & H. 48, grew out of a contract made in 1848, while the law against champerty in the (Va.) Code of 1819 was still enforced. It was decided by the special court of appeals of Virginia in 1855 and is cited in the margin of our present Code. Though not a binding authority, yet, owing to the full discussion of the subject of champerty and contingent fees by council of marked eminence in their day, it has been from that time to this our leading case on the general doctrine. The legality of a contingent fee is recognized in *Polsley v. Anderson*, 7 W. Va. 202. In *Graham v. Graham*, 10 W. Va. 355, 384, in which it is said that the doctrine laid down by 4 Bl. Comm., p. 135, on the subject of champerty has been very much modified by statute in our state, it was held, that the contract in that case to pay costs and carry on the suit about the subject matter purchased did not, with us, amount to champerty or maintenance. In *Anderson v. Caraway*, 27 W. Va. 385, the same doctrine was laid down."

Where the owner of the lands who has suits pending between him and other parties claiming the same lands, employs counsel to prosecute his suits to recover the same, and contracts to pay him certain fees for his services as such counsel, the amount of which are wholly or in part contingent upon the recovery of the land in controversy, such contract is not champertous. *Anderson v. Caraway*, 27 W. Va. 386.

When Client Dismisses Suit.—Where an attorney made a special contract with a client to prosecute a suit in

equity for a certain fee and a further fee contingent on success in the case, but the client afterwards dismissed his suit without the attorney's consent, it was held, that the attorney was not entitled, as a matter of law, to recover the whole contingent fee; but that he might recover, either on a special count or a quantum meruit, the reasonable value of his services. *Polsley v. Anderson*, 7 W. Va. 202. See also, *Majqr v. Gibson*, 1 Pat. & H. 48.

Percentage on Amount to Which Decree Is Reduced.—A contract to pay an attorney "ten per cent. on the amount that he may succeed in getting a decree reduced which has been rendered," is not champertous. *Nickels v. Kane*, 82 Va. 309.

Payment of Costs.—In *Graham v. Graham*, 10 W. Va. 355, it was held, that the contract in that case to pay costs and carry on the suit about the subject matter purchased did not, in West Virginia, amount to champerty or maintenance.

C. BETWEEN LAYMEN.

Effect of Interest.—A contract between persons interested in the subject matter of the suit, to unite in the prosecution or defense of suit involving the subject matter, bearing the cost both below and on appeal, and to share in the fruits of such suit, is not such a contract as is contemplated by the law relating to champerty and maintenance. *Graham v. Graham*, 10 W. Va. 355.

A person having, or honestly believing he has, an interest in the subject of litigation in a suit, may lawfully assist in the payment of costs and expenses in the defense or maintenance of such suit. *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444. In this case the court said: "The doctrine of common law as to champerty and maintenance is to be understood with proper limitations and qualifications, and can not be applied to a person having an interest, or believing that he has an interest in the subject in dispute, and bona fide act-

ing in the suit; for he may lawfully assist in the defense or maintenance of that suit."

Clearing Title.—An agreement by a cotenant to clear the title by suit at his own expense, is free from any taint of champerty. *Anderson v. Caraway*, 27 W. Va. 386. See generally, the titles JOINT TENANTS AND TENANTS IN COMMON; QUIETING TITLE.

Agreement between Debtor and Creditor.—Where a creditor, who had sued his debtor, agreed to abandon his suit on the debtor's giving him a lien on securities in the hands of another creditor, with authority to sue that creditor; and the creditor agreed to use his best endeavors to recover the securities, it has been held, that the agreement did not amount to champerty, as there was no stipulation that the creditor was to have the profits to be derived by the debtor from the suit. He was only to receive payment of his debt. *Ruffners v. Lewis*, 7 Leigh 720, citing *Hartley v. Russell*, 2 Sim. & Stu., 244; *Cond. Eng. ch. Rep.* 439.

D. CONVEYANCE OF LAND BY PARTY OUT OF POSSESSION.

1. Operation and Effect in General.

a. Nature of Possession Rendering Conveyance Void.

As to nature of possession rendering a conveyance inoperative, see post, "Effect to Pass Title," III, D, 1, b.

Adverse.—The possession which would render a conveyance by a party out of possession, inoperative, must have been an adversary possession. *Cline v. Catron*, 22 Gratt. 379.

What Constitutes Adverse Possession.—See the title ADVERSE POSSESSION, vol. 1, p. 199.

It is the holding by claim of title, adverse to another's title, that constitutes an adverse possession. Though a mere intruder or squatter, without the pretense of title, holds possession of land and keeps the owner thereof out of it, such possession does not

amount to an adversary possession within the meaning of the law. Having no pretense of title, he can not hold by title adverse. The law pays no respect to the wrongful intrusion of a party without a scintilla of title. It requires, too, that this adverse possession should be made out not by inference but by clear proof, and makes every presumption in favor of the possession being subordinate to the true owner. "These opinions are sustained by the decision of some of our most respectable tribunals. Authorities upon such a subject are naturally more abundant in a newly settled country, where adventurers set down, very often upon the land which suits them best without pretense of title. Judge Spencer in the case of *Jackson v. Todd*, 2 Caines 185, remarks, that 'it has been adjudged, that mere possession by a person claiming no title, is no disseizin of the rightful owner, and consequently he may convey or devise, notwithstanding the statute against champerty and maintenance.'" *Williams v. Snidow*, 4 Leigh 14.

If the bargainor continue in possession after the conveyance, that possession will not render a conveyance by the bargainee void. *Duvall v. Bibb*, 3 Call 362.

Possession of a Fiduciary Character.

—Actual possession of the land by the grantor is not indispensable to give effect to his deed for if the possession held by another be of a fiduciary character, or if its origin and continuance were such as not to amount to a disseizin except at the election of the owner for the purposes of the remedy, it will not impede the operation of the deed. *Early v. Garland*, 13 Gratt. 8, citing *Tabb v. Baird*, 3 Call 475; *Williams v. Snidow*, 4 Leigh 14. See also, *Cline v. Catron*, 22 Gratt. 379.

Length of Possession.—In 1831 and until the passage of the act of March 30, 1837, no possession short of fifteen years, unaided by a descent cast, would

bar the entry of one having right or title to the land. *Kincheloe v. Tracewells*, 11 Gratt. 587. But see Va. Code, 1904, § 2915.

b. Effect to Pass Title.

See ante, "Nature of Possession Rendering Conveyance Void," III, D, 1, a. As to present statute, see post, "Present Statute," III, D, 3.

To the point that an owner of land, whose seizin is interrupted by the actual entry and adverse possession of another, can not, while out of possession, effectively convey such land by deed of bargain and sale, *Duvall v. Bibb*, 3 Call 362; *Tabb v. Baird*, 3 Call 475; *Hall v. Hall*, 3 Call 488; *Bream v. Cooper*, 5 Munf. 7; *Clay v. White*, 1 Munf. 162; *Hopkins v. Ward*, 6 Munf. 38, are cited in *Williams v. Snidow*, 4 Leigh 17.

As to the effect of the statute of 1787, against conveying pretended titles on a conveyance by a party out of possession, see post, "Effect on Conveyance—Penalty," III, D, 2, c.

Conveyance by Disseized Heirs.—If the disseizee before making entry, dies intestate, and his heirs make a conveyance of the premises, at a time when they are not in possession thereof, their conveyance will pass nothing. *Cline v. Catron*, 22 Gratt. 379. But see Va. Code, 1904, § 2915.

If the title of the heir be abated by a stranger, he can not convey it by deed of bargain and sale, before entry. *Hall v. Hall*, 3 Call 488.

Devise by Disseized Testator.—See generally, the title *WILLS*.

If A be tenant of the freehold, and B tortiously enter upon, and turn the subtenant of A out of possession, claiming the land as his absolute property; and he, or those claiming under him, continue to hold the same, by actual adverse possession, until the death of A, this is an actual disseizin of A; so that (in such a case, before the 1st of January, 1787) he could not, for the purpose of being enabled to

devise the land, elect to consider himself as not disseized. *Davis v. Martin*, 3 Munf. 285.

Deed Inoperative.—See generally, the title *DEEDS*.

If the ground in controversy was in the actual adversary possession of the widow or daughter of C. at the time of the conveyance by M. T. to L. or by L. to G., these deeds could not operate as a transfer of the legal title. *Early v. Garland*, 13 Gratt. 1. See to the same effect *Carrington v. Goddin*, 13 Gratt. 587.

In *Tabb v. Baird*, 3 Call 475, it is questioned whether a deed of bargain and sale for land, by one out of possession, is not void.

Ejectment by Grantee.—See generally, the title *EJECTMENT*.

A person, whose seizin is interrupted by the actual entry and adverse possession of another, can not, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Clay v. White*, 1 Munf. 162.

If the verdict does not find title or possession in the grantor, he can convey neither; and, therefore, his grantee can not maintain an ejectment against the tenant in possession. *Tabb v. Baird*, 3 Call 475.

2. Statute of 1786 against Buying and Selling Pretensed Titles.

a. When in Force.

The statute against conveying or taking pretended titles enacted in 1786 (1 Rev. Stat., Va. Code, 1819, ch. 103), continued in force until its repeal at the revival of 1849. *Niemeyer v. Wright*, 75 Va. 240, 40 Am. Rep. 720. See also, *Tabb v. Baird*, 3 Call 481; *Middleton v. Arnolds*, 13 Gratt. 489; *Cline v. Catron*, 22 Gratt. 378.

b. Conveyances Prohibited.

Confirming Possession.—"The act to prevent the buying of pretended titles * * * prohibits the purchasing of latent titles in order to disturb the possessions of others. But it was never

intended to prevent a person in possession from confirming and strengthening that possession by purchasing the rights of others." *Wilcox v. Callo-way*, 1 Wash. 38. See to the same effect *Middleton v. Arnold*, 13 Gratt. 489; *Morrison v. Campbell*, 2 Rand. 206.

Equitable Interests.—That the statute against buying and selling pretended titles does not prohibit the sale and purchase of equitable rights in lands, see *Tabb v. Baird*, 3 Call 475; *Ruffners v. Lewis*, 7 Leigh 740; *Waggener v. Dyer*, 11 Leigh 392; *Steed v. Baker*, 13 Gratt. 387; *Middleton v. Arnolds*, 13 Gratt. 491; *Allen v. Smith*, 1 Leigh 231.

"I am ready to admit that equity will not enforce an equitable title, purchased by a party under circumstances which, if it were a legal title, would subject him to the penalties of the act against buying and selling a pretended title; which was the position taken by Judge Brooke in *Allen v. Smith*, 1 Leigh 254. But with this admission I think it perfectly consistent to say that, as a general principle, the act does not apply to every sale and purchase of equitable rights. Such was the decision in that case; and in the case of *Wood v. Griffith*, 1 Swanst. 43, Lord Eldon says, 'It is extremely clear, that an equitable interest under a contract or purchase may be the subject of sale. If I were to suffer the doctrine to be shaken by any reference to the law of champerty, I should violate the established habits of the court.'" *Ruffners v. Lewis*, 7 Leigh 720.

Right of Redemption—Mortgage.—Land sold under a trust deed made to secure claimant of a debt, is purchased by and conveyed to the creditor and cestui que trust, and he is in possession thereof, but under circumstances which entitled the debtor to redeem; another creditor procures from the debtor a conveyance of the land, absolute in form, but intended as a mortgage. Held, the last convey-

ance is not affected by the statute against buying and selling pretended titles and the creditors who claim under it shall be entertained in equity, in a suit to set aside the sale under the trust deed, and have a resale of the land. *Waggener v. Dyer*, 11 Leigh 384.

Purchase Money Returned—Reconveyance.—Where land is sold and conveyed and subsequently an adversary claim being set up by a third party the vendor repays the purchase money to the vendee and receives a reconveyance of the land, the transaction is not in violation of the act against conveying or taking pretended titles. Per *Cabell & Brockenbrough, JJ. Martin v. Flowers*, 8 Leigh 158.

c. Effect on Conveyance—Penalty.

"The statute 'against conveying or taking pretended titles,' enacted in 1786 (See 1 Rev. Va. Code, 1819, ch. 103), * * * expressly prohibited the conveying or taking 'pretended titles,' and inflicted upon the offender a forfeiture of the whole value of the lands; and yet it was uniformly held by this court, that although the conveyance was prohibited under the penalty of forfeiture, it was not therefore void, nor were the obligations for the purchase money of the land so conveyed invalid. *Middleton v. Arnolds*, 13 Gratt. 489, and cases there cited. In *Tabb v. Baird*, 3 Call 481, Judge Roane said: 'It is to be observed that the act against pretended titles does not declare the conveyance therein inhibited to be void. It leaves the effect and legal operation of such conveyances to be decided by the laws relative to the subject.'" *Niemeyer v. Wright*, 75 Va. 240, 40 Am. Rep. 720. *Duval v. Bibb*, 4 Hen. & M. 113; *Duval v. Bibb*, 3 Call 362; *Allen v. Smith*, 1 Leigh 231; *Williams v. Snidow*, 4 Leigh 16; *Raines v. Watson*, 2 W. Va. 403.

As to effect of conveyance by party out of possession to pass title under

the laws relating to that subject, see ante, "Effect to Pass Title," III, D, 1, b. And as to present statute, see post, "Present Statute," III, D, 3.

3. Present Statute.

A party having an interest in or claim to land held adversely by another, may sell and convey the same; and his grantee may maintain ejectment for it. *Carrington v. Goddin*, 13 Gratt. 586. See also, *Kincheloe v. Tracewells*, 11 Gratt. 587; *Middleton v. Arnolds*, 13 Gratt. 490. And see Va. Code, 1904, § 2915.

IV. Effect of Champerty.

A. ON CONTRACT.

See generally, the titles CONTRACTS; ILLEGAL CONTRACTS.

It need hardly be stated that cham-

perty avoids the contract into which it enters. *Nickels v. Kane*, 82 Va. 309; *Major v. Gibson*, 1 Pat. & H. 48. See also, the cases cited under the definition.

B. PARTIES AFFECTED.

Contract Avoided as to What Persons.—A taint of champerty only invalidates contracts as between parties to the champerty. 1 Whart. Cont., § 429; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557.

V. Who May Set Up as Defense.

Strangers.—Where a contract is affected with champerty, only the parties to it, and not a stranger, can make that defense against it. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557.

Chancery.

See the title EQUITY.

CHANGE.—In *Hinton v. Bland*, 81 Va. 595, it is said: "And a change or conversion of the goods, so as to amount to an administration, has been held to mean a change in the property of the goods, not a change in specie." See also, the title EXECUTORS AND ADMINISTRATORS.

Changing Possession of Property.—When one has taken forcible possession of premises, and an injunction is granted staying his hand and forbidding him to do anything further, and to permit the plaintiff in the injunction cause to cultivate the land, this is not an order changing the possession of the property, within the meaning of § 1, ch. 17, acts of 1872-73. The court said: "But it is claimed that it did more than grant the injunction; that it went much further, and changed the possession of the property. If it did this, it was appealable. But did it change the possession? It certainly did not do so in terms, but it is claimed it did so in effect. The injunction was granted in general terms, 'according to the prayer of the bill.' The bill, it is true, prayed that the property be 'restored' to the plaintiff; but this was not a part of the prayer for the injunction, but it was what the plaintiff desired the court to do on the hearing. The other parts of the prayer are that defendant 'be restrained and prohibited from using, cultivating, or further trespassing on said premises, and be restrained from interfering with the plaintiff in his cultivation of the premises.' It just stopped him where he was. It did not evict him from the premises. It left him in possession, but stayed his hand. He could not go forward, but he could, if he liked, just stay where he was. It never was intended by such an order to change the possession of the property, and such an order is not contemplated by the statute which allowed an appeal from a 'decree or order changing the possession of the property.'" *Robrecht v. Wharton*, 29 W. Va. 746, 2 S. E. 793, 795.

Change of Domicile.

See the title CONFLICT OF LAWS.

Change of Grade of Streets.

See the title ABUTTING OWNERS, vol. 1, p. 60.

CHANGE OF VENUE.

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CROSS REFERENCES.

See the titles AFFIDAVITS, vol. 1, p. 227; COURTS; CRIMINAL LAW; JUDGES; JURISDICTION; JURY; REMOVAL OF CAUSES; VENUE

I. Right to Change.

A. AT COMMON LAW.

Previous to the passage of the statute giving the court authority to allow a change of venue there seems to have been a conflict in the decisions as to the power of the court to allow a change of venue. Some decisions held that in cases of misdemeanor the venue could be changed for a good cause. See *Com. v. Bedinger*, 1 Va. Cas. 125; *Com. v. McCue*, 1 Va. Cas. 137.

And in *Darmsdatt v. Wolfe*, 4 Hen. & M. 246, it was held, that the superior court of chancery had power (upon general principles of equity) to direct the venue to be changed after issue joined in a county or other inferior court, where it appeared that strong prejudices existed against the defendant, which were unknown to him until after such issue was joined, and that a fair and impartial trial could not be expected in the court where the suit was depending.

But it was held in *Com. v. Rolls*, 2 Va. Cas. 68; *Com. v. Wildy*, 2 Va. Cas. 69, that the superior court had no power to change the venue in any case of misdemeanor, treason or felony. And in *Com. v. Carter*, 2 Va. Cas. 131, it was held, that where the court had allowed a change of venue and in pursuance of this direction the case had been transferred to another county that upon the decision of the special court of appeals that the superior court had no power to change the venue, the court of the county from which the case had been transferred could proceed with the case as though a change of venue had never been granted.

B. BY STATUTE.

By an act of the assembly passed in 1819, the superior courts of law were authorized for certain causes to change the venue from the county in which the suit was pending in cases of treason or felony. And at the present time the courts have power whenever neces-

sary to allow a change of venue. (See § 4036, p. 2126, Va. Code, 1904.) See *Vance v. Com.*, 2 Va. Cas. 163; *Wormeley v. Com.*, 10 Gratt. 672; *Muscoe v. Com.*, 87 Va. 462, 12 S. E. 790; *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527; *Ott v. McHenry*, 2 W. Va. 73; *State v. Greer*, 22 W. Va. 800; *State v. Manns*, 48 W. Va. 480, 37 S. E. 613; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

It is the right of the prisoner in a criminal case to be tried in the county, where the alleged offense was committed; a right which the state can not take from him. But on the prisoner's petition, and for good cause shown, he may have the venue changed to some other county. *State v. Greer*, 22 W. Va. 800; *State v. Sheppard*, 49 W. Va. 592, 39 S. E. 676.

C. POWER TO OBTAIN JURY FROM ANOTHER COUNTY.

The court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving can not be conveniently found in the county or corporation, may send to another county or corporation for such jurors. And in acting in such case the court must have a large discretion. *Chahoon v. Com.*, 21 Gratt. 822. See also, *Wormeley v. Com.*, 10 Gratt. 672; *Sands v. Com.*, 21 Gratt. 885. See generally, the title JURY.

II. Grounds for Change.

A. PREJUDICE.

1. In General.

Criminal Cases.—The reasons for having crimes tried in the locality wherein they have been committed are both weighty and obvious, and a criminal case, therefore, ought not to be sent elsewhere for trial, unless it is made to appear to the court in which the case is pending, that a trial in the vicinage is likely to result in a miscarriage of justice, that is, the community has been so warped by passion or prejudice that there is danger of the jury being influenced by the opinions and

prejudice of the public, and not entirely and exclusively by the evidence, in reaching a verdict. *Muscoe v. Com.*, 87 Va. 462, 12 S. E. 790.

Known prejudice and ill feeling towards a prisoner, extending over a large portion of a county, owing to his agency and service of process in behalf of certain persons claiming the lands of many residents of such county by superior title, and about which there is much unsettled litigation pending, is good cause for a change of venue, especially during the heat of the excitement engendered by the offense with which the prisoner is charged. *State v. Manns*, 48 W. Va. 480, 37 S. E. 613.

And the fact that a jury free from exceptions can be impaneled is not conclusive, on a motion for a change of venue, that prejudice does not exist endangering a fair trial, and will not justify the court in refusing to receive other evidence to support such motion. *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885.

Blackstone in speaking of causes for removal says: "Where the question has an extensive local tendency; where a cry has been raised and where the passions of the multitude have been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious." He says to summon a jury laboring under local prejudices, "Is laying a snare for their consciences, and, though they should have virtue and vigor of mind sufficient to keep them upright; the parties will grow suspicious and resort under various pretenses to another mode of trial." Under such circumstances the venue should be changed. *State v. Sheppard*, 49 W. Va. 593, 39 S. E. 676.

Civil Cases.—It is error for a circuit court to overrule a motion for a change of venue in an action of ejectment, when it is shown by affidavit that fair and impartial trial could not be

had in a county in which the suit was pending, arising from strong and unjust prejudices among the people against the original patentees of land, under whom the party making the motion claims to hold. *Ott v. McHenry*, 2 W. Va. 73. See also, *Graham v. Citizens Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

Secret Prejudice.—The depth and extent of a secret prejudice can never be known from surface indications, but it may secretly extend to the bounds of the county through sympathy. *State v. Greer*, 22 W. Va. 800; *State v. Douglass*, 41 W. Va. 537, 23 S. E. 724; *State v. Manns*, 48 W. Va. 481, 37 S. E. 613.

Writing of Letter by Sheriff.—Where a prisoner indicted for murder showed that the sheriff of the county was against him and wrote a letter calculated to prejudice him, which was published in a newspaper printed and circulated in the prisoner's county, and great excitement was shown to exist, and ten months after the homicide threats of lynching him were made by a mob, the most of whom lived in or near the county seat, where he would have to be tried; it was held, that good cause was shown for a change of venue. *State v. Greer*, 22 W. Va. 800.

Raising of Fund to Prosecute Prisoner.—The fact that subscription papers were circulated to raise a fee for the employment of counsel to aid in the prosecution, and that they had been signed by some twenty or thirty persons, is, of itself, no ground for a change of venue. *Wormeley v. Com.*, 10 Gratt. 674.

Prejudice against Railroad.—In an action against a railroad company to recover damages for a personal injury, the fact that a prejudice exists against the company in the city in which the action is pending because the company had removed its shops from the city and abandoned the city as a terminal, in violation of a contract with the

city, is not sufficient to justify a change of venue of the action, especially when the witnesses by whom the feeling against the company is shown express the opinion that a perfectly fair and impartial jury to try the case can be gotten in the city. *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

Effect of Failure to Move for Change of Venue.—In *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245, it was held, that if a prejudice existed against the defendant, he should make application for a change of venue before the trial, or, at least, before a verdict was rendered, and if he fails to do so, he can not allege prejudice to support a motion for a new trial in a court of chancery.

2. Prejudice Existing in Part of County.

Where it appears from the petition and affidavits that, immediately after the commission of the crime, there were rumors and talk of mob violence against the prisoner, but such rumors and talk were confined to the inhabitants of a small portion of the county, and there had been some excitement and prejudice and feeling against the prisoner immediately after the perpetration of the crime, but, at the time of the trial, there was no longer talk of such violence and the excitement, prejudice and feeling had greatly subsided, and no trouble was found in obtaining a jury free from exception; it was held, that the court may properly overrule a motion for a change of venue. *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

The supreme court will not reverse the ruling of a trial court refusing a change of venue in a criminal case, on account of local prejudice, when the affidavits of the prisoner and his counsel in support of the change represent the hostility to the prisoner as existing in one corner of the county, where the offense was committed, eleven miles from the county seat, and not wide-

spread throughout the county, and it appears that little or no difficulty was experienced in getting a jury in the county to try the case, and the record does not disclose such a condition at the time of trial as would warrant the apprehensions expressed in the affidavits when they were made. *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527.

3. Failure to Obtain Impartial Jury. a. Virginia Rule.

If a fair and impartial jury can not be obtained in the county in which the case is being tried, this difficulty can be overcome by summoning as many jurors as may be necessary from an adjoining county, and it is not a ground for a change of venue. *Wright v. Com.*, 33 Gratt. 880; *Waller v. Com.*, 84 Va. 492, 5 S. E. 364; *Joyce v. Com.*, 78 Va. 287. See generally, the title JURY.

The fact that upon the first trial of a case, an incompetent juror is permitted to serve on the jury and for that reason the case is reversed by a higher court, will not be evidence that an impartial jury can not be obtained in the county where the case was tried, or support a motion for a change of venue. *Wright v. Com.*, 33 Gratt. 880.

In *Wormeley v. Com.*, 10 Gratt. 658, it was held, that the fact that several panels had been exhausted and only one juror found competent to try the case, was not sufficient to warrant a change of venue on the ground of prejudice, as the court could send into other counties, where no prejudice existed, and obtain competent jurors.

"It is obvious also that a state of facts, which, under the former laws regulating the sources from which the jury were to be drawn, might have been conclusive in favor of a motion for a change of venue, might, under the existing statutes, wholly fail to show any difficulty in the way of obtaining a fair trial in the county. For whilst by the law as it formerly stood, the court had no power to send beyond

the limits of the county for a jury, no matter what might be the difficulty of obtaining therein a jury free from exception; it is now provided by the 10th section of chapter 208 of the Code, that if qualified jurors not exempt from serving can not be conveniently found in the county in which the trial is to be, the court may cause so many as may be necessary, of such jurors, to be summoned from any other county or corporation by the sheriff or sergeant or by its own officer. In this state of the law it is difficult to suppose a case in which this court could safely undertake to pronounce erroneous a judgment of a circuit court refusing an application for change of venue based simply on the ground of difficulty in obtaining jurors for the trial in the county. Cases, however, may be supposed of such strong and extensive and influential prejudice and excitement against the accused, as to endanger the fairness and impartiality of a trial conducted in the county, even though the court should encounter no serious difficulty or inconvenience in obtaining a jury." *Wormeley v. Com.*, 10 Gratt. 673.

But in such cases, in order to obtain a full, free, dispassionate, just and impartial hearing of the cause, it might be just as important to change the theatre of the trial, as to have a jury filling all the requirements of the law as to qualifications and freedom from exception. In view of such a possible state of things, and of the possible existence of other causes not necessarily connected with the jury, and in order to preclude the inference, that, by enlarging the power of the court as to the sources from which the jury might be taken, it intended to curtail the court of any power or discretion which it previously had of changing the venue for causes other than the difficulty of obtaining a jury in the county, the legislature have declared that the circuit courts may, on the motion either of

the accused or of the attorney for the commonwealth, or without such motion, for good cause, order the venue for the trial of a criminal case in such court to be changed to some other circuit court. *Wormeley v. Com.*, 10 Gratt. 673.

The court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving can not be conveniently found in the county or corporation, may send to another county or corporation for such jurors. *Sands v. Com.*, 21 Gratt. 871.

Effect of Obtaining Impartial Jury.

—The law has provided the test as to the fitness of a person to sit upon a jury in the trial of criminal cases, and if, by applying this test, an impartial jury was in fact secured in the county where the trial was to take place, a conclusive presumption arises that the motion for a change of venue was unfounded. *Wright v. Com.*, 33 Gratt. 880; *Joyce v. Com.*, 78 Va. 289; *Waller v. Com.*, 84 Va. 496, 5 S. E. 364; *Bowles v. Com.*, 103 Va. 823, 48 S. E. 527. See also, *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

The supreme court will not reverse the ruling of a trial court refusing to order a jury from another county to try a criminal case, when it appears that an impartial jury was in fact obtained in the county fixed for the trial. *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527.

b. West Virginia Rule.

It is the right of each party in any suit to have the jury composed of persons not related to either, who have no interest in the cause, have neither formed nor expressed any opinion, who are free from bias or prejudice and stand indifferent in the cause. Where a jury thus qualified can not be otherwise obtained in the county where the suit is brought, the case should be removed. *Ingersoll v. Wilson*, 2 W. Va. 59.

Impartial Jury.—The fact that a

jury free from exception can be impeached is not conclusive, on a motion for a change of venue, that prejudice does not exist, endangering a fair trial, and will not justify the court in refusing to receive other evidence to support such motion. *State v. Flaherty*, 42 W. Va. 240, 24 S. E. 885.

B. INTEREST OF JUDGE.

In *Boswell v. Flockheart*, 8 Leigh 365, the court said: "On this subject I will remark, that the change of venue refers altogether to the jury. There is not, that I am aware, any such thing known, as a demand, at common law, that a judge shall remove cause from his own forum because he is prejudiced against one of the parties."

When a judge of a circuit court is interested in a case which but for such interest would be proper for the jurisdiction of his court, the action or suit may be brought in any county in an adjoining circuit, the county seat of which county is nearest the county seat of the county wherein said judge resides; and in such case the suit may be brought and prosecuted in such adjoining county, if none of the parties reside therein. *McConaughy v. Bennett*, 50 W. Va. 172, 40 S. E. 540.

C. INTEREST OF CITY SERGEANT.

The mere fact that a plaintiff in a common-law action in a corporation court is sergeant of the city is no ground for a change of venue on motion of the defendant. Ample provision is made by § 893 of the Virginia Code of 1904 for a case where it is improper for the sergeant to summon the jury. And where in such a case, no suggestion was made at the trial that the jury was not properly summoned, or that the defendant could not have a fair trial with the jury selected the case will not be reversed for the failure of the court to allow a change of venue. *American Bonding, etc., Co. v. Milstead*, 102 Va. 687, 47 S. E. 853.

III. Proceedings to Procure Change.

A. PRELIMINARY PROCEEDINGS —MOTION FOR JURY FROM ANOTHER COUNTY.

A motion for a jury from another county should always precede a motion for a change of venue. *Wright v. Com.*, 33 Gratt. 880; *Waller v. Com.*, 84 Va. 492, 5 S. E. 364. See also, the title JURY.

Upon application for change of venue on ground that an impartial jury can not be had in that county, or brought thereto from another county or corporation, application is refused, and a jury obtained in the county. It was held, prisoner should first have asked for jury from another county. Not having done so, and an impartial jury having in fact been obtained, the conclusive presumption is that the application for change of venue was unfounded. *Joyce v. Com.*, 78 Va. 287.

B. TIME OF APPLICATION.

An application for a change of venue should be made at the earliest opportunity. *Wheeling v. Black*, 25 W. Va. 267.

And where the defendants permitted four terms to pass after the issues were made up before they made their motion, it was held, that this was too late. *Wheeling v. Black*, 25 W. Va. 280.

C. NOTICE.

In all applications to change the venue, the notice given to the opposite party, shall state the cause to be assigned in support of the application. See *Regula Generalis*, 2 Va. Cas. 88.

West Virginia Rule.—No notice is required to be given to the adverse party of a motion to change the venue, unless the motion is to be made in vacation. *Ingersoll v. Wilson*, 2 W. Va. 59.

D. EVIDENCE.

1. Burden of Proof.

The burden of proof is on the pris-

oner to show, to the satisfaction of the court, good cause to have the trial of the case removed to a county other than that in which the crime was committed, and such cause must exist at the time the application for the change of venue is made. *State v. Greer*, 22 W. Va. 800. *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676. See generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

2. Affidavits.

a. Necessity.

Affidavits of Disinterested Persons.

—An application by a defendant for a change of venue, on the ground of general prejudices existing against him in the town or county where the cause is to be tried, should be supported by the affidavits of disinterested individuals. *Boswell v. Flockheart*, 8 Leigh 364; *Wormeley v. Com.*, 10 Gratt. 672; *Muscoe v. Com.*, 87 Va. 460, 12 S. E. 790; *State v. Greer*, 22 W. Va. 806; *State v. Douglass*, 41 W. Va. 538, 23 S. E. 725; *State v. Sheppard*, 49 W. Va. 593, 39 S. E. 676.

b. Requisites and Sufficiency.

(1) In General.

So long ago as 1817 the Virginia general court adopted a general rule that in future, in all motions to change the venue, the petition and affidavit "shall set forth the particular facts from which the petitioner is induced to believe that he can not have a fair trial in the county." 2 Va. Cas. 88. *State v. Douglass*, 41 W. Va. 537, 23 S. E. 725.

Conclusions Are Insufficient.—The affidavits must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial can not be had. The court must be satisfied from the facts sworn to, and not from the conclusions to which the defendant or his witnesses may denote. *State v. Douglass*, 41 W. Va. 537, 23 S. E. 725; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

(2) Mere Belief or Fears of Defendant.

The venue will not be changed for the mere belief of the party or his witnesses that he can not have a fair trial in the county. Facts and circumstances must appear satisfying the court. *State v. Douglass*, 41 W. Va. 537, 23 S. E. 725; *Wormeley v. Com.*, 10 Gratt. 672; *Muscoe v. Com.*, 87 Va. 462, 12 S. E. 790; *Bowles v. Com.*, 103 Va. 823, 48 S. E. 527.

Upon an application of a prisoner charged with murder, for a change of venue, his affidavit alone, of his fears or belief that he can not obtain a fair trial in the county, is not sufficient to sustain the motion; but he should be required to show by independent and disinterested testimony such facts as make it appear probable at least that his fears and belief are well founded. But where such facts are shown by the prisoner, and are not successfully repelled or explained by the commonwealth, no argument of inconvenience or delay should be permitted to stand in the way of the great end to be attained, a fair and impartial trial. *Wormeley v. Com.*, 10 Gratt. 658; *Muscoe v. Com.*, 87 Va. 462, 12 S. E. 790; *Bowles v. Com.*, 103 Va. 823, 48 S. E. 527.

3. Effect of Evidence Opposing a Change of Venue.

Upon a motion for a change of venue counter affidavits may be read; and if the court is satisfied from all the affidavits or other evidence for and against the motion, that the venue ought to be changed, it will in the exercise of its discretion remove the case, otherwise it will not. The exercise of this discretion is of course reviewable by the appellate court. *Pittsburg, etc., R. Co. v. Applegate*, 21 W. Va. 172.

A prisoner who was indicted for murder made affidavit that he could not have an impartial trial by reason of prejudice existing against him, and presented extracts from newspapers alleging his guilt. Several witnesses were

introduced on behalf of the state who testified that not greater than the usual prejudice existed, and in their opinion a fair trial could be had. It was held, that a change of venue was properly denied. *Muscoe v. Com.*, 87 Va. 460, 12 S. E. 790.

The defendant filed a motion for a change of venue and offered affidavits in support of such motion, alleging that because of the prejudice which existed against him in the county in which the action was pending, that he could not obtain a fair and impartial trial. The motion was resisted by the plaintiff who also offered affidavit to support the contention, that the defendant could have a fair and impartial trial in the county in which the case was pending. The motion was overruled by the court who declared that from the affidavits offered by the plaintiff, he was convinced that defendant could have an impartial trial in such county, and that it would amount to almost a miscarriage of justice against the plaintiff to send the case to another county. It was held, by the supreme court, that the decision of the trial judge was not error. *Caperton v. Bowyer*, 4 W. Va. 176.

E. DISCRETION OF THE COURT.

Where a motion is made for a change of venue the court is invested with a large discretion as to the allowance of the motion. *Wormeley v. Com.*, 10 Gratt. 658. See also, *Chahoon v. Com.*, 21 Gratt. 822; *Pittsburg, etc., R. Co. v. Applegate*, 21 W. Va. 172. See generally, the title COURTS.

It is a general rule that the granting of a change of venue is discretionary with the court and subject to revision only in cases of abuse; but it would hardly be so here, where the constitution guarantees it, when good cause therefor is shown. *State v. Sheppard*, 49 W. Va. 593, 39 S. E. 676.

Both plaintiffs and defendants being present by their counsel, the court makes an order removing a cause to

the court of another county, assigning as a reason for making it, that it appears that the cause had been improperly brought in the court. If this reason was unfounded in fact, it would not invalidate the order which the court had power under the statute, Va. Code, ch. 174, § 3, p. 7., to make; and to which there was no exception. *Muller v. Bayly*, 21 Gratt. 521.

F. CHANGE BY CONSENT.

The consent of all parties to the removal of a cause from one court having jurisdiction thereof to another court of like jurisdiction is equivalent to a motion by such parties for such removal, and the guardian ad litem of infant parties may give such consent for the infants. *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249.

G. ORDER CHANGING VENUE.

The defendant was indicted for a felony in the circuit court of a certain county, and the court for a good cause, sent the case to the circuit court of another county to be tried at the particular term of said court. The circuit court of the county to which the case had been transferred, doubted its competency to try the case at that term, which was a special one, and continued the case until the next regular term of the court, and the prisoner was afterwards tried there and convicted. It was held, that the circuit court of the county from which the case had been transferred, had no power to direct the case to be tried at any particular term, but should only have made an order that the venue should be changed from the former county to the latter. *Brooks v. Com.*, 4 Leigh 669.

H. CHANGE OF VENUE SUBSEQUENT TO ABATEMENT.

See generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

The court having by an order entered in said cause after the suit was abated removed the cause to a court in another circuit, there to be heard and deter-

mined, which court proceeded therein to make a decree, settling the rights of the parties, and decreeing a sale of the defendants' lands. It was held, all such proceedings in said cause subsequent to said abatement are void. *Chapman v. Maitland*, 22 W. Va. 330.

IV. Proceedings after Change.

A. CERTIFICATION OF RECORD.

Copy of Record of Examining Court.

—The act of assembly which directed that on a change of the venue in a case of felony, the judge shall certify the recognizances, together with a copy of the record of the case, "and all other papers which he may deem necessary to the trial," did not require that the judge should certify a copy of the record of the examining court. *Vance v. Com.*, 2 Va. Cas. 162. See generally, the title RECORDS.

B. FAILURE OF CLERK TO MAKE COPY OF RECORD.

When a case has been removed from one court to another, although the clerk of the former court has not made the copies of rules and orders required by § 3318 of the Virginia Code of 1904, yet, where it appears that the whole record was before the circuit court when it decided the case, the court of appeals will not presume that the case was heard and decided in the lower court in the absence of any of the papers in the case. *Bell v. Farmville*, etc., R. Co., 91 Va. 99, 20 S. E. 942. See generally, the title RECORDS.

C. REARRAIGNMENT OF PRISONER.

A prisoner having been arraigned and pleaded in the county in which the offense was committed, need not be arraigned, nor required to plead, in the county to which the venue is changed. *Vance v. Com.*, 2 Va. Cas. 162.

D. CHANGED VENUE NO GROUNDS FOR PLEA TO THE JURISDICTION.

See generally, the title JURISDICTION.

The venue being changed from one county to another a plea that the murder was committed in former county, and that therefore the court of the latter county has no jurisdiction, is bad on demurrer. *Vance v. Com.*, 2 Va. Cas. 162.

E. EFFECT OF CHANGE.

Entire Cause Removed.—Where in a cause a petition is filed to obtain relief as to part of a fund in the hands of a receiver, under decrees in the cause, and that petition is removed for decision to another county, though there had been a final decree in the case, if it be doubtful whether the circuit court intended to remove the entire cause, or only the petition, it will be considered that the entire cause was removed, where necessary to administer full justice in the cause. *Baltimore, etc., R. Co. v. Vanderwerker*, 33 W. Va. 191, 10 S. E. 289.

Character in Evidence

See generally, the titles CRIMINAL LAW; EVIDENCE. As to the evidence of character in prosecutions for specific offenses, see the various specific offenses. As to evidence of character in civil proceedings, see the titles LIBEL AND SLANDER; MALICIOUS PROSECUTION. As to impeachment of character of witness, see the title WITNESSES.

CHARGE.—In *Radford v. Carwile*, 13 W. Va. 658, it is said: "The word **charge** in this case is used in a very vague and indefinite sense. It is said a married woman may **charge** her separate estate in like manner and to the same extent as a feme sole, but in the proper sense of the word **charge** a feme sole can **charge** her property only by executing an instrument, which creates a

specific lien, such as a deed of trust, or mortgage; but such is obviously not the meaning intended by the word **charge** as here used. If used in the sense of rendering her estate generally liable for a debt, then, when it is said 'a married woman may **charge** her separate estate in the same manner and to the same extent as a feme sole,' it must mean, that as a feme sole in contracting a debt thus **charges** all her property, no matter what was her intention, so a married woman in contracting a debt **charges** all her separate property, no matter what was her intention." See also, the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

Upon the meaning of this term as used in a statute prohibiting bankrupts from **charging** their estate, the court said: "The word **charge** has a specific technical and also a broad legal meaning, under which it includes any lien on property of any description. In construing a word susceptible of two meanings, the court will give it such construction as will render the law effective, and not nugatory. 3 Am. & Eng. Enc. Law, 118, note 3; 23 Am. & Eng. Enc. Law, 319, 362, 364; 1 Cooley, Bl. 59, 61, note 21. * * * In the section under consideration it is the 'legal effect or result,' rather than the instrument, which the legislature had in contemplation in using the words 'assignment,' 'transfer,' or **charge**, and it intended to cover thereby and include therein any transaction, of whatever kind or character, which an insolvent debtor might use or attempt to use to secure an appropriation of his property, or a part thereof, for the benefit of one creditor, to the exclusion or prejudice of his other creditors." Mack v. Prince, 40 W. Va. 324, 21 S. E. 1013, 1014.

In Nuzum v. Herron, 52 W. Va. 499, 44 S. E. 262, it is said: "Section 2, ch. 74, Code, 1899, defines what the word **charge** shall there be taken to mean. In that section it says: 'The word **charge** shall be taken to include every confessed judgment, deed of trust, mortgage, lien and encumbrance.'"

In Gordon v. Rixey, 76 Va. 699, it is said: "The lien of a vendor before a conveyance may be an interest in real estate, but afterwards it is a mere **charge**. It is not a property in the thing—neither a jus in re, nor a jus ad rem, but only a **charge** on the thing." See also, the title VENDOR'S LIEN.

Charge—Jury.—See the title JURY.

In Dillworth v. Com., 12 Gratt. 702, it is said: "In Ward v. State, 1 Humph. R. 253, decided by the supreme court of Tennessee, after the jury were sworn and impaneled, but before any witnesses were examined, it was discovered that several of the jury were not freeholders; and on the motion of the attorney general, he was permitted to challenge the jurors on account of their disability. They were set aside, against the consent of the prisoner, and others were substituted in their place, and the prisoner convicted. And it was held, that the prisoner was thereby discharged. The court said that after the jury were sworn, it was too late to challenge any of its members propter defectum; that a jury could not be discharged after they were sworn and **charged**; that the word **charged** did not mean after the jury were sworn and had heard the testimony, or a part of it, but after the prisoner had been placed in the hands of the jury for trial; and that the discharge of the jury after they were sworn and so **charged**, against the consent of the prisoner, operated his discharge."

Charge of Court.

See the title INSTRUCTIONS.

Charge of Debts and Legacies.

See the title MARSHALING ASSETS AND SECURITIES.

CHARGING LIEN.—See the title ATTORNEY AND CLIENT, ante, p. 145.
And see *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

CHARITIES.

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CROSS REFERENCES.

See the titles BENEFICIAL AND BENEVOLENT ASSOCIATIONS, ante, p. 344; COLLEGES AND UNIVERSITIES; EQUITY; GIFTS; INTERPRETATION AND CONSTRUCTION; JURISDICTION; RELIGIOUS SOCIETIES; TAXATION; TRUSTS AND TRUSTEES; WILLS.

I. Definitions and Distinctions.

"A Charity."—"A charity," in a legal sense, may be more accurately described as a gift to be applied, consistently with existing laws, for the benefit

of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assist-

ing them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable. *Episcopal Ed. Soc. v. Churchman*, 80 Va. 718.

Charities may be, and indeed must be, for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. *Episcopal Ed. Soc. v. Churchman*, 80 Va. 762, quoting from *Old South Soc. v. Crocker*, 119 Mass. 23.

Charitable Use.—A charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well doing or the well being of social man. *Episcopal Ed. Soc. v. Churchman*, 80 Va. 762, quoting from *Ould v. Washington Hospital*, 95 U. S. A. 311.

Charitable Purpose.—The assistance of the indigent members and families of its members of an association is a charitable purpose, where the revenues of the association are wholly applied to paying its current expenses, and in such case it is not necessary that the purposes should be universal. *Petersburg v. Petersburg Ben. Ass'n*, 78 Va. 431.

Charitable Trust.—A charitable trust is simply an indefinite or uncertain trust, a trust without a beneficiary. *Knox v. Knox*, 9 W. Va. 148.

Charitable Trusts Distinguished from Gifts to Corporations Authorized by Charter to Receive.—“Charitable trusts,” should be carefully distinguished from gifts to corporations, which are authorized by their charters, or other statutes, to receive and hold property, and apply it to objects which fall within the general designation of charitable. Such gifts are permitted in the states where the peculiar doc-

trine of “charitable trusts” has been abrogated, and they are regulated by the general rules of law applicable to all corporations, or by the provisions of the individual charter. *Episcopal Ed. Soc. v. Churchman*, 80 Va. 731.

II. Creation.

In *Baker v. Baker*, 53 W. Va. 165, 44 S. E. 174, the following provision appeared in a will under construction: “21. I will that the balance of my lands not willed shall be sold and the money given to my wife for charitable purposes. I will that the balance of my bonds not sold shall be collected and the money given to my wife for charitable purposes.” Held, that the wife took the money bequeathed absolutely, the words “for charitable purposes” being mere precatory words containing no demand or instruction, but leaving the whole matter in the discretion of the legatee. See the title TRUSTS AND TRUSTEES.

III. Legislative Control.

Charitable Corporation.—Charitable corporations are “quasi public” in nature, and being created for public purposes are subject in all respects to the state’s control. *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 5 S. E. 25.

Changing Beneficiary.—A by a certain clause of his will bequeathed all the residue of his estate, after the payment of certain bequests, to the Virginia Literary Fund; and he died in 1861. The legislature of the restored government of Virginia on December 20, 1862, passed an act, by which they appropriated this residuary fund to the Brooke Academy, which was essentially a private educational institution, though incorporated by an act of the legislature of Virginia, passed January 10, 1799. Held, that the act of December 20, 1862, so far as it attempted to make an appropriation of the residuary fund, was unconstitutional, null and

void. *Trustees of Brooke Academy v. George*, 14 W. Va. 411.

Funds Dedicated for Public Use.—Funds dedicated to public uses are entirely within the scope of the legislative powers of the general assembly, and acts of legislation changing the custody of such funds, and directing payment thereof to the new custodian, and the execution of a release to the debtor are held invalid, and binding on all affected thereby. *Prince William School Board v. Stuart*, 80 Va. 64.

IV. Chancery Jurisdiction.

Early Virginia Doctrine.—The general powers of a court of equity over charitable bequests has been a subject of much uncertainty, and has given rise to two lines of cases in direct conflict, one denying that courts of chancery exercised at common law any general jurisdiction over charities, and declaring that such powers as these courts have were given by 43 Elizabeth and that 43 Elizabeth, if it ever existed in Virginia, was repealed in 1792, with the result that charitable bequests, except in so far as made certain by statutory provisions, which are very limited in Virginia, are void for vagueness and uncertainty. This doctrine was first declared in Virginia in the year 1832, in the case of *Gallego v. Attorney General*, 3 Leigh 450, which case followed the doctrine as set forth in *Baptist Ass'n v. Hart*, 4 Wheat. (U. S.) 1, decided by Marshall, C. J., in 1819; *Gallago v. Attorney General*, 3 Leigh 450, was followed, and the doctrine therein approved, by a long and continuous line of cases down to the year 1885, including *Seaburn v. Seaburn*, 15 Gratt. 423; *Brooke v. Shacklett*, 13 Gratt. 301; *Kelly v. Love*, 20 Gratt. 124; *Janey v. Latane*, 4 Leigh 327; *Literary Fund v. Dawson*, 1 Rob. 402; *Bible Soc. v. Pendleton*, 7 W. Va. 79; *Knox v. Knox*, 9 W. Va. 124; *Carskadon v. Torreyson*, 17 W. Va. 43; *Brown v. Caldwell*, 23 W. Va. 187;

Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302. See the title EQUITY.

Later Virginia Doctrine.—The doctrine of *Gallego v. Attorney General*, 3 Leigh 450, however, was overruled in *Episcopal Ed. Soc. v. Churchman*, 80 Va. 718, decided in 1885, which latter case was approved in *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318 (1889), and *Gallego v. Attorney General*, 3 Leigh 450, was directly overruled. And in both cases *Baptist Ass'n v. Hart*, 4 Wheat. (U. S.) 1, which was the basis of decision in *Gallego v. Attorney General*, 3 Leigh 450, was disapproved and the later case of *Vidal v. Girard*, 2 How. (U. S.) 127, decided in 1844, and overruling *Baptist Ass'n v. Hart*, 4 Wheat. (U. S.) 1, was approved. According to these decisions chancery courts had general jurisdiction over charitable bequests at common law, independently of the statute of 43 Elizabeth, this statute merely creating an auxiliary remedy to encourage and enforce charities, and not conferring any new power.

Present Virginia Law—Original Doctrine Restored.—The doctrine as expounded in *Episcopal Ed. Soc. v. Churchman*, 80 Va. 718, continued to be the law until 1897, when this case and *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318, were themselves overruled, and the original doctrine as set forth in *Gallego v. Attorney General*, 3 Leigh 450, was restored by the decision in *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. 446. In the course of the opinion the court declared that the dicta in the cases of *Episcopal Ed. Soc. v. Churchman*, 80 Va. 718, and *Trustees v. Guthrie*, 86 Va. 128, 10 S. E. 318, announce views contrary to a long line of decisions of very able judges; and although this line of decisions may have been based upon erroneous views as to the powers of courts of chancery over charities at common law, and as to the extent to which the statute of 43 Elizabeth had been or was in force

in this state, still those decisions had settled the law upon the subject, except as changed by the legislature from time to time.

V. Beneficiaries.

A. IN GENERAL.

Parol Evidence to Identify.—Where the person or object referred to in a bequest is uncertain, or imperfectly described, or where there are two or more objects which answer the description equally well, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used. *Roy v. Rowzie*, 25 Gratt. 599; *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318; *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389. See the titles PAROL EVIDENCE; WILLS.

Incorrectly Named.—In a suit to construe a will leaving a legacy to "the secretary of the board of foreign missions of the Presbyterian Church in the United States," and known as the "Southern Presbyterian Church," it was proved by parol testimony that the testator had been a member and elder in a Presbyterian church which was part of the corporation known as the "Southern Presbyterian Church," and was specially interested in foreign missions, and had said he meant to leave a legacy for that cause. The court held, that the legacy was not void for uncertainty of the beneficiary, but should pass to the corporation for the use of the executive committee of foreign missions. *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318; *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

Mistake in Name Does Not Defeat Bequest.—Where the name or description is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not defeat the bequest; and the same rules apply to corporations as well as individuals.

Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302.

Not in Existence.—A bequest "to the school commissioners and their successors of South Farnham district, Essex county, for the schooling of the poor children of that district, to be put out at interest, and the interest only applied for the schooling of said poor children," was held to be void, there being school commissioners for that county, who, however, did not form a corporate body; and there being no school commissioners of South Farnham district, nor indeed any such district, that being the name only of an ancient parish. *Janey v. Latane*, 4 Leigh 327.

B. PERSONS DESIGNATED BY GENERAL CLASSES.

Widows.—A bequest of money to be distributed among "needy, poor and respectable widows" is void by reason of the uncertainty of beneficiaries. *Gallego v. Attorney General*, 3 Leigh 450.

Youths Unable to Pay Teachers' Fees.—A testator devised and bequeathed to his executors real and personal estate, for the purpose of creating three seminaries of learning, in certain places specified, and directed that any surplus of the property given for that purpose should "be used for the education of such youths as are not able to pay teachers' fees." Held, that the devise and bequest were void for uncertainty as to the beneficiaries thereof. *Literary Fund v. Dawson*, 10 Leigh 147.

Other Persons in Distress.—In *Hill v. Bowman*, 7 Leigh 650, it is said, that "it is agreed on all hands that the words 'any other person or persons who may be in distress,' are too vague and uncertain, and that the declaration of trust as to such persons is altogether inoperative and void."

C. PARTICULAR CAUSES AND PURPOSES.

Promotion of Religion.—A bequest

to a wife for life or during her widowhood, to use as much thereof as she thought fit, and the balance, on her death, to go to a missionary society, is not rendered invalid for uncertainty by a provision that such society should expend the money on the Indian mission. *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357.

Propagation of Gospel.—Neither is a devise void for uncertainty of devisee, which gives the estate "to the propagation of the Gospel in foreign lands." *Carpenter v. Miller*, 3 W. Va. 174.

Foreign Missions.—A direction that a bequest shall be expended on a foreign mission, named, does not avoid the bequest for uncertainty. *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357.

Educational Purposes—Schools.—A devise of lands and personal estate to trustees for the establishment and support of a school, although void at common law, is made legal by the act of April 2, 1839 (Va. Code, 1887, §§ 1420, 1421), providing for the validity of endowments to schools, and declaring that gifts, grants, or devises for literary purposes shall be valid. *Kelly v. Love*, 20 Gratt. 124; *Kinnaird v. Miller*, 25 Gratt. 107; *Roy v. Rowzie*, 25 Gratt. 607. See generally, the title SCHOOLS.

Repairing Cemetery.—A bequest of realty and personalty in trust, with provision that it be sold and invested, and proceeds devoted solely to repairing and keeping in good order a cemetery, is void because it creates an indefinite trust. *Knox v. Knox*, 9 W. Va. 124.

Establishment and Support of Churches and Chapels.—A testator directed that in case a certain Roman Catholic chapel should be continued at the time of his death, \$1,000 be paid towards its support; and directed that, if the Roman Catholic congregation should come to a determination to build a chapel at Richmond, \$3,000 should be paid towards its accomplish-

ment; and devised a lot in Richmond to four trustees in fee, upon trust, to permit all and every person belonging to the Roman Catholic Church, as members thereof, or professing that religion, and residing in Richmond at the time of his death, to build a church on the lot for the use of themselves and all others of that religion who might thereafter reside in Richmond. Upon information filed by the attorney general in chancery, to enforce the charitable bequests and devise, it was held, that they were uncertain as to the beneficiaries, and therefore void. *Gallego v. Attorney General*, 3 Leigh 450. See also, ante, "Chancery Jurisdiction," IV.

D. CORPORATIONS.

Where Corporation Not in Esse.—"Wherever a devise or bequest is made to a corporation, to be afterwards, within a period not too remote, created by law for the purpose of carrying into effect a charitable intention of the testator, expressed in his will, the same may be good and valid as an executory devise or bequest, and will become absolute and executed, if, and when, such a corporation shall be created accordingly." *Kinnaird v. Miller*, 25 Gratt. 107; *Literary Fund v. Dawson*, 10 Leigh 147; *Literary Fund v. Dawson*, 1 Rob. 402.

No Charter of Incorporation Intended.—A devise of land to certain persons as trustees to build a school-house for the purpose of a free school, and further extending the education of poor children, the testator not contemplating that a charter of incorporation shall be obtained for it, is null and void at law, on the ground of the uncertainty of the beneficiaries intended. *Stonestreet v. Doyle*, 75 Va. 356.

Executory Trusts—Perpetuities.—The corporation "must of necessity be created, if at all, within the period prescribed by law in regard to per-

petuities; that is, within the term of a life or lives in being and twenty-one years thereafter." *Kinnaird v. Miller*, 25 Gratt. 107; *Literary Fund v. Dawson*, 10 Leigh 147.

When Trust Personal.—When the trust is to be executed by the executor, and is personal, the limitation is not too remote, as in such case it is only limited by life or lives in being. Therefore, when the executor is to obtain an act from the legislature the contingency of its passage is within life or lives in being and is not too remote. *Literary Fund v. Dawson*, 1 Rob. 402.

When Trust Official.—An executory trust in executors being official, violates the rule against perpetuities, and is void, and there is no limitation of the time of its execution. It could be executed by an administrator de bonis non with the will annexed, a century hence, as well as now. *Literary Fund v. Dawson*, 1 Rob. 402.

Foreign Corporations.—Foreign corporations may take bequests of charities, under a will made in this state, when and to the extent authorized by their charters. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *Roy v. Rowzie*, 25 Gratt. 599. See also, *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389. And see post, "Theological Seminaries," V, E.

E. THEOLOGICAL SEMINARIES.

Domestic Theological Seminary.—A will contained the following provision: "I have subscribed \$2,000 towards the founding of an academy in or near the town of Martinsburg, to be under the control and direction of the presbytery of Winchester (old school), which, if not sooner paid by me, I hereby direct my executor first of all to pay, out of the proceeds of the aforesaid land (in Pennsylvania), as soon as the same may come into his hands, to such a person or persons as the said presbytery may authorize to receive the same, the sum of \$2,000." The bequest was

held to be void as for the use of a "theological seminary," within the exception to Va. Code, 1849, § 2 (Va. Code, 1887, § 1420), authorizing bequests for educational purposes. *Bible Soc. v. Pendleton*, 7 W. Va. 79.

Foreign Theological Seminary.—A bequest to an incorporated theological seminary located in another state is valid if the corporation is authorized to take by will and the amount of the bequest is within the charter limit. *Roy v. Rowzie*, 25 Gratt. 599.

VI. Contributors—Donors.

A. CONTROL OF FUND.

Where contributors have subscribed to a fund for a charitable purpose and have paid it over to the hands by which it is to be received and applied, their interest and control over it cease and determine, and whatever jurisdiction is thereafter entertained by the courts with respect to the disposition and control of this fund, must be called into active exercise either by the attorney general, acting on behalf of the public, or by the trustee charged with its custody and administration, or, by some person having a beneficial interest in the object of the trust. *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

Misappropriation.—*Clark v. Oliver*, 91 Va. 421, 22 S. E. 175, is also authority for the proposition that where money is contributed for a certain purpose, in trust, the contributors can not require trustees to account for a misappropriation of the trust fund, merely because the trustees appropriated a part of the fund for a church.

B. RESULTING TRUST.

Where the whole interest of a donor in a fund devoted to charity has passed out of him, and the charity fails, there is no resulting trust to the donor and his heirs. *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

But in *Venable v. Coffman*, 2 W. Va. 310, the court seems to establish a con

trary doctrine. The view expressed in that case is, that where the purpose for which it was created fails, by reason of the organization to which it was donated ceasing to exist, the charity reverts to the donor or his heirs.

When Trust Fails to Vest.—The trust having failed by reason of partial invalidity, the intention can not be carried out, and the heirs are entitled to come in and claim lands devised on such trusts, in absence of other provisions. *Com. v. Levy*, 23 Gratt. 21.

VII. Trustees.

A. WHO MAY BE TRUSTEE.

1. Unincorporated Association.

A devise to an unincorporated association as trustee is a good devise. *Charles v. Hunnicutt*, 5 Call 311.

But a bequest to the trustees of a church or unincorporated religious society is void. *Mong v. Roush*, 29 W. Va. 119, 11 S. E. 906.

2. Corporations.

A private corporation may take a bequest in trust for religious uses. *Episcopal Ed. Soc. v. Churchman*, 80 Va. 718.

3. Trustee for Poor.

A charity given to the minister and vestry, in trust for the poor of a parish, vests in the overseer of the poor for the parish, when there ceases to be a minister and vestry. *Richmond County v. Tayloe*, Gilmer 336.

B. RIGHTS.

When Selection Discretionary.—When the testator leaves the mode of investing the fund discretionary with the trustee, a court of equity should not interfere by directing the manner of investment. *Richmond County v. Tayloe*, Gilmer 336.

The court in *Richmond County v. Tayloe*, Gilmer 336, further said, that the court would not interfere to control the discretion of the trustee, unless in case of manifest incapacity to

carry out the trust, or some failure or abuse.

Misappropriation — Division.—Where money was contributed to establish an industrial school for colored youths, the contributors can not require trustees to account as for a misappropriation of the trust fund, merely because the trustees appropriated a part of the fund for a church. *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

C. ESTOPPEL.

Acceptance of a trust estops the trustee from denying the title of him from whom such trustee holds. Such trustee can set up no claim to the property against the beneficiary under the trust. *Morris v. Morris*, 48 W. Va. 430, 37 S. E. 570.

VIII. Devises and Bequests.

Expounded Liberally.—Devises in favor of charities, and particularly those in favor of liberty, should be expounded liberally. *Charles v. Hunnicutt*, 5 Call 311.

Agencies for Carrying Out Bequest Changed.—Where agencies have been appointed for carrying out a bequest, such agencies being but a secondary consideration with the testator, the object being consistent with the constitution and laws, the bequest is valid, though the agencies existing at the time of the bequest have since been changed. *Kinnaird v. Miller*, 25 Gratt. 107.

Statute Authorizes "Conveyances," Not "Bequests."—The W. Va. Code, 1899, ch. 57, § 1, which authorizes "conveyances of lands" for the residence of a minister, does not authorize a bequest. *Bible Soc. v. Pendleton*, 7 W. Va. 79.

Future Devises.—Va. Code, 1849, ch. 77, § 8 (Va. Code, 1887, § 1398), which provides that "conveyances, and devises which have been made, and conveyances of land which shall hereafter be made to charitable uses, shall be valid,

etc.," does not include future devises. *Seaburn v. Seaburn*, 15 Gratt. 423.

Exemption from Taxation.—Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, this exemption does not include a tax on a devise or bequest of property to such institutions. *Miller v. Com.*, 27 Gratt. 110.

IX. Taxation.

Constitutionality of Property Exemption.—The constitution of Virginia, 1869, art. 10, § 3, empowered the legislature to exempt all property from taxation which was "used exclusively for state, county, municipal, benevolent, charitable, educational and religious purposes." The grant of power to exempt all property used for the purposes enumerated, was held to carry with it the power to exempt property, the proceeds of which were devoted to any of those purposes. Hence the Va. Code, 1873, ch. 33, § 14, and acts amendatory thereof. See Va. Code, 1887, §§ 457, 488), exempting from taxation property owned by benevolent associations, were constitutional and valid. *Petersburg v. Petersburg Ben. Ass'n*, 78 Va. 431.

X. Procedure.

A. FORUM.

The general jurisdiction of chancery embraces all questions arising upon legal bequests, for charitable uses or otherwise. *Elcan v. Lancasterian School*, 2 Pat. & H. 53.

B. PROCESS.

It has been held, that a writ of mandamus will not lie in the case of a private eleemosynary institution, if there be a visitor. *Bracken v. Visitors of William & Mary College*, 3 Call 573.

C. PARTIES.

1. Trustees.

A bill may be filed by trustees or

one of them asking the aid of a court of equity. *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

When Beneficiary.—Trustees of a college, interested as beneficiaries in a will, may file a bill in equity to enforce their rights under the will. *Trustees E. & H. College v. Shoemaker College*, 92 Va. 320, 23 S. E. 765.

2. Beneficiary.

A bill may be filed in equity by any beneficiary of a trust, calling upon the court to compel its due execution. *Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

D. EVIDENCE.

Beneficiary or Subject Uncertain.—Where the person or object referred to, or the subject matter of the bequest is uncertain, or imperfectly described, or where there are two or more objects, which answer the description equally well, resort must be had to parol evidence and the surrounding circumstances, to show what the testator intended by the expressions which he used. *Roy v. Rowzie*, 25 Gratt. 599; *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. 318; *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193.

Collateral Inheritances.—A succession tax is not a "tax on property," and hence does not fall within the statute exempting charitable institutions from taxation. See *Schoolfield v. Lynchburg*, 78 Va. 371; *Peters v. Lynchburg*, 76 Va. 930; *Miller v. Com.*, 27 Gratt. 110; *Eyre v. Jacob*, 14 Gratt. 423. See also, *Plummer v. Coler*, 178 U. S. 115.

Devise to Charitable Institution.

Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, this exemption does not include a tax on a devise or bequest of property to such institutions. *Miller v. Com.*, 27 Gratt. 110.

CHARTER.—See the titles **BANKS AND BANKING**, ante, p. 254; **CONSTITUTIONAL LAW**; **CORPORATIONS**; **STOCK AND STOCKHOLDERS**.

In *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1003, it is said: "A **charter** of incorporation is a franchise which is defined to be 'a royal privilege, or branch of the king's prerogative subsisting in the hands of a subject.' 2 Bl. Comm. 37; *Bank v. Earle*, 13 Pet. 595."

In *Dew v. Judges of Sweet Springs*, 3 Hen. & M. 22, it is said: "Judge Buller informs us that the writ of mandamus is, in England, a prerogative writ, issuing out of the court of K. B. (as that court has a general superintendency over all inferior jurisdictions and persons), and is the proper remedy to enforce obedience to acts of Parliament, and to the king's **charters**, and in such case is demandable of right. (Bull. N. P. 199.) Under the term **charters**, are comprehended all grants from the crown, whether of lands, honours, franchises, or aught besides. (2 Blac. Com. 346.) Under this description then, all commissioners granted by the crown, whereby any person is authorized to hold, and exercise any public office whatsoever, come under the general head of the king's **charters**."

"The word **charter** is here used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature, or in articles of association, or in either of these, taken in connection with the general laws of the state." *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 38 S. E. 653, 661, 54 L. R. A. 536, 87 Am. St. Rep. 805.

Charter Party.

See the title **SHIPS AND SHIPPING**.

Chastity.

See references under **CHARACTER IN EVIDENCE**, ante, p. 788. See the titles **RAPE**; **SEDUCTION**.

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CROSS REFERENCES.

See the titles ATTACHMENT AND GARNISHMENT, ante, p. 70; DEEDS OF TRUST; FRAUDULENT AND VOLUNTARY CONVEYANCES; SALES.

I. Definition.

A mortgage is only an equitable security for the payment of money. *Amber v. Warwick*, 1 Leigh 195.

Thus a bill of sale, or any contract

in writing not under seal, but designed to operate as a security, has been held by the courts to be a mortgage of goods and chattels. *Rauch v. Oil Co.*, 8 W. Va. 36.

II. Distinguished from Other Instruments.

A. DEED OF TRUST.

1. Distinctions.

In *Ambler v. Warwick*, 1 Leigh 195, Brooke, P., said, "If (as was insisted) a deed of trust was, in all respects, as regards the jurisdiction of the court, nothing more than a mortgage, it would be admitted, that, in every case, resort might be had to a court of equity, to adjust the rights of the parties under it. But they are essentially different. A mortgage is only an equitable security for the payment of money; and the moment the property in it is forfeited to the mortgagee, by a failure to pay the money, and to comply with its terms, it exclusively belongs to equity, to relieve against it upon a bill to redeem, or to adjust the rights of the parties on a bill to foreclose. The mortgagor has an inherent equity in the contract itself, which it belongs to the court of equity, exclusively, to take cognizance of; an equity which follows the mortgage in whosever hands it may be. But it is not so in the case of a deed of trust. That is a legal security for the payment of money, etc., recognized as such by statute law. The property in it, is not liable to forfeiture, in any event, as in the case of a mortgage. There is nothing in it against conscience, to give a court of equity jurisdiction. The trustee may sell the property in it, and execute the trust confided to him by the parties to it; and having done so, in pursuance of the deed, there is nothing for a court of equity to act on. Neither the debtor nor the creditor can come into the court, on the contract in the deed alone, as in the case of the mortgage. If either come into the court, it must be on ground foreign to the deed. Each party has a right to insist on the execution of the trust by the trustee. Having the legal title to the property, under the deed, his

remedy to get possession of it is adequate at law; or, on his declining to sue there, the cestui que trust may, in his name, recover the property at law, in order that it may be administered by the trustee, according to the terms of the deed." See the title **DEEDS OF TRUST**.

2. When Construed to Be Mortgage.

A paper purporting to be a deed of trust, reciting a corporation as grantor, and having affixed thereto the following attestation: "Witness the signature and seal of William Scott, president of said Blennerhassett Oil Co., and who is legally authorized by the board of directors of said company to make this grant, this date aforewritten. William Scott. (Seal)," is not the deed of the corporation, but such paper, however, relating merely to goods and chattels, is valid, as a mortgage against creditors and subsequent purchasers, from the time that it is duly admitted to record in the county where the property embraced in said paper may be, under § 5, ch. 74, W. Va. Code, 1899. *Rauch v. Oil Co.*, 8 W. Va. 36.

B. PLEDGE.

In *Neill v. Rogers*, 41 W. Va. 37, 23 S. E. 702, the court said: "Upon the question as to the effect of the transfer of a bill of lading Mr. Justice Bradley, in delivering the opinion of the court in the case of *Casey v. Cavaroc*, 96 U. S. 477, says: 'The difference ordinarily recognized between a mortgage and a pledge is that title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge; and, if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual; it may be constructive, as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case the act done will be considered as a token, standing for actual delivery of

the goods. It puts the property under the power and control of the creditor. In some cases such constructive delivery can not be effected without doing what amounts to a transfer of the property also. The assignment or a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case there is a union of two distinct forms of security, that of a mortgage and that of a pledge; mortgage by virtue of the title, and pledge by virtue of the possession." See the title PLEDGE AND COLLATERAL SECURITY.

C. CONDITIONAL SALE.

1. Distinctions.

"In *Robertson v. Campbell*, 2 Call 421, Judge Pendleton says: 'It is often a nice and difficult question to draw the line between mortgages and conditional sales. But the great desideratum, which this court has made the ground of their decision, is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated and the price fixed; or whether the purpose was a loan of money, and a security or pledge for the repayment intended.' In *Earp v. Boothe*, 24 Gratt. 374, Christian, J., speaking for the court on this same subject, said: 'Generally speaking, the difference between them is that the one is a security for a debt, the other a purchase for a price paid, to become absolute in a particular event; or a purchase accompanied by an agreement to resell upon particular terms.' And in *Jones on Chattel Mortgages*, § 33, the author, after saying that wherever it appears that the parties intended a conditional sale, and not a mortgage, the instrument will be so construed, says: 'Notwithstanding the leaning of the courts in favor of construing an instrument, which leaves the

intention of the parties in doubt, to be a mortgage rather than a conditional sale, there is no difference in point of law between a sale for a price paid, or to be paid, to become absolute on the happening of a particular event, and a purchase accompanied by an agreement to resell upon certain agreed terms. In both cases the sale is to be regarded as conditional, and if the condition which is to defeat it be not promptly performed, in the one case the title will not vest in the vendee, and in the other it will be divested.' To the same effect is the current of authority." *McComb v. Donald*, 82 Va. 909, 5 S. E. 558. See generally, the title SALES.

"If the intention of the parties is to do something more than provide a security for money loaned or advanced, and to make a conditional sale, if a further sum is advanced or the first sum is not repaid, there is certainly no rule of law which authorizes a court to control that intention." *Moss v. Green*, 10 Leigh 265.

Evidence.—In some cases parol evidence has been admitted for the purpose of explaining away a mortgage into a conditional sale. *Moss v. Green*, 10 Leigh 270.

2. What Constitutes.

A being in want of money, B, his friend, applies to C to lend it, which the latter refuses, but says he will advance the money upon condition that A will let him have a particular slave at a fair value. A conversation ensues as to the value of the slave, and \$600 is fixed on as a fair price. Whereupon C agrees that if A will convey the slave to him, he will advance the money that is wanted, and if it is returned at Christmas with interest, he will release the slave, and if it is not returned by that time, he will make it \$600, and keep the slave. A, being informed of this proposition, declares himself willing to comply with it, and

observes that the slave is the one he preferred to sell, and that he thinks \$600 a fair price. Afterwards A and C go together to a scrivener, and request him to write a conditional bill of sale for the slave, which he writes accordingly, and it is thereupon executed by A. It expresses on its face that A, in consideration of \$393.89 cents, which is paid to him, has bargained and sold the slave to C with the following conditions; to wit, if A shall pay to C the sum of \$393.89 cents on or before December 25 following, with lawful interest from the date, then the conveyance is to be void; but if A shall fail to return the said sum and interest on or before December 25, he obliges himself, upon C's paying him the sum of \$206.11 cents (which makes up the \$600), to deliver to C the slave, and make him a complete title. A, failing to make payments on or before December 25, C gets possession of the slave, and insists that the transaction is a conditional sale, which he can make absolute by paying the \$206.11 cents; whereas A contends it is a mortgage, which he may redeem by paying the \$393.89 cents with interest. Held, the transaction is a conditional sale, and not a mortgage. *Dissentientibus*, Tucker, P., and Brooke, J. *Moss v. Green*, 10 Leigh 251.

C. gave an instrument of writing to T., stating that C. had received of T. £30, and had put into the hands of T. a slave, as security, and that if the £30 were not paid on or before the certain day, T. was to have the slave for the £30. Held, under the evidence in the cause, to be a conditional sale, which became absolute on the failure of C. to pay the £30 on the day specified in the instrument. *Chapman v. Turner*, 1 Call 280.

D. BILL OF SALE.

1. Distinctions.

Under certain circumstances, a bill of sale, though absolute on its face,

will be deemed a mortgage, the true question always being whether a purchase of the property, or a loan of money or forbearance of a debt were intended, and circumstances proving the bill of sale to have been intended as a mortgage, were gathered from other writings and acts of the parties. *Dabney v. Green*, 4 Hen. & M. 101. See *Curtin v. Isaacsen*, 36 W. Va. 391. 15 S. E. 171.

No act of a scrivener can turn that which was intended as a mortgage, into an absolute sale, so as to preclude a redemption, and so it must not be permitted to designing men to turn a real, though defeasible sale into a mortgage, without the free consent of the other contracting party. *Chapman v. Turner*, 1 Call 287.

Upon a question whether a deed is to be considered as a mortgage, or an absolute purchase, a court of equity governs itself by the intention of the parties; and if the former appears to have been intended, the court will not suffer it to be turned into a purchase by any form of words, so as to preclude a redemption. The deed in this case is in aspect, form, and expense, a mortgage. No price was contemplated or agreed upon; the grantor retained the possession, and there is a covenant for payment of the money; and though interest is not mentioned, yet the principal debt being payable on demand, it bore interest from the date. In the case of a purchase, the vendee takes possession, in lieu of interest, and if there be a condition to repurchase, it is done on payment of the principal only, unless the contrary is stipulated. *Thompson v. Davenport*, 1 Wash. 125.

Evidence.—"In many cases parol evidence has been freely admitted to prove an absolute sale in form to be a mortgage in fact, and in some has been admitted for the much more questionable purpose of explaining away a mortgage into a conditional sale

(*Chapman v. Turner*, 1 Call 280)." *Moss v. Green*, 10 Leigh 270.

2. When Construed to Be Mortgages.

L. executes a bill of sale of a slave to B. which bill of sale, though absolute on its face, was in fact intended as a mortgage; the bill of sale, though intended as a mortgage, was never recorded; and possession of the slave was never delivered to or acquired by the vendee, and could not be at the time the deed was executed, the slave being then a runaway; but the vendor afterwards got possession of him, without the knowledge or consent of the vendee; and then sold him to C., a fair purchaser, for valuable consideration, without notice of the previous bill of sale to B. Held, that the bill of sale from L. to B. must be taken for what it was intended to be, a mortgage, which was void as against the subsequent fair purchaser, because it was not recorded. *Bird v. Wilkinson*, 4 Leigh 266.

An instrument appearing on its face to be an absolute bill of sale is admitted to have been intended only as a security for the sum of money therein mentioned, as the price of the property granted, will be treated and enforced as a mortgage. *Gold v. Marshall*, 76 Va. 668; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685; *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4; *Rauch v. Oil Co.*, 8 W. Va. 40.

III. What May Be Mortgaged.

A. PRESENT INTERESTS.

At law to constitute a valid sale the vendor must have a present property, either actual or potential, hence trees, grass, and corn growing and standing on the ground, fruit upon the trees, and wool upon the sheep's back may be mortgaged. *Brockenbrough v. Brockenbrough*, 31 Gratt. 592.

B. PROPERTY TO BE ACQUIRED.

1. At Law.

"It is a maxim of the common law

that a man can not grant a thing which he has not—*nemo dat quod non habet*. To constitute a valid sale at law the vendor must have a present property, either actual or potential, in the thing sold. *Smithhurst v. Edmunds*, 1 McCarter (14 N. J. Chy. Rep.) 409. It is said 'that things have a potential existence which are the natural product or the expected increase of something already belonging to the vendor.' 9 Bush. (Ky.) 319. Hence, trees, grass, and corn growing and standing on the ground, fruit upon the trees, and wool upon the sheep's back may be mortgaged. The legal title passes. *Idem*. There is conflict in the authorities as to whether unplanted or future crops—*fructus industriales*—can be conveyed so as to pass the title at law. It was held, in a recent case in the supreme court of New York, that while at law a mortgage or sale of future-acquired personal property, the mortgagor neither having acquired the thing nor the agent of its production at the time of making the contract, creates no valid subsisting property, yet if the future-acquired property be the product of present property in the mortgagor, as the wool growing on a flock of sheep, or the produce of a dairy, or of a farm, or anything of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law." *Brockenbrough v. Brockenbrough*, 31 Gratt. 592.

2. In Equity.

In *Brockenbrough v. Brockenbrough*, 31 Gratt. 592, the court said: "Upon the general doctrine in equity as to liens or charges upon after-acquired property, Mr. Justice Story in *Mitchell v. Winslow*, 2 Story 630, after an examination of the authorities says: 'It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real

or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy.’”

“There are cases to the effect that while a mortgage of unplanted crops does not operate to pass the legal title, yet in equity a lien attaches as soon as they are produced, which will be enforced.” *Brockenbrough v. Brockenbrough*, 31 Gratt. 592.

IV. Form and Requisites.

A. WRITING.

Any contract in writing not under seal, but designed to operate as a security, has been held to be a mortgage of goods and chattels. *Rauch v. Oil Co.*, 8 W. Va. 36.

B. SEALING.

“A mortgage does not *ex vi termini* import a sealed instrument, when applied to goods and chattels. And if a deed conveying goods and chattels in trust to secure a debt, or by way of mortgage, is made valid by the statute, it is not easy to perceive why an instrument in writing not under seal, but similar in language and purpose, is not made equally valid, under the name or head of “mortgage” contained in said fifth section. The objects of both instruments are the same, and the language of the statute sufficiently broad to cover them both. And notice of the status of the property being equally given by the recording of the paper, it is not seen that any prejudice can result to purchasers or creditors from the mere absence of a seal, which the statute does not absolutely require.” *Rauch v. Oil Co.*, 8 W. Va. 41.

C. DESCRIPTION OF PROPERTY CONVEYED.

See post, “As to Notice,” IV, G, 5, b.

Sufficiency of.—“Where there is a description of the property mortgaged, and the description is true, and, by the aid of such description and the surrounding circumstances, the third person would, in the ordinary course of things, know the property was mortgaged, the description should be held sufficient.” *Williamson v. Payne*, 103 Va. 557, 49 S. E. 660.

Thus a mortgage which describes the property as “one black mule six years old in the mortgagor’s possession in White county, Ark.,” has been held sufficient. Cattle described by their names, as registered in the “American Shorthorn Herd Book,” as eighteen head of two-year-old steers of various colors, also one span of heavy dark-bay mules, all kept on the premises of the mortgagor, whose residence was stated, has been held sufficient. But a description of cattle “as nineteen pure blood Hereford cattle,” giving their names, and stating their names were the same as recorded in the American Hereford Herd Book, was held to be too indefinite. A mortgage describing the property conveyed as “One dunn bull, known as the Grinnell bull. Said bull is four years old and weighs about two thousand, four hundred pounds,” has been held sufficient, when recorded, to constitute constructive notice. A recorded mortgage was held insufficient for that purpose which described the property as “one sorrel horse, three years old,” and makes the further recital that the mortgagor is a resident of a certain county, and in case of foreclosure the property was to be sold in that county. *Hardaway v. Jones*, 100 Va. 485, 41 S. E. 957.

In *Williamson v. Payne*, 103 Va. 557, 49 S. E. 660, the court, quoting from *Shaffer v. Pickrell*, 22 Kan. 619, said: “A chattel mortgage in which the de-

scription of the property is as follows: "Two hundred and fifty stock hogs owned by the said B. D. Mott, in Franklin county, Kansas," and which contains the provision that until default be made, or until such time as the mortgagees shall deem themselves insecure, the mortgagor, said Mott, is to continue in the peaceable possession of all the property, all of which, in consideration whereof, he engages shall be left in as good condition as the same now is, and taken care of at his own cost and expense, is not void for uncertainty."

Defective Description Aided by Other Parts of Instrument.—In *Williamson v. Payne*, 103 Va. 557, 49 S. E. 660, the court also quoted from *Estes v. Springer*, 47 Mo. App. 90, where it was held: "Notwithstanding the description in a chattel mortgage is faulty, in that it does not locate the property and does not state who is the owner, yet such default is cured where other portions of the instrument show the residence of the mortgagor, and that the property is in his possession, and that it shall not be moved from the county in which the mortgagor's residence is fixed, and that upon default it shall be sold in such county."

Extraneous Inquiry.—"The written description of personal property in mortgages, taken alone, rarely furnishes strangers adequate means of identifying the property, and information thus imparted must usually be supplemented or aided by extraneous inquiry." *Williamson v. Payne*, 103 Va. 556, 49 S. E. 660.

D. DESCRIPTION OF INDEBTEDNESS SECURED.

General Rule.—"It is not necessary to the validity of a mortgage, that it should truly state the debt it is intended to secure; but it shall stand as a security for the real equitable claims of the mortgagee, whether they

existed at the date of the mortgage, or arose afterwards upon the faith of the mortgage before notice of the defendant's equity." *McCarty v. Chalfant*, 14 W. Va. 546.

Misdescription.—In *Tingle v. Fisher*, 20 W. Va. 504, the court said: "In the case of *Shirras v. Caig*, 7 Cranch 50, Marshall, C. J., says of the description of the debt in that case: 'It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of thirty thousand pounds sterling due to all the mortgagees. It was really intended to secure different sums due at the time, to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount. It is not to be denied, that a deed, which misrepresents the transaction it recites, and the consideration, on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable, fairly and plainly to state the truth. But if upon investigation the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his equitable rights, unless it be in favor of a person, who has been in fact injured and deceived by the misrepresentation.'" See post, "Debt or Liability Secured," V.

Effect of Sum Stated on the Security in Evidence.—On its face the instrument, which is admitted to have been intended as a security, names a sum certain; that sum is *prima facie* the amount due the creditor, and the presumption must be repelled by the debtor. *Gold v. Marshall*, 76 Va. 668.

E. ATTESTING WITNESS.

Generally.—Under § 4, act of the general assembly, for regulating conveyances, passed December, 1792, all deeds of trust and mortgages of slaves,

or other personal estate are void against creditors and purchasers for valuable consideration, not having notice thereof, unless the same be either acknowledged by the party or parties, or proved by three witnesses, and thereupon duly recorded. *Moore v. Auditor*, 3 Hen. & M. 232; *Jennings v. Attorney General*, 4 Hen. & M. 424.

And if under this statute a deed be attested and proved by two witnesses only, it will be void as to creditors and subsequent purchasers without due notice. *Moore v. Auditor*, 3 Hen. & M. 232.

When Defect Immaterial.—A mortgage being attested by one witness only, and therefore defective (See 1 Rev. Code, ch. 90, § 1, 4, p. 157); yet, if the mortgagee has recovered upon it at law, a court of equity will not regard the defect. *Dust v. Conrod*, 5 Munf. 411.

F. ACKNOWLEDGMENT.

Under § 4, act of assembly, for regulating conveyances passed December 1792, all deeds of trust and mortgages of slaves, or other personal estate are void against creditors and purchasers for valuable consideration, not having notice thereof, unless the same be acknowledged by the party, or parties, who shall have sealed and delivered it, or proved by three witnesses, and thereupon duly recorded. *Moore v. Auditor*, 3 Hen. & M. 232.

G. RECORDATION.

1. Meaning of "Goods and Chattels" as Used in Act.

The words "goods and chattels" as used in the recording acts do not embrace choses in action, but only personal property, which is visible, tangible and movable. *Tingle v. Fisher*, 20 W. Va. 497.

2. Necessity.

The law now generally requires a record of all such instruments as chattel mortgages. *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 796.

Chapter 74, § 5, W. Va. Code of 1891, provides, that every deed of gift or deed of trust or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be. *Rauch v. Oil Co.*, 8 W. Va. 40; *Conaway v. Stealey*, 44 W. Va. 163, 23 S. E. 793. And see *McComb v. Donald*, 82 Va. 910, 5 S. E. 558.

All deeds of trust and mortgages of slaves, or other personal estate are void against creditors and purchasers for valuable consideration, not having notice thereof, unless duly recorded as provided by § 4, act of general assembly for regulating conveyances, passed December, 1792. *Moore v. Auditor*, 3 Hen. & M. 232. See *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171; *Bird v. Wilkinson*, 4 Leigh 266; *Moore v. Auditor*, 3 Hen. & M. 232.

A mortgage of chattels must be recorded in order to affect creditors, and purchasers without notice, but, if recorded, it will bind them. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

A writing importing an absolute sale of chattels, but in fact intended only to secure a debt, is a mortgage, and must be recorded as a mortgage of chattels to affect creditors and purchasers without notice, but, if recorded, it will bind them. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685; *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

3. Place of Recording.

See post, "Priority of Liens," VIII.

a. County or Corporation.

Generally—Change of Ownership.—

"The provision of the statute which declares that every deed of trust or mortgage conveying real estate or goods and chattels, shall be void as

to creditors until and except from the time it is duly admitted to record 'in the county or corporation wherein the property embraced in such contract or deed may be,' certainly can not be said to mean, by any proper construction, that the deed or mortgage must be recorded in that county or corporation where the chattel may happen to be at the moment the sale is consummated." *Lucado v. Tutwiler*, 28 Gratt. 39.

"The residence of the owner is the place where the property 'may be' in contemplation of the statute (ch. 114, Va. Code, 1873), and it is there that the mortgage is to be recorded. After the ownership is changed, and the property is removed to another county or corporation, then the mortgage must be within twelve months recorded in that county or corporation, in order to affect creditors with notice." *Lucado v. Tutwiler*, 28 Gratt. 39.

"The boat at the time of the sale was plying on the canal between Scottsville and Richmond. The fact that the boat at the time of the sale and mortgage was lying in the basin at Richmond, or was in motion on the canal, or lying at any of the landings in the several counties through which the canal passes, can make no difference. The locus of the boat was then in Fluvanna, and that was the place under the statute for the recordation of the mortgage. After the boat was delivered to Cox at Richmond, or carried by him to Richmond, its locus became Richmond, and there the mortgage was to be recorded in Richmond within twelve months. So that all the requisites of the statute were strictly complied with." *Lucado v. Tutwiler*, 28 Gratt. 39.

b. State—Conflict of Laws.

A chattel mortgage which is valid and duly recorded where it was executed, both as between the immediate parties thereto and against third persons, will be upheld by courts of a

sister state to which the property may be afterwards removed. *Craig v. Williams*, 90 Va. 500, 18 S. E. 899. See generally, the title CONFLICT OF LAWS.

And in the same case the court said: "It is said in 3 Amer. & Enc. Law, p. 190; 'The general rule is that a chattel mortgage which is valid under the laws of the state where it was executed, both as between the immediate parties thereto and as against third persons, will be so held by the courts of a sister state, to which the property may be removed. And if a mortgage is valid where it is made, and if it is executed and recorded according to the laws of the state or country of its execution, it will be enforced in the courts of another state or country as a matter of comity, although it is not executed according to the requirements of the law of the latter state; and this is because of the general principle that the law of the place of contract governs as to the nature, validity, construction, and effect of the contract, citing numerous authorities."

Foreign Mortgages.—"We have no express statutes in Virginia requiring foreign mortgages to be recorded, and the weight of authority is that in such case our recording acts do not apply to them." *Craig v. Williams*, 90 Va. 500, 18 S. E. 899.

A statute relating to the record of chattel mortgages has no application to a mortgage executed outside the state, unless it expressly so provides. *Craig v. Williams*, 90 Va. 500, 18 S. E. 899.

4. Time of Recordation.

The mortgage must be recorded at the residence of the owner, which is in contemplation of the statute, ch. 114, Va. Code, 1873, where the property "may be," and after the ownership is changed, and the property is removed to another county or corporation, then the mortgage must be within twelve months recorded in that county or corporation, in order to affect creditors

with notice. *Lucado v. Tutwiler*, 28 Gratt. 39.

All deeds of trust and mortgages must be proved by three witnesses, or acknowledged by the party and recorded within eight months, or they will be void as to creditors and subsequent purchasers, and they are only valid, as to such, from the time when they are fully executed. *Jennings v. Attorney General*, 4 Hen. & M. 424.

5. Effect of Recordation.

a. As to Nature of Instrument.

A deed of absolute sale of goods and chattels is recorded. Another writing, contemporaneous with it, operates to make such deed a mortgage, but it is not recorded. There is no delivery of possession of such goods and chattels. The recordation of such deed alone has no effect to render it effective as an absolute sale, nor to make the transaction valid as a mortgage, as to creditors of the grantor in such deed. *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171.

"In *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. 171, were two papers, a bill of sale and a paper declaring it but a mortgage; and it was held, that recording the bill of sale alone was ineffectual, but, if both had been recorded, they would have been good. That case does not decide this. There was in fact a second paper, which referred to and made part of it the bill of sale. The second paper was the true mortgage, and it was not recorded; or else both made the mortgage." *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

b. As to Notice.

Generally.—The law now generally requires a record of all such instruments as chattel mortgages, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of incumbrances. *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 796.

"The only parties who can claim to

be injuriously affected are unsecured creditors. But they are notified by the record of the exact relations between the mortgagor and the mortgagee; and surely subsequent creditors have no right to complain if they deal with the mortgagor with full knowledge of such relations. Existing creditors, may, of course, challenge the good faith of the transaction." *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793. See also, *Rose v. Burgess*, 10 Leigh 197.

No provision is made for recording a written sale of personalty, but a mortgage or deed of trust of personalty must be recorded, and the courts hold an absolute bill of sale intended only as a security for a debt to be a mortgage, there is a right to so record it as a mortgage, and its record is notice to creditors and purchasers. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

As Effected by Description.—A deed of trust or mortgage conveying chattels, when recorded, is constructive notice to third persons, if the description in the deed or mortgage is such as will enable them to identify the property, aided by the inquiries which the deed or mortgage itself indicates and directs. But a deed of trust on "four mules," which does not give their color, sex, size, age, from whom purchased, nor state where or in whose possession they are, nor mention the residence of the grantor, the trustee, or the beneficiary therein, does not give constructive notice under § 2468, Va. Code, 1904, to innocent third persons. *Hardaway v. Jones*, 100 Va. 481, 41 S. E. 957.

"The doctrine of *Hardaway v. Jones*, 100 Va. 481, 41 S. E. 957, is that a deed of trust or mortgage conveying chattels, constitutes constructive notice to third persons, when the description in the deed or mortgage is such as would enable them to identify the property, aided by the inquiries which the deed or mortgage itself indicates and di-

rects. And the court, in that case, at p. 485, observes: 'In no case that we have seen has the recordation of a deed of trust been held to be constructive notice, which contained no description of the animals conveyed except their number, which did not state in whose possession the property was, or where it was located or might be found, or where any party to the deed resided.' The converse of that proposition is also true, that the recordation of a deed which furnishes a stranger with the obvious means of identifying the property, which these deeds afford, does give constructive notice." *Williamson v. Payne*, 103 Va. 555, 49 S. E. 660. See the title DEEDS OF TRUST.

V. Debt or Liability Secured.

A. EXISTING DEBT.

As to the validity of mortgages for existing debts, there can be no doubt. *McCarty v. Chalfant*, 14 W. Va. 546.

B. FUTURE ADVANCES.

A mortgage bona fide made, may be for future advances as well as for present debts and liabilities, and will be valid between the parties as against subsequent purchasers after advances are made with constructive or actual notice of the mortgage, not only as to indebtedness at the execution of the trust, but also subsequent advances made on faith of the note subsequent to the execution thereof to the extent of the amount named in the notes. *McCarty v. Chalfant*, 14 W. Va. 531.

VI. Right to Possession of Mortgaged Property.

See post, "Effect of Vendor Having Possession and Right of Redemption," IX, G.

It is said in *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, that it is usual for mortgagors to remain in possession of the property conveyed under the mortgage.

Possession Not Adverse.—"Whether the mortgage be of real or of personal property, the retaining possession by the mortgagor is never looked upon as adversary to the mortgagee. If the subject be real, he is looked upon as a tenant at sufferance, whose possession is never held adversary to his landlord; if it is personal, he retains the possession from the implied character of the transaction. It is, in its nature, but a charge, a lien or incumbrance upon the property, for the security of the payment of money, or the performance of conditions (as in this case) at a future day. Until that time, it is implied, and sometimes it is so expressed, that possession shall remain with the mortgagor. Were it otherwise, it would be the case of a pledge, not of a mortgage. Were it otherwise, the transaction might be void for failure to deliver possession, under the doctrine of *Edwards v. Harben*, 2 T. R. 587." *Rose v. Burgess*, 10 Leigh 196.

Fraud upon Creditors.—See ante, "Recordation," IV, G.

Continuing in possession by a mortgagor of personal property, is not an evidence of fraud, if the mortgage appear to have been made upon a bona fide consideration, and was duly recorded. But the mortgagor having afterwards by deed released the equity of redemption to the mortgagee (which deed was not duly recorded) and still retaining the possession, such deed is void against creditors. *Clayborn v. Hill*, 1 Wash. 177.

But though, by the character of the transaction, the mortgagor is permitted to retain possession at the will of the mortgagee, he does not stand upon the footing of a loanee under the statute of frauds. He holds not by loan, but, by the character of the stipulation between the parties, his original possession remains undisturbed. No creditor or purchaser is deceived or defrauded. It is the duty of the party

who would trust the mortgagor on the credit of the property thus left in his possession, to look to the record; and there he would see, not indeed a recorded loan, but a recorded mortgage of the property itself. And the court referring to the holding of *Clayborn v. Hill*, 1 Wash. 177, says: "This decision is again recognized in *Glasscock v. Batton*, 6 Rand. 78. And in the case of *U. S. v. Hooe*, 3 Cranch 73, 88, Chief Justice Marshall, delivering the opinion of the court, asserts the same principles. After referring to the case of *Hamilton v. Russell*, 1 Cranch 310, as to absolute bills of sale, he says: 'But the difference is a marked one between a conveyance which purports to be absolute, and one which, from its terms, is to leave the possession in the vendor. If in the latter case the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right.' In *Hamilton v. Russell*, 1 Cranch 310, 316, he also says: 'The recording acts do not comprehend absolute bills of sale among those where the title may be separated from the possession, and yet the conveyance be valid if recorded;' implying thereby, that a recorded mortgage of personalty would be valid though the mortgagor retained possession. All this can only be upon the supposition that the retaining of possession is consistent with the true character of the deed, and with the universal understanding that the mortgagor is to hold the possession by the permission of the creditor, until he makes default. The holding possession at the will of the creditor is then not adversary but permissive, and no protection under the statute of limitations can ever be acquired from such holding, until, by lapse of time, payment is presumed, and when that is done, the possession

is taken to be adversary from the supposed date of payment, or a release is presumed to have been executed by the mortgagee, by reason of the discharge of the demand or the fulfilment of the stipulations." *Rose v. Burgess*, 10 Leigh 197.

But in *McComb v. Donald*, 82 Va. 907, 5 S. E. 558, it is said: "The same reason does not exist in cases of conditional sales, for making the property of one man liable for the debts of another, in whose hands it may be found, as in cases where the owner has sold or mortgaged to another property once possessed by him and yet retained possession of it, and, consequently, the rule of law should be different. For, whereas, in the former case, the change of possession at once puts third persons on inquiry as to the title, in the latter case there is not given to the world the usual evidence of a change of title; viz, possession, and there is nothing to put third persons upon inquiry. They have the right, therefore, to presume that the title remains with the vendor or mortgagor, as the case may be. In the last case, too, the retention of possession, after an absolute sale, is properly regarded as a badge of fraud; yet, even in such a case, since the case of *Davis v. Turner*, 4 Gratt. 423, this presumption is not conclusive, but may be rebutted by proof." See the title SALES.

In *Glasscock v. Batton*, 6 Rand. 78: Where a slave had been mortgaged, and afterwards sold absolutely to the mortgagee, but the bill of sale not recorded, and possession permitted to remain with the vendor, such sale is fraudulent, as against a subsequent purchaser; and equity will (under the particular circumstances), entertain such purchaser to recover the slave against the fraudulent vendee who had clandestinely gotten possession of him. Nor can such fraudulent vendee prevent a recovery, by showing that the

plaintiff did not take possession at the instant of the purchase; as such omission can not make good the fraudulent sale.

Certain persons having become the sureties of an executor in his executorial bond, a deed is made by him mortgaging slaves to them, upon condition that if he shall faithfully perform in all things his office of executor, then the deed shall be void; but the deed contains no clause providing that possession shall remain with him until default in the performance. The mortgagor, after the date of the mortgage, is in possession of the slaves for more than five years. Whereupon a creditor of his procures the slaves to be taken under execution and sold. And then, in less than five years after they are so taken, an action of detinue is brought by the mortgagees against a purchaser at the sale under the execution. Held, 1. The action is commenced in due time; and 2, the fact of possession remaining with mortgagor five years without demand made and pursued by process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds, the property is taken to be with the possession, and liable to the creditors of the person in possession. *Rose v. Burgess*, 10 Leigh 186. See generally, the title SLAVES.

VII. Confusion of Chattel Mortgage with Mortgage on Realty.

If machinery under mortgage is placed in a mill already mortgaged, it becomes subject to the realty mortgage, to the extent that is necessary to keep the security thereof unimpaired, so far as the personalty mortgage is concerned. If such machinery is mortgaged to its full value, and it will not damage the mill property by its removal, the mortgagee or purchaser may remove the same; otherwise, he must make good the damage

caused by such removal. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

The true equitable rule is stated in the case of *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, to wit: "A chattel mortgage is effectual to preserve the character of the mortgaged chattels, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate, or the buildings thereon. If the detachment would occasion some diminution in the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case." This rule is said to be firmly established in the interest of trade. That the realty mortgagee's security is kept whole is all that he can ask, as against the property of third parties. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

"When the mortgaged personal property is attached to the realty, the mortgagor has only an equity of redemption therein, to which the mortgage on the realty at once attaches." *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

Where machinery under mortgage is placed in a mill already mortgaged, if the mortgagee of the machinery is unable to identify the property covered by his lien, he can not have the benefit thereof. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237. See generally, the title MORTGAGES.

VIII. Priority of Liens.

See ante, "Bill of Sale," II, D; "Recordation," IV, G; "Confusion of Chattel Mortgage with Mortgage on Realty," VII.

As against Claim of Commonwealth—Jurisdiction.—The courts of chancery have jurisdiction in all cases where property taken in execution on behalf

of the commonwealth is claimed by any person under a mortgage or deed of trust, and if such mortgage or deed of trust be found not to have been duly recorded, may (notwithstanding no fraud be proved) decree the same to be void as against the claim of the commonwealth. *Moore v. Auditor*, 3 Hen. & M. 232.

As between Mortgages.—A mortgage of slaves is recorded in the county of A, the slaves being at the time of the execution and recording of the deed, in the county of B, and after the recording of the deed in A, the slaves are removed to A but the deed is not recorded anew there, after such removal; and then the mortgagor mortgages the same slaves to another person, and this mortgage is recorded in A where the slaves are at the time of the execution and recording thereof; held, upon the construction of the statute, 1 Rev. Va. Code, ch. 99, § 11, the first mortgage was not duly recorded, and so is void as against the second mortgagee. *Lane v. Mason*, 5 Leigh 520.

As against Judgment Creditors of Mortgagee.—A canal boat, which plied between Richmond and a point in Fluvanna county, was owned by one Tutwiler, who resided in said county. He sold the boat to Cox, who lived in Richmond, and took a mortgage thereon to secure the purchase money, which mortgage he forthwith recorded in Fluvanna county, and within twelve months thereafter in the city of Richmond. Between the dates of the recordation of the mortgage in the two places, judgment creditors of Cox issued fieri facias, under which the boat was seized at Richmond. Upon a bill filed by Tutwiler's administratrix to assert her (alleged) prior lien; held, that the mortgage in favor of her intestate was properly recorded, and she therefore had priority. *Lucado v. Tutwiler*, 28 Gratt. 39.

IX. Equity of Redemption.

See ante, "Bill of Sale," II, D; "Confusion of Chattel Mortgage with Mortgage on Realty," VII.

A. GENERALLY—JURISDICTION.

"The principle respecting mortgages and pawns in England, borrowed from the hypothecations and pignurations of the civil law, are well settled as to the right of redemption. Equity allows that redemption on this ground, that security for the debt being the object, no price for parting with it is contemplated; and as the subject pledged is usually of more value than the debt, it would be unjust that the mortgagor should lose his property, from his misfortune of not being able to pay the money at the day; whilst on the other hand, the creditor receiving his debt and interest, has what was his purpose to secure, and no injury is done him. A court of equity, therefore, allows redemption on a general principle adopted by that court, of relieving against all forfeitures where compensation can be made." *Chapman v. Turner*, 1 Call 292.

"If it was in its inception a mortgage, I agree that the court will not permit it to be converted into an absolute purchase, for the default in the payment of the mortgage money at the appointed time. The rule is, once a mortgage always a mortgage, to which the right of redemption is inseparably incident, and can not be restrained by any clause or agreement whatever made at the time of the loan." *Moss v. Green*, 10 Leigh 265.

In the case of mortgagor and mortgagee, in whomever the legal title and possession of the mortgaged subject may be, the equity of redemption in the mortgagor or his assignee, follows it, and can only be foreclosed in a court of equity. Not so in the case of a sale of property under a deed of trust, in pursuance of the deed. In such case, there remains no equity of redemption

any where. *Ambler v. Warwick*, 1 Leigh 205.

B. WHO MAY REDEEM.

1. General Rule.

See ante, "Generally—Jurisdiction," IX, A.

2. Bona Fide Purchaser from Mortgagor.

a. General Rule.

If the mortgagee of a slave recover him in detinue against a person claiming under a bona fide purchaser from the mortgagor, equity will consider such person, as standing in the place of the mortgagor, and entitled to redeem the slave by paying the debt. *Dust v. Conrod*, 5 Munf. 411.

It will, also, at the same time (to make an end of the controversy) give him relief against the mortgagor, who sold the slave with warranty of the title. *Dust v. Conrod*, 5 Munf. 411.

b. Effect of Submission to Arbitration.

In such case, the right of the derivative purchaser to redeem the slave, and to relief against the mortgagor, who improperly sold him, is not affected by his having submitted to arbitration, the suit brought against him by the mortgagee. *Dust v. Conrod*, 5 Munf. 411.

C. WAIVER.

"The general right of a mortgagor to redeem may be waived, however, or the party may come into court, asserting it under circumstances so unfavorable, that the door of the court of equity may be shut against him." *Dabney v. Green*, 4 Hen. & M. 101. See also, *Chapman v. Turner*, 1 Call 292.

D. EFFECT OF PURCHASE UNDER EXECUTION BY MORTGAGEE.

A mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, in general, deprive the mortgagor of the right of redemption. But, if such judgment and execution were upon an attachment against the mortgagor, as an abscond-

ing debtor, attempting to defraud the mortgagee of his security by removing the property out of the state, he shall not be permitted to redeem, under the influence of the maxim, "that he who hath done iniquity shall not have equity." *Dabney v. Green*, 4 Hen. & M. 101.

E. ACQUISITION OF EQUITY OF REDEMPTION BY MORTGAGEE—MERGER.

"The general rule is, that the mortgagee's acquisition of the equity of redemption does not merge the legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, if such appears to have been the intention of the parties and justice requires it. 1 *Jones on Mortgages*, § 380, and authorities cited in note (1). In the case of *Forbes v. Moffat*, 18 Ves. R. 384, 390, the master of the rolls, Sir William Grant says: 'It is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united.' And it is said that even where the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and mortgagee in the latter, it will still be upheld as a source of title wherever it is for his interest, by reason of some intervening title or other cause, that it should not be regarded as merged. 'This is based upon the presumption as matter of law,' says Chief Justice Bellows in the recent case of *Stantons v. Thompson*, 49 New Hamp., R. 272 (cited in 1 *Jones on Mortgages*, § 873), 'that the party must

have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and it is no matter whether the parties through ignorance of such intervening title, or through inadvertence, actually discharged the mortgage and cancelled the notes and really intended to extinguish them; still on its being made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title." *Brockenbrough v. Brockenbrough*, 31 Gratt. 587.

F. STATUTE OF LIMITATION.

"And, further, if it appear that a mortgage was really intended, the chancellor will not suffer the usual relief to be evaded, by any restrictive clauses inserted by the act of scribes. Against the redemption, the act of limitations does not run (if it does in any case in equity), but circumstances may bar it, manifesting a waiver of the right, or such a change in the state of things as would render the redemption iniquitous, instead of being equitable. But, as on the one hand, the chancellor will not permit a real mortgage to be made irredeemable by the act of a scrivener, so neither on the other, will he suffer real, conditional or defeasible sales to be changed into mortgages by the like acts. The real intention of the parties governs him." *Chapman v. Turner*, 1 Call 292.

G. EFFECT OF VENDOR HAVING POSSESSION AND RIGHT OF REDEMPTION.

If a sale of chattels capable of possession is really to secure a debt, thus constituting a mortgage, the right of redemption of such an interest in the seller as taken with his retention of possession, renders it so void. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

X. Attachment of Mortgaged Goods.

A chattel pawned or mortgaged is not attachable in an action against the pawner or mortgagor. *Neill v. Rogers*, 41 W. Va. 37, 23 S. E. 702.

XI. Foreclosure and Sale.

Sale of Property of Separate Mortgages.—When a mill and its machinery are subject to separate mortgages, and are sold under a decree of court, they should be offered for sale both separately and together, and then sold in which ever way they will bring the larger sum. If together they will bring a larger sum than when offered separately, the difference between the two sums will show the amount to which the realty mortgagee would be damaged by separate sale, while the personal mortgagee would be only entitled to what the personal property would bring if sold separately, because such is the extent of his mortgage. If they sell for more separately, it will show the extent of the damage they are to each other; while, if the mill should sell for less separately than when sold in connection with the machinery, it will show to what extent the removal of the machinery causes loss to the realty mortgagee, who is entitled to be made whole out of the personalty; otherwise, she would be damaged by the removal of the machinery without recompense, contrary to the law as before settled. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

Sale by Mortgagee.—If it be agreed between a mortgagor and mortgagee, that, in case the debt be not paid, the mortgagee may sell the property, and in consequence thereof, he sells (without proof of fraud), he is accountable to the mortgagor for the surplus of the sum, for which he sells, above the amount of the debt, with interest on such surplus until payment; but not

for profits, unless he appears to have received them previous to the sale, nor for the value of the property at any subsequent time. *Moore v. Aylett*, 1 Hen. & M. 29.

Property in the Hands of Third Person — Parties. — A decree being entered for the sale of mortgaged property of which a person not a

party to the suit is found to be in possession, a rule may be made upon such person; and, unless he shows a paramount right in himself, the property may be ordered to be delivered to the commissioners acting under the decree; and, if necessary, such order may be enforced by an attachment. *Com. v. Com.*, 2 Hen. & M. 8.

Chattels.

See the titles **FIXTURES; GIFTS; SALES; SLAVES; WARRANTY.**

Cheats.

See the titles **FALSE PRETENSES AND CHEATS; WEIGHTS AND MEASURES.**

Checks.

See the titles **ALTERATION OF INSTRUMENTS**, vol. 1, p. 310; **BANKS AND BANKING**, ante, p. 254; **BILLS, NOTES AND CHECKS**, ante, p. 401; **FORGERY AND COUNTERFEITING; PAYMENT.**

Chief of Police.

See the title **MUNICIPAL CORPORATIONS.**

CHILD—CHILDREN.—See the titles **BASTARDY**, ante, p. 334; **IMPUTABLE NEGLIGENCE; INFANTS; MARRIAGE; NEGLIGENCE; PARENT AND CHILD; PRESUMPTIONS AND BURDEN OF PROOF; SHELLEY'S CASE (RULE IN).** And see **FAMILY; HEIR, HEIRS AND THE LIKE; ISSUE.** And for many cases construing the terms as used in Wills, see the title **WILLS.**

In *Brett v. Donaghe*, 101 Va. 788, 45 S. E. 324, it is said: "As was said by Judge Buchanan in *Waring v. Waring*, 96 Va. 641, 32 S. E. 150: 'The word **children** has a definite legal signification, and where no other words are joined with it, it has in general no other meaning but issue in the first degree. In order that it may be construed to mean lineal descendants of a more remote degree, there must be something on the face of the will to show that it was so intended, for no rule is better settled than that technical words are presumed to be used technically, and that words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument.' *Moon v. Stone*, 19 Gratt. 130; *Jarman on Wills*, p. 156." See also, the title **WILLS.**

Grandchildren—Descendants.—In *Morris v. Owen*, 2 Call 520, it was held, that a power to appoint to **children** will not authorize an appointment to **grandchildren**. To the same effect, see *Hood v. Haden*, 82 Va. 595; *Hudson v. Hudson*, 6 Munf. 356. See also, the title **WILLS.**

In *Waldron v. Taylor*, 52 W. Va. 289, 45 S. E. 336, it is said: "Evidently the word **children** used in its common and ordinary sense was deemed by the leg-

lature not broad enough to include grandchildren and more remote descendants; hence, the change of words from children to descendants."

Adults.—As used in the statute providing for the naturalization, it has been held, that the term children meant minor children and did not include adults. *Dryden v. Swinburne*, 20 W. Va. 131.

Word of Limitation or Purchase.—See the title WILLS.

Child's Share.—Quære, if a testator direct that each of his children, upon separating from the family, shall have a child's share of the personal property, is it to be such part as he or she would have been entitled to in case of the father's intestacy? or is the whole to be divided among the children excluding the widow? or among the children and the widow, in such manner as to give her a child's part? *Branch v. Booker*, 3 Munf. 43. See also, *Crow v. Crow*, 1 Leigh 79. See generally, the title WILLS.

Child of a Child.—In *Otterback v. Bohrer*, 87 Va. 551, 12 S. E. 1013, it is said: "What is a child of a child?" When a father speaks of the youngest child of his child, or the youngest child of all his children, he can mean nothing else but his grandchild.

Child Stealing.

See the title ABDUCTION AND KIDNAPPING, vol. 1, p. 56.

Chilling Bidding.

See the title AUCTIONS AND AUCTIONEERS, ante, p. 179.

CHOSE IN ACTION.—See the titles ASSIGNMENTS, vol. 1, p. 745; CHAMPERTY AND MAINTENANCE, ante, p. 773; EXECUTIONS; TAXATION. And see such specific titles as BILLS, NOTES AND CHECKS, ante, p. 401; BONDS, ante, p. 507; etc.

The words "goods or chattels" used in § 2414, Va. Code, 1904, relating to gifts, do not apply to choses in action, but only to visible and tangible property. A chose in action is the money, damages of thing owing; the bond or note, etc., is but the evidence of it. *First National Bank of Richmond v. Holland*, 99 Va. 495, 39 S. E. 126.

In *First National Bank of Richmond v. Holland*, 99 Va. 503, 39 S. E. 126. it is said: "A chose in action is defined by Kent as a personal right not reduced into possession, but recoverable by a suit at law. Money due on bond, note, or other contract, damages due for breach of contract, for the detention of chattels or for torts, are included under this general head or title of things in action. 2 Kent's Com. (11th Ed.), marg., p. 351. Any right which has not been reduced to possession, is a chose in action. 1 Parsons on Contracts, ch. 14, § 1. A chose in action is the money, damages or thing owing; the bond or note, etc., possession. *Purdue v. Jackson*, cited by Judge Allen in *Yerby v. Lynch*, 3 Gratt. 494." See also, *Williams v. Sloan*, 75 Va. 144.

Illustrations.—The right of a former owner of real estate, forfeited for the nonpayment of taxes, to the excess of the sum for which the land may be sold over taxes and costs, is a chose in action. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 808.

A wife's earnings regarded as choses in action. *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 638.

In *Effinger v. Hall*, 81 Va. 107, it is said: "This question was very fully discussed in *Harcum v. Hudnall*, 14 Gratt. 369, and it was there held, that where

land is devised to be sold, and the proceeds distributed, the land, as respects the legatees, is deemed in equity a mere chose in action."

A balance in bank to the credit of a depositor is, strictly speaking, a chose in action. *Koss v. Kastelberg*, 98 Va. 278, 36 S. E. 377.

City script or orders are choses in action. *Whitaker v. Charleston Gas Co.*, 16 W. Va. 717.

In *Lee v. Hill*, 87 Va. 503, 12 S. E. 1052, it is said: "The contract in question, as it is described in the declaration, was property, or specific personal estate. It gave the right, upon the performance of a stipulated service, to receive certain wages, or, in other words, it was a chose in action, which is comprehended within the term 'estate.'"

Christianity.

See the titles COMMON LAW; CONSTITUTIONAL LAW; RELIGIOUS SOCIETIES; SUNDAYS AND HOLIDAYS.

Churches.

See the titles CHARITIES, ante, p. 790; RELIGIOUS SOCIETIES.

Church Property.

See the title RELIGIOUS SOCIETIES.

CIDER.—See *State v. Oliver*, 26 W. Va. 425; *State v. Haymond*, 20 W. Va. 21. And see the title INTOXICATING LIQUORS.

Cigarettes.

See the titles INTERSTATE COMMERCE; LICENSES.

Circuit Courts.

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Circuitry of Action.

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CIRCUMSTANTIAL EVIDENCE.

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I. Competency.**A. IN GENERAL.**

Circumstances which tend to prove an offense, and to connect a prisoner with it, may be given in evidence against him. *Davis v. Com.*, 99 Va. 838, 38 S. E. 191.

Circumstantial evidence is legal and competent in criminal cases, and, if it is so strong as to exclude every reasonable hypothesis, other than the prisoner's guilt, is entitled to the same weight as direct testimony. *Longley v. Com.*, 99 Va. 808, 37 S. E. 339.

Latitude Allowed in Reception.—

Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. *Cluverius v. Com.*, 81 Va. 861.

To Establish Trust.—Circumstantial evidence may be introduced to show that where land is purchased by the husband, and the deed taken in the name of the wife, no gift is intended, but a trust results therefrom. *Deck v. Taber*, 41 W. Va. 332, 23 S. E. 721.

B. PARTICULAR CIRCUMSTANCES.

The surrounding circumstances constituting parts of the *res gestæ* may always be shown to the jury along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of

his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of more particular description. *State v. Abbott*, 8 W. Va. 754.

Tools and Instruments.—It is always pertinent to show, as one element connecting an accused person with the crime charged, that he possessed the tools and instruments by which the crime had been committed. *Nicholas v. Com.*, 91 Va. 748, 21 S. E. 364.

Conduct and Feelings of Prisoner.—

"In cases of homicide it has always been competent to show the conduct and the feelings of the prisoner toward his victim, and proof that he had made previous threats, or attempts to kill his victim has always been received." *Nicholas v. Com.*, 91 Va. 748, 21 S. E. 364. See the title HOMICIDE.

Letters and Notes.—Where the evidence established that the deceased left Bath for Richmond on the 12th, assigning as her reasons for leaving, the contents of a letter then exhibited and read, and that early on the 14th, she was found dead in Richmond, under circumstances indicating she had been murdered, that letter was admissible in evidence for the prosecution, as part of the *res gestæ*, or of those acts—verbal, or written, or done—which stand in causal relation to the crime. And so, likewise, a note addressed on the 13th of the month in the handwriting of the deceased, from room No. 21 of the hotel in Richmond, to the accused, under circumstances indicating it was written by the deceased to the accused

in answer to a note addressed to the occupant of that room, is admissible as part of the *res gestæ*, and also for the purpose of identifying that occupant with the deceased, and of showing that she was in communication with him on the day of her death. *Cluverious v. Com.*, 81 Va. 787. See the title *HOMICIDE*.

Threats and Previous Attempts.—On a trial for homicide, antecedent threats and previous attempts to take the life of the deceased are competent evidence both on the question of deliberation and of premeditation. And where it is shown that the deceased came to his death by drowning, while in company with the accused, it is competent to show that shortly theretofore the accused stated to the friends and relatives of the deceased that deceased had heart disease and was liable to die at any time. The *corpus delicti* was sufficiently proved in this case to admit circumstantial evidence tending to connect the accused with the crime. *Nicholas v. Com.*, 91 Va. 742, 21 S. E. 364.

Conduct of Accused.—In all cases of circumstantial evidence the conduct of the accused is always an important factor in the estimate of the weight of circumstances which point to his guilt. *Dean v. Com.*, 32 Gratt. 923.

Conduct Respecting Funds.—Upon an indictment against S., the secretary of a building fund association, for the larceny of a check, the property of said association, the records of the association whilst he was in office, and oral evidence relating to the organization, objects and business of the building association, the appointment and duties of S. as secretary, his conduct with respect to the funds of the association in his hands, and his disposition and appropriation of the check, for the larceny of which he was indicted, are competent evidence against him. *Shinn v. Com.*, 32 Gratt. 899.

II. Weight and Sufficiency.

A. IN CRIMINAL CASES.

1. In General.

If circumstantial evidence is so strong as to exclude every reasonable hypothesis other than the prisoner's guilt, it is entitled to the same weight as direct testimony. *Longley v. Com.*, 99 Va. 808, 37 S. E. 339. See also, *Russell v. Com.*, 78 Va. 400.

A person charged with crime may be convicted on circumstantial evidence alone, if the jury believe from such evidence, to a moral certainty and beyond a reasonable doubt, that the defendant is guilty of the crime alleged against him. *State v. Sheppard*, 49 W. Va. 585, 39 S. E. 676.

Time, Place, Motive.—Where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of the crime, it must produce a moral, if not absolute, certainty of his guilt. *State v. Baker*, 33 W. Va. 319, 10 S. E. 658; *Dean v. Com.*, 32 Gratt. 912.

Failure to Assert Alibi.—The failure unexplained to assert the defense of an alibi when it could first be made, and if true, would be conclusive, is always regarded by the best writers on circumstantial evidence as a most suspicious circumstance. *Dean v. Com.*, 32 Gratt. 925.

Compared to Chain.—"The effect of a body of circumstantial evidence (says Mr. Wills) is sometimes compared to that of a chain,' but the metaphor is obviously inaccurate, since the weakest part of a chain is of necessity the strongest. Such evidence is more aptly compared to a rope made up of many slender filaments twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose." *Dean v. Com.*, 32 Gratt. 927; *State v. Baker*, 33 Va. 317, 10 S. E. 658.

2. Should Exclude Every Hypothesis but Guilt.

In order to convict a person of crime upon circumstantial evidence, it is essential that the circumstances should to a moral certainty exclude every hypothesis but that of guilt. *State v. Flanagan*, 26 W. Va. 122; *State v. Sheppard*, 49 W. Va. 611, 29 S. E. 676. *Johnson v. Com.*, 29 Gratt. 817. See the title REASONABLE DOUBT.

"It is essential that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can or can not be ascertained. It is, on the other hand, of a conclusive nature and tendency, when the probability in favor of the hypothesis exceeds all limits of an arithmetical or moral nature." *State v. Flanagan*, 26 W. Va. 122.

If any of the essential circumstances be consistent with the hypothesis of the innocence of the accused, then that circumstance ought not to have any influence in establishing the main fact to be proved. *State v. Flanagan*, 26 W. Va. 117.

The test of the sufficiency of circumstantial evidence is that the facts which the jury accept as proved can be reasonably accounted for only on the hypothesis of the prisoner's guilt, that they are consistent with his guilt, and point to it so clearly as to satisfy the jury of it beyond a reasonable doubt. *Davis v. Com.*, 99 Va. 838, 38 S. E. 191.

3. Received with Caution.

Circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to

produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt. *Dean v. Com.*, 32 Gratt. 912; *Grayson's Case*, 6 Gratt. 712; *Johnson v. Com.*, 29 Gratt. 796; *Hatchett v. Com.*, 76 Va. 1026; *Cluverius v. Com.*, 81 Va. 816; *Anderson v. Com.*, 83 Va. 326, 2 S. E. 281; *Finschim v. Com.*, 83 Va. 689, 3 S. E. 343; *Prather v. Com.*, 85 Va. 122, 7 S. E. 178; *State v. Sheppard*, 49 W. Va. 610, 39 S. E. 676. See *State v. Baker*, 33 W. Va. 319, 10 S. E. 639. See also, the title REASONABLE DOUBT.

It is altogether circumstantial. In the very outset two things must be borne in mind. First, that circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt; but, secondly, it must also be remembered that there are some crimes committed with such secrecy that to require the production of a witness who saw the act committed would be to defeat public justice, to deny all protection to society, to let the greatest offenders go free, and the most heinous crimes go unpunished. *State v. Baker*, 33 W. Va. 319, 10 S. E. 658.

While circumstantial evidence is often stronger and more satisfactory than direct evidence, yet it is the well-established rule that in a criminal case circumstantial evidence ought to be acted on with the utmost caution. *Grayson's Case*, 6 Gratt. 712. *Anderson v. Com.*, 83 Va. 326, 2 S. E. 281.

4. Proof of Circumstances.

Where the criminal agency of the accused is to be established by circumstantial evidence, it can only be

done by proving the circumstances. *Nicholas v. Com.*, 91 Va. 748, 21 S. E. 364.

Proof of Every Essential Element.—

In order to warrant a conviction for crime on circumstantial evidence every essential fact or circumstance upon which conviction depends must be proved by competent evidence beyond a reasonable doubt. *Porterfield v. Com.*, 91 Va. 804, 22 S. E. 352; *State v. Sheppard*, 49 W. Va. 610, 39 S. E. 676.

Chief Justice Shaw, in Webster's case, laid down the rule on the subject as follows: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence as if each were itself the main act." *Porterfield v. Com.*, 91 Va. 804, 22 S. E. 352.

If a party be accused of crime and a conviction is sought upon evidence in whole or in part circumstantial, it is essential, that all the circumstances, from which the conclusion is to be drawn, and without which it could not be drawn, shall be established by full proof, and every circumstance essential to the conclusion must be proved in the same manner and to the same extent, as if the whole issue had rested upon the proof of each individual and essential circumstance. *State v. Flanagan*, 26 W. Va. 117.

B. IN CIVIL CASES.

1. To Establish Negro's Right to Freedom.

The right of freedom, *prima facie*, acquired by a slave imported into this state, subsequent to the year 1786, could only be obviated by evidence adduced to show, or by circumstances authorizing a presumption, that the oath required by law had been taken by the importer. *Garnett v. Phillis*, 5 Munf. 543. See generally, the title SLAVES.

2. To Prove Fraud.

Circumstantial evidence is not only sufficient to establish fraud, but, on account of the secrecy of fraudulent transactions, is often the only evidence that can be obtained. *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Saunders v. Parrish*, 86 Va. 593, 10 S. E. 748; *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822; *Hazelwood v. Forrer*, 94 Va. 703, 27 S. E. 507; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *White v. Perry*, 14 W. Va. 66; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022. See also, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Fraud may be established by circumstantial evidence as well as by direct testimony, but, in either case, it must be clearly and satisfactorily proved. It will not be presumed from doubtful evidence, or circumstances of suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475.

Fraudulent intent in a conveyance may be shown by either direct or circumstantial evidence, and such circumstantial evidence, though only circumstantial, is sufficient if it lead a reasonable man to the conclusion that such fraudulent intent existed. *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892.

Fraud may be established by circumstantial evidence as well as by direct and positive proof, and in most cases circumstantial evidence is the only proof that can be adduced. A transaction, however, may of itself and by itself furnish proof of fraud so conclusive as to outweigh the answer of the defendant, and even the evidence

of witnesses. *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792.

Fraud is to be legally inferred from the facts and circumstances of the case, where those facts and circumstances are such as to lead a reasonable man to the conclusion that a conveyance was made with intent to hinder, delay or defraud creditors, either prior or subsequent. *Hunter v. Hunter*, 10 W. Va. 321.

Fraud must be both charged and proved. It may be proved by circumstantial evidence; but the evidence must be such as to satisfy the chancellor that the conveyance was not made in good faith, before he can so declare. *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748.

The question of the due execution of a will is to be determined like any other, in view of all the legitimate evidence in the case; and no controlling effect is to be given to the testimony of the subscribing witness. Their direct participation in the transaction must of course under ordinary circumstances give great weight to their testimony; but it is liable to be rebutted by other evidence either direct or circumstantial. *Webb v. Dye*, 18 W. Va. 376. See generally, the title *WILLS*.

When P. & K. dissolved, K. assumed all firm debts. P. informed plaintiff, who held firm's note, urging him to push K. Plaintiff, however, continued to sell to K. P. then gave plaintiff his bond for individual indebtedness, and offered him land to pay this and firm debt. The offer was refused. P. conveyed the land to his brother, to pay a debt of equal value. Plaintiff sued to set aside the conveyance as fraudulent. It was held, the facts did not show fraud. *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748.

Husband, as wife's agent, bought goods by false statements as to his means. Within three months they

granted all the goods in her store at M. in trust to secure alleged debts to her father and brother. The latter had no visible means and returned on oath his property for taxation at five dollars. Nearly seven thousand dollars' worth of goods down to about one thousand five hundred dollars, in her store had disappeared, and also numerous trunks of husband. Father had carried numerous new trunks full of something and had shipped large quantities of goods, out of his line, by rail to his store in N. C., and plaintiff's clerks had identified those goods sold by them to defendant; it was held, evidence ample to stamp the trust deed as fraudulent. *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129.

3. To Prove Payment on Bond.

Where a nonnegotiable note or bond is given by a debtor to his creditor for an existing debt, such bond or note is prima facie not a conditional payment but collateral security for such debt; though it may be shown, by either direct or circumstantial evidence to have been intended by the parties to be an absolute or conditional payment. *Hoge v. Vintroux*, 21 W. Va. 1. See also, *Sayre v. King*, 17 W. Va. 562.

III. Instructions.

See generally, the title *INSTRUCTIONS*.

The jury may be properly instructed and that they have the right to convict upon circumstantial evidence in a case in which the evidence is circumstantial, if, from it, they believe the defendant is guilty. *State v. Sheppard*, 49 W. Va. 585, 39 S. E. 676.

An instruction, that in cases of circumstantial evidence the time, place, manner, opportunity, motive and conduct must concur in pointing to the prisoner as the guilty agent, is not improperly modified by charging that all these circumstances, or such of them as may be proved with other

facts, if any, must so concur. *Sutton v. Com.*, 85 Va. 128, 7 S. E. 323.

In a case where the evidence is entirely circumstantial, it is error in the court to instruct the jury that circumstantial evidence is often more reliable than the direct testimony of eyewitnesses, and that a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony

of eyewitnesses where memory must be relied upon, and where passions and prejudices may have influenced them, for the reason that it institutes a comparison between the two kinds of evidence mentioned, and instructs the jury as to the comparative weight of circumstantial evidence. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

Citation.

See the titles EXECUTORS AND ADMINISTRATORS; SERVICE OF PROCESS; WILLS.

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III. Expatriation, 826.

CROSS REFERENCES.

See the titles ALIENS, vol. 1, p. 291; CIVIL DEATH; CIVIL RIGHTS; CONSTITUTIONAL LAW; DESCENT AND DISTRIBUTION; HOME-STEAD EXEMPTIONS; JURY; REMOVAL OF CAUSES; SLAVES.

I. Who Are Citizens.

Code Provision.—The Virginia Code provides that all persons born in this state, all persons born in any other state of this union, who may be or become residents of this state; all aliens naturalized under the laws of the United States, who may be or become residents of this state; all persons who have obtained a right to citizenship under former laws; and all children, whenever born, whose father, or, if he be dead, whose mother, shall be a citizen of this state at the time of the birth of such children, shall be deemed citizens of this state. Va. Code, 1904, ch. 6, § 39. See

Towles' Case, 5 Leigh 743; *Baker v. Wise*, 16 Gratt. 213.

Residents.—"In the case of *Gassiss v. Ballow*, 6 Peters R. 761, it was held by Chief Justice Marshall, that a citizen of the United States residing in any state of the union is a citizen of that state." *Baker v. Wise*, 16 Gratt. 213. See also, the title CONSTITUTIONAL LAW.

Within the meaning of the removal act the word resident is not equivalent to the word citizen. *Clarke v. Figgins*, 27 W. Va. 663. See also, the title REMOVAL OF CAUSES.

Residence alone does not constitute citizenship. *Guarantee Co. v. First*

Nat. Bank, 95 Va. 480, 28 S. E. 909. But see *Baker v. Wise*, 16 Gratt. 214.

If the word resident is treated as a mere synonym of "citizen" then there would be a discrimination in favor of foreigners against native Virginians, who had expatriated themselves from the state, or who were merely sojourning in any other of the United States, without having abandoned their domicile in Virginia, or who were domiciliated in any foreign country, without having yet become citizens thereof. *Baker v. Wise*, 16 Gratt. 214.

Residence at Time of Revolution.—When the people of Virginia renounced the government of Great Britain and declared themselves independent, it would seem that all persons then actually and permanently domiciliated in Virginia, even although hostile to the revolution, were members of the community, and must be considered as citizens, bound and protected by her laws, and owing allegiance to her government, unless they elected to adhere to their former allegiance, within a reasonable time; and that, from necessity, and from the principles of all government, whilst those who were then permanently domiciliated in Great Britain, whether born there or in Virginia, not being members of the Virginia community, nor bound by the laws, nor capable of the protection of Virginia, could not, therefore, be considered as her citizens, unless they elected within a reasonable time to adhere to Virginia. *Barzizas v. Hopkins*, 2 Rand. 278.

Negroes.—"In the case of *Dred Scott v. Sanford*, 19 How. 393, the supreme court of the United States decided that a negro, though he might be a freeman, was not and could not be a citizen." Quoted in *State v. Strauder*, 11 W. Va. 803, overruled as to other questions in *Strauder v. West Virginia*, 100 U. S. 303. See also, the title CIVIL RIGHTS.

And by the Virginia Code of 1849, p. 61, it is declared, that all free white per-

sons born in this state, all free white persons born in any other state of this union, who may be or become residents of this state, all aliens being free white persons naturalized under the laws of the United States, who may be or become residents of this state, etc., shall be deemed citizens of this state. *Baker v. Wise*, 16 Gratt. 213.

But negroes are made citizens of the United States by the fourteenth amendment to the constitution. *Kinnaird v. Miller*, 25 Gratt. 117. See also, *Strauder v. West Virginia*, 100 U. S. 303, overruling *State v. Strauder*, 11 W. Va. 803. See also, the title CONSTITUTIONAL LAW.

Person Permanently Domiciled in Virginia.—It seems very clear, that an individual permanently residing in Virginia and domiciled here, and who is entitled to all privileges and immunities of citizens of this state, can not be regarded otherwise than as a citizen of the state. *Com. v. Towles*, 5 Leigh 749. See also, *Baker v. Wise*, 16 Gratt. 213.

Persons Born in Foreign Country.—Persons born in a foreign country, of parents also born in foreign countries, are not citizens of Virginia. *Barzizas v. Hopkins*, 2 Rand. 276. See also, the title ALIENS, vol. 1, p. 291.

Corporation.—Whilst a corporation may, by its agents, transact business anywhere, unless prohibited by its charter, or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter. *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445. See also, the title CORPORATIONS.

Proof of Citizenship.—The question of citizenship may be decided, after a great lapse of time, by facts and circumstances leading to a presumption that a foreigner had actually become a citizen. *Nalle v. Fenwick*, 4 Rand. 585. See also, the title PRESUMPTIONS AND BURDEN OF PROOF.

II. Naturalization.

Preference Given to Negroes.—In *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262, it was said that persons of African blood enjoy a preference in regard to naturalization over persons of white blood.

Races Excluded from Naturalization.—Under the naturalization laws of the United States, the children of the Indians, Mongolians and Filipinos, unless one of their parents was an African, and not a white person, can not be admitted to citizenship in this country (§ 2169, Rev. Stat., U. S., 16 Am. & Eng. Enc. Law, 225). *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

When Naturalization of Father Affects Son.—By § 2172 of the Revised Statutes of the United States if a father be naturalized, while the son is under the age of twenty-one years, and while the son is residing in the United States, the son will be considered a citizen of the United States; but if at the time of the naturalization of the father the son is over twenty-one years of age, such son can not be considered a citizen though the father was naturalized prior to the first day of December, 1873, when said Revised Statute of the United States went into operation. *Dryden v. Swinburne*, 20 W. Va. 90.

Irregularity in Naturalization Order.—It is improper to look behind an order of a court of record admitting a foreigner to citizenship, for any irregularity in the previous proceedings, unless the irregularity be such as to show plainly that the requisitions of the act of congress have not been complied with; therefore, where the record of the previous declaration made by the party, omits to state that it was made on oath, and that it included a renunciation of allegiance to foreign princes, etc., such omission does not invalidate the subsequent act of natu-

ralization founded on such previous declaration. *Com. v. Towles*, 5 Leigh 743.

Certificate as to Oath.—Certificate of naturalization states the party "took the oath in such case required by the act of congress." It was held to import that he took the oath required in the very words prescribed by the statute, and so the act of naturalization is good. *Com. v. Towles*, 5 Leigh 743.

Facts and Circumstances to Prove Naturalization.—Where it is unknown, when an alien was naturalized, and it is impossible to produce the record of his naturalization, it will under some circumstances be presumed by proof of facts, which could not well have existed, unless he was naturalized. But to presume under such circumstances that one has been naturalized, is a very different proposition from saying that when the record book is produced, by which his naturalization must appear, if he ever was naturalized, the court will permit it to be in effect contradicted by parol evidence tending to show that he was naturalized, when the record shows that he was not. *Dryden v. Swinburne*, 20 W. Va. 123.

Parol Evidence.—The law requires that an alien should be naturalized in a court of record, and his admission to citizenship must be a judgment of such court; and therefore if it is claimed in any case, that an alien has been naturalized in a certain court, and it be shown, that if naturalized at all, he was naturalized in that court, and the records of such court are produced, and an examination of them shows, that no entry was made on the records of such court naturalizing such alien, it can not be proven by parol evidence, that he was admitted to citizenship in such court, but that by inadvertence or for any other reason there was no entry made of it; nor can the citizenship of an alien under such circumstances be

presumed by proof of his having held real estate or of his having voted or held office, or by other circumstances. *Dryden v. Swinburne*, 20 W. Va. 90. See generally, the title EVIDENCE.

When Person Becomes Naturalized.

—No court has any power or authority in naturalizing an alien to declare in its order, that such alien shall be held to be a citizen from a time preceding the making of the order; and if it makes such declaration its act is unauthorized and void, so far as this declaration is concerned and he is a citizen only from the time when such order was made. *Dryden v. Swinburne*, 20 W. Va. 91.

III. Expatriation.

Power of State to Regulate.—Nature has given to all men the right of relinquishing the society in which birth or accident may have thrown them, and of seeking subsistence and happiness elsewhere; and it is believed that this right of emigration, or expatriation, is one of those "inherent rights, of which, when they enter into a state of society, they can not, by any compact, deprive, or divest their posterity." But, although municipal laws can not take away or destroy this great right, they may regulate the manner, and prescribe the evidence of its exercise; and, in the absence of the regulations *juros positivi*, the right must be exercised according to the principles of general law. *Murray v. M'Carty*, 2 Munf. 397.

Power Not Delegated to Congress.

It has been held, that the commonwealth had never delegated to congress the exclusive power to legislate on the subject of the great natural right of expatriation as relative to the commonwealth of Virginia. See *Murray v. M'Carty*, 2 Munf. 404.

Code Provision.—The Virginia Code provides that, whenever a citizen of this state, by deed in writing, executed in the presence of and subscribed by two witnesses, and by them proved in the

court of the county or corporation where he resides, or by open verbal declaration made in such court and entered of record, shall declare that he relinquishes the character of a citizen of this state, and shall depart out of the same, such person shall, from the time of such departure, be considered as having exercised his right of expatriation, so far as regards this state, and shall thenceforth be deemed no citizen thereof. Va. Code, 1904, ch. 6, § 40. See *Baker v. Wise*, 16 Gratt. 213.

Temporary Absence.—A temporary absence will not divest a man of the character of citizen, or subject of the state, or nation to which he may belong. There must be a removal with an intention to lay aside that character, and he must actually join himself to some other community. *Murray v. M'Carty*, 2 Munf. 397.

Confinement in Penitentiary of Another State.—In *Guarantee Co. v. Bank*, 95 Va. 484, 28 S. E. 909, it was held, that the compulsory removal of a citizen of this state to the penitentiary of another state to serve a sentence imposed by a federal court, did not operate to change his residence or citizenship from Virginia to the state in which the penitentiary was located. In this case, it was held, that a person's citizenship could be changed only by their voluntary act and not by their involuntary incarceration in a penitentiary located in another state.

Failure to Comply with Expatriation Act.—In *Murray v. M'Carty*, 2 Munf. 394, the question was raised as to whether the rights of citizenship in Virginia could be relinquished without complying with the terms of an act of the general assembly concerning expatriation found in Va. Code, 1804, vol. 1, ch. 110, p. 207, § 5. (See Va. Code, 1904, ch. 6, § 40.) The judge who delivered the opinion did not attempt to decide this question, but spoke as follows: "I give no decided opinion

upon either of these important questions but I deem it not improper to state it as my present impression, that, if a citizen of Virginia shall have departed out of this commonwealth with an open and avowed, fair and bona fide intention of quitting it, and of becoming a citizen of some other state, and shall, in fact, have become a citizen thereof, that, from thenceforth, he ceased to be a citizen of Virginia, notwithstanding he may have omitted to comply with the requisites of our expatriation act."

By Becoming Citizen of Another State or County.—By the Virginia Code of 1849, it was declared that any citizen of the state being twenty-one years of age, who shall reside elsewhere and in good faith become the citizen of some other state of this union or the citizen or subject of a foreign state, shall not, while the citizen or subject of another state or sovereign,

be deemed a citizen of this state. *Baker v. Wise*, 16 Gratt. 213.

Expatriation as a Ground of Action against Feme Covert.—To debt on bond, defendant pleaded that she was feme covert at the time the bond was executed; plaintiff replies, that defendant's husband had abjured the commonwealth, and was not then or now a citizen thereof; on general demurrer to his replication, it was held naught. *Branch v. Bowman*, 2 Leigh 170.

"If it intended to rely upon the expatriation of the husband under our statute, it should have been shewn how he expatriated himself, by a recorded declaration by deed, or in open court, and that he had departed from the commonwealth; and even that would not have been sufficient, without the further allegation, that he resided abroad at the time of the execution of the bond by his wife." *Branch v. Bowman*, 2 Leigh 172.

CIVIL.—See **CRIMINAL**.

CIVIL CASE.—See **CRIMINAL**.

Where a statute allowed a special jury in **civil cases** only, it was held, that one accused of a misdemeanor was not entitled to a special jury. *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

Where the circuit court takes action under § 9, ch. 77, Va. Code, 1860, either party may appeal; the judgment of the court being in its nature final and conclusive, and can only be reviewed by an appellate tribunal. A judgment under this section is rendered in a **civil case**, within the meaning of § 2, ch. 182, Code, 1860. *Venable v. Coffman*, 2 W. Va. 102.

Where a claim against the state for services rendered, as shorthand reporter, in a criminal case, has been allowed by the circuit court in which the case was tried, and been certified to the auditor for payment, by whom a portion of the claim is allowed, and the residue refused, and the holder of the claim applies by petition, it was held, that this was not a **civil case** within the West Virginia statute providing for appeals in **civil cases**. *Robinson v. LaFollette*, 46 W. Va. 565, 33 S. E. 288.

CIVIL COMMOTION.—In *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 622, it is said: "The next inquiry is, does this loss fall within the excepting clause of the policies? Was it a loss by fire which happened or took place 'by means of invasion, insurrection, riot or **civil commotion**, or of any military, or usurped power?' The terms, 'insurrection, riot or **civil commotion**,' may be laid out of view, as they can have no application to the government of the United States, whose act has been shown to be the responsible cause of the fire. Their mean-

ing, when found in excepting clauses of policies of insurance, is defined or explained in some adjudged cases. *Langdale v. Mason* (a nisi prius case before Lord Mansfield), 1 Bennett's Fire Ins. Cas. 16; *Spruill v. North Car. Mut. Life Ins. Co.*, 1 Jones R. 126. See also, May on Ins. 490, 491, Lord Mansfield in *Langdale v. Mason* states, that the words **civil commotion** were introduced in policies as early as 1727—words, said he, as general and untechnical as can possibly be used. His idea of a **civil commotion** is thus expressed: 'I think a **civil commotion** is this; an insurrection of the people for general purposes, though it may not amount to a rebellion where there is a usurped power.' In *Spruill v. North Car. Mut. Life Ins. Co.*, the court, after defining a riot, describe a commotion, according to Worcester, as being a tumult, and a tumult as being a promiscuous commotion in a multitude—an irregular violence, a wild commotion." See generally, the title FIRE INSURANCE.

Civil Damage Acts.

See the title INTOXICATING LIQUORS.

CIVIL DEATH.

CROSS REFERENCES.

See the titles BANKRUPTCY AND INSOLVENCY, ante, p. 232; CITIZENSHIP, ante, p. 823; CRIMINAL LAW; PARTIES; PRISONS AND PRISONERS; REMOVAL OF CAUSES; SERVICE OF PROCESS.

Convicts in Penitentiary.—A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the state. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state. He is *civilter mortuus*; and his estate, if he has any, is administered like that of a dead man. *Ruffin v. Com.*, 21 Gratt. 795. See also, *Guarantee Co. v. First Nat. Bank*, 95 Va. 485, 28 S. E. 909. See the title PRISONS AND PRISONERS.

Person Non Compos Mentis.—In *State v. Shank*, 36 W. Va. 223, 14 S. E. 1001, the court, by implication, held that

a person who was non compos mentis was *civilter mortuus*, and could not be made a party or held answerable to any civil process without the intervention of a personal representative in whose name to proceed. See the title INSANITY.

Bankrupts.—In *Cannon v. Wellford*, 22 Gratt. 195, it was held, that persons who had become bankrupts were *civilter mortui*, and could not sue either for themselves or another, and that all their rights of property, legal and equitable, passed by assignment and by operation of law to their proper assignees, in whose name alone suit could be prosecuted. See also, the title BANKRUPTCY AND INSOLVENCY, ante, p. 232.

Liability to Suit.—It is provided by statute that when a person, other than a married woman having no separate estate, is sentenced to confinement in the penitentiary of the state by a court thereof for more than one year, a committee of his estate may be appointed, who shall have charge thereof

until the convict is discharged, and who may sue and be sued in respect to debts due to or by such convict. Va. Code, 1904, §§ 4115, 4116. *Guarantee Co. v. First Nat. Bank*, 95 Va. 484, 28 S. E. 909.

At common law a person convicted of felony, though disabled from suing, did not possess immunity from suit. And so, a citizen of Virginia serving a term of penal servitude in the penitentiary of another state, under a judgment of a federal court in this state, may be sued in the courts of this state. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909. See also, the titles PARTIES; PRISONS AND PRISONERS; REMOVAL OF CAUSES.

Service on Convicted Felon.—Where process was served upon a defendant in an action of debt, on the day on which he was convicted of a felony, but before the conviction had taken place, and in that action a judgment by default was obtained against the defendant while he was confined in

the penitentiary, the court having fairly acquired jurisdiction of the cause, the doctrine of relation does not apply so as to override and avoid the process. *Neale v. Utz*, 75 Va. 480.

Under such circumstances, the utmost that could have been exacted of the plaintiff was a suspension of all proceedings until the disability was removed, or the appointment of a committee to defend the suit for the convict; and where neither course was pursued, the judgment is not void, but voidable, and can not be assailed collaterally in a court of equity, or elsewhere. *Neale v. Utz*, 75 Va. 480.

As a general rule, the law does not regard fractions of a day; but this rule is departed from in many cases where the purposes of justice require it. Courts would be very slow to decide that a man by a fiction of law is to be considered a felon before the conviction has actually taken place. *Neale v. Utz*, 75 Va. 480. See also, the title SERVICE OF PROCESS.

Civiliter Mortuus.

See the title CIVIL DEATH, ante, p. 828.

CIVIL POWER.—See *Peerce v. Carskadon*, 4 W. Va. 245.

CIVIL RIGHTS.

I. Constitutional Provisions, 830.

II. Rights of Colored Persons, 830.

- A. In General, 830.
- B. School Privileges, 830.
- C. Competency as Witnesses, 831.
- D. Right to Trial by Mixed Jury, 831.
- E. Trial by Jury of Colored Persons, 832.
- F. Validity of Bequest for Education of White Children, 832.
- G. Removal of Causes, 832.

CROSS REFERENCES.

See the titles CITIZENSHIP, ante, p. 823; CONSTITUTIONAL LAW; JURY; PAUPERS; REMOVAL OF CAUSES; SLAVES; TRIAL.

I. Constitutional Provisions.

See generally, the title CONSTITUTIONAL LAW.

The fourteenth amendment of the federal constitution was held to be one of a series of constitutional provisions having a common purpose; namely, to secure to a race recently emancipated and held in slavery through many generations, all the civil rights that the superior race enjoy, and to give to them the protection of the general government, in the enjoyment of such rights, whenever they should be denied by the states. Whether it had other, and if so what, purposes, not decided. *Strauder v. West Virginia*, 100 U. S. 664, reversing *State v. Strauder*, 11 W. Va. 749.

The amendment not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and invested congress with power, by appropriate legislation, to enforce its provisions. *Strauder v. West Virginia*, 100 U. S. 664, reversing *State v. Strauder*, 11 W. Va. 749.

Provision for Separate Schools.—Section 8, art. 12, of the constitution of West Virginia, which provides that "white and colored persons shall not be taught in the same school," is not repugnant to § 1 of the fourteenth amendment to the constitution of the United States. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348.

II. Rights of Colored Persons.

See also, the titles CITIZENSHIP, ante, p. 823; SLAVES.

A. IN GENERAL.

Discrimination because of Color Illegal.—Discrimination against the colored people, because of color alone, as to privileges, immunities, and equal legal protection, is contrary to public policy and the law of the land. *Williams v. Board of Education*, 45 W. Va. 199, 31 S. E. 986.

B. SCHOOL PRIVILEGES.

See generally, the title SCHOOLS.

Shall Be Taught in Separate Schools.

—Section 1492 of the Code of Virginia of 1904 provides that white and colored persons shall not be taught in the same schools, but in separate schools, under the same general regulations as to the management, usefulness, and efficiency. *Eubank v. Boughton*, 98 Va. 501, 36 S. E. 529.

Discretion as to Assignment of Children.

—It is the duty of school boards to assign white children to white schools, and colored children to colored schools, but whether a child is white or colored is a fact to be determined by the board, and involves the exercise of a judicial discretion on the part of the board which the courts can not control. If the party aggrieved is dissatisfied with the action of the board, an appeal is allowed him to the county superintendent of schools, and, this being an adequate remedy, mandamus will not lie. *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529.

Section 1466 of the Virginia Code of 1887 made it one of the duties of the boards of school trustees "to explain and enforce the school laws and regulations." When, therefore, application was made to the board to admit to a white school the son of petitioner, it became at once the duty of the board to ascertain before granting or refusing the request whether the child of petitioner was a white person or a negro—that is to say, whether he had more than one-fourth of negro blood, for that is the test established by § 49 of the Code, which declares that "every person having one-fourth or more of negro blood shall be deemed a colored person." *Eubank v. Boughton*, 98 Va. 501, 36 S. E. 529.

Provision of West Virginia Constitution.—That section of the constitution of West Virginia (See art. 12, § 8), which provides that white and colored persons shall not be taught in the same

school, prevents the legislature and boards of education from infringing on the rights of both in compelling them to attend a common school, which might be highly detrimental to both, and injurious to the school. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348.

No Discrimination as to Length of Term.—The law of West Virginia does not authorize boards of education to discriminate between white and colored schools in the same district as to length of term to be taught. *Williams v. Board of Education*, 45 W. Va. 199, 31 S. E. 985.

Compensation of Teacher in Colored School.—Where a teacher has been employed to teach a colored school by the trustees thereof, under the supervision of the board of education, and she teaches the same the full term of the other primary schools in the same district, satisfactorily to the patrons of such school, she is entitled to pay for her whole term of service; and the board of education can not escape the payment thereof by interposing a plea that it had, by reason of the school being a colored school, limited the term thereof to a shorter period than the white schools in the same district. Such discrimination, being made merely on account of color, can not be recognized or tolerated, as it is contrary to public policy and the law of the land. *Williams v. Board of Education*, 45 W. Va. 199, 31 S. E. 985.

Admission of Colored Child to White School.—Where it was insisted that while it is the settled law that white and colored children shall not be taught in the same school, yet, because the legislature and the board of education had failed to make proper provision to afford equal facilities to colored children, that they are entitled to attend the school provided for white children, on equal terms; it was held, that such a determination would be, in effect, permitting the neglect of

the legislature or board of education to abrogate the constitution, while it is the paramount duty of the supreme court to see that they obey it. Therefore, the circuit court could not do otherwise than refuse the prayer of the petition. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 349.

C. COMPETENCY AS WITNESSES.

See generally, the titles EVIDENCE; WITNESSES.

Persons having less than one-fourth of negro blood in their veins were competent witnesses, on the trial of a white man. *Dean v. Com.*, 4 Gratt. 541.

The fact that a witness was of negro descent, though not so near as to render him incompetent as a witness, was not competent evidence to impeach his credibility. *Dean v. Com.*, 4 Gratt. 541.

D. RIGHT TO TRIAL BY MIXED JURY.

See also, the titles CITIZENSHIP, ante, p. 823; JURY.

A prisoner on trial charged with a criminal offense is entitled to a trial by the jury of his peers, and not a trial by a jury of any particular color or complexion. Therefore, a man of color indicted for a felony is not entitled to demand to be tried by a mixed jury. *Mitchell v. Com.*, 33 Gratt. 845; *Lawrence v. Com.*, 81 Va. 484; *Virginia v. Rives*, 100 U. S. 338.

Statute Barring Colored Man from Juries.—The statute of West Virginia, which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law, as jurors, because of their color, though qualified in all other respects, is, practically, a brand upon them affixed by the law, and is a discrimination against that race, forbidden by the fourteenth amendment to the constitution of the United States. It is a denial of the equal protection of the laws to the race thus excluded,

since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds. *Strauder v. West Virginia*, 100 U. S. 664, reversing *State v. Strauder*, 11 W. Va. 749.

Where a state statute secures to every white man the right of trial by jury selected from and without discrimination against his race, and at the same time permits or requires such discrimination against the colored man because of his race, the latter is not equally protected by law with the former. *Strauder v. West Virginia*, 100 U. S. 664, reversing *State v. Strauder*, 11 W. Va. 749.

E. TRIAL BY JURY OF COLORED PERSONS.

See generally, the title **JURY**.

Where a motion was made to quash a writ of venire facias because the jury was composed of colored men, and the court in overruling this motion assigned as a reason that the prisoner and prosecutrix were colored, and that the jury was composed of intelligent colored men qualified as jurors, it was held, that this is not proof that the court intentionally summoned those persons because they were colored, and the motion was properly overruled. *Coleman v. Com.*, 84 Va. 1, 3 S. E. 878.

F. VALIDITY OF BEQUEST FOR EDUCATION OF WHITE CHILDREN.

See generally, the title **WILLS**.

In *Kinnaird v. Miller*, 25 Gratt. 117, it was held, that a bequest in a will, providing for the education of white children only, was valid, and not in conflict with the fourteenth amendment to the constitution of the United States.

G. REMOVAL OF CAUSES.

See generally, the title **REMOVAL OF CAUSES**.

Constitutionality of Statute.—Section 641 of the Revised Statutes of the United States, which declares that "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or can not enforce, in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil right of citizens of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for the trial into the next circuit court to be held in the district where it is pending," is not in conflict with the federal constitution. *Strauder v. West Virginia*, 100 U. S. 664, reversing *State v. Strauder*, 11 W. Va. 749.

Removal of Case for Denial of Civil Rights.—Where the defendant, a colored man, was charged with an offense against the laws of a state and he filed a petition asking that his case be removed to the federal court, because of the fact that by a statute of West Virginia then existing colored men were excluded from serving on juries, which application was denied by the supreme court of the state, it was held, by the supreme court of the United States, that as the exclusion of colored men from service upon jury was in violation of the fourteenth amendment to the constitution of the United States, and the colored man was therefore deprived of some of the rights and immunities of citizenship provided by that amendment, his case was a proper one for removal to the federal courts. *Strauder v. West Virginia*, 100 U. S. 664, reversing *State v. Strauder*, 11 W. Va. 745.

CIVIL WAR.—In *Hedges v. Price*, 2 W. Va. 192, it was held, that the late war between the states was a civil war. See generally, the titles CONFEDERATE STATES; WAR.

CLAIM.—In *Junkins v. Hamilton Lumber Co.*, 44 W. Va. 641, 29 S. E. 1018, it is said: "The reading of the law is that the justice shall have jurisdiction in civil cases, 'provided the amount of money or damages, or the value of the property claimed, does not exceed three hundred dollars, exclusive of interest and costs.' The word **claimed** does not refer to the amount plaintiff might be entitled to demand from the defendant, but the amount which he actually does demand, and for which he **claims** judgment." See generally, the title JUSTICES OF THE PEACE.

In *Young v. Young*, 89 Va. 675, 17 S. E. 471, it is said: "But 'this matter,' as Mr. Minor expresses it, is assisted in Virginia by statute, which provides that any interest or claim to real estate may be disposed of by deed or will. 2 Minor, Inst. 362; Code, § 2418. 'The effect of this enactment,' as was said by the supreme court of Kentucky in *Nutter v. Russell*, 3 Metc. (Ky.) 163, 'is to obviate at once all the difficulties growing out of the distinctions which had been established by judicial construction between such estates as were alienable, and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in or claim to real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by deed or will.'"

In *State v. Barnes*, 52 W. Va. 85, 43 S. E. 132, it is said: "But the declaration states such a promise, and, if so, these taxes were collectible **claims** by suit before a justice; and § 148, ch. 50, Code, makes a constable's bond answer for 'any claim' intrusted to him 'to sue upon or collect.' A tax bill which the tax payer has promised the sheriff to pay, being thus a cause of action, is a **claim** under that section. As to fee bills, the Code gives the power to levy only to a sheriff, not a constable. I suppose a fee bill is not per se evidence of debt, so as to be ground of action, though I think an officer could bring assumpsit for services, and I think they are suable before a justice. However, the declaration alleges a promise to pay these fees, and thus they were **claims** which a constable could sue upon."

Class Legislation.

See the title CONSTITUTIONAL LAW.

Clergy.

See BENEFIT OF CLERGY, ante, p. 351. See the title RELIGIOUS SOCIETIES.

Clerical Errors.

See the titles AMENDMENTS, vol. 1, p. 353; APPEAL AND ERROR, vol. 1, p. 609; GRAND JURY; INDICTMENTS. INFORMATIONS AND PRESENTMENTS; JUDGMENTS AND DECREES.

CLERKS OF COURT.

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CROSS REFERENCES.

See the titles AFFIDAVITS, vol. 1, p. 227; AMENDMENTS, vol. 1, p. 316; APPEAL AND ERROR, vol. 1, p. 418; CONSTITUTIONAL LAW; COURTS; DE FACTO OFFICERS; PUBLIC OFFICERS; RECORDS.

As to the clerk's duty in making up the records in case of an appeal, see the title APPEAL AND ERROR, vol. 1, p. 418. As to the clerk's power to take acknowledgments, see the title ACKNOWLEDGMENTS, vol. 1, p. 104. As to the clerk's power to issue attachments, see the title ATTACHMENT AND GARNISHMENT, ante, p. 70. As to the clerk's power to take confession of judgment, see the title CONFESSION OF JUDGMENTS. As to the clerk's duty to announce special terms of court, see the title COURTS. As to the clerk's duty to describe depositions, see the title DEPOSITIONS. As to the clerk's power to dismiss suits, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT. As to the clerk's duty to keep ballots, see the title ELECTIONS. As to the clerk's power to appoint administrators, see the title EXECUTORS AND ADMINISTRATORS. As to the clerk's power to enter judgment, see the title JUDGMENTS AND DECREES. As to the clerk's power to admit documents to record, see the title RECORDING ACTS. As to the clerk's power to issue process, see the title SUMMONS AND PROCESS. As to the clerk's power in connection with opening, closing and taking the rules, see the title RULES. As to the clerk's duties in regard to taxation and tax sales, see the title TAXATION.

I. Election, Appointment and Qualification.

A. ELECTION.

See the title ELECTIONS.

Constitutional Provision Not Self-Executing.—Article 7, § 1, of the Virginia constitution of 1869 with reference to the election of clerks is not self-executing and to give it effect legislation is necessary. *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147.

Election of Separate Clerk for Circuit Court.—Whether there shall be elected at a general election a separate clerk for the circuit court of a county is determined by the last general census taken before election. If such census shows a population of less than fifteen thousand inhabitants, the clerk of the county court is *ex officio* clerk of the circuit court for a full term of six years, regardless of what may be shown by a census taken during his term. If he die during his term, but after a new census showing more than fifteen thousand inhabitants, his successor holds, as he would have held, the office of clerk of both courts for the residue of his term. *Watkins v. Venable*, 99 Va. 440, 39 S. E. 147.

B. APPOINTMENT.

See generally, the title PUBLIC OFFICERS.

Clerk Pro Tempore for Wheeling.—A statute, ch. 57, W. Va. acts, 1870, authorized the judge of the municipal court of Wheeling, "when necessary," to appoint a clerk pro tempore. In August, 1881, in absence of the clerk, the said judge appointed a clerk pro tempore. The clerk resumed the discharge of his duties and afterwards, in October, 1882, in absence of the clerk, the same person who had been in 1881, appointed clerk pro tempore, assumed again to act as such and issued an execution. The court held, that the issue of execution by him was without authority. *Taney v. Woodmansee*, 23 W. Va. 709.

Contents of Commission.—The commission of a clerk of court need not contain the technical words "do hereby constitute and appoint, etc." It is sufficient if the words "is appointed" are used. *Dew v. Judges*, 3 Hen. & M. 1.

Nor need the commission state that the grantors were judges of the general court. It is sufficient if the judges simply sign their names. *Dew v. Judges*, 3 Hen. & M. 1.

A certificate that S. D. is appointed clerk, etc., signed and sealed by a majority of the judges of the court (without styling themselves such), is a sufficient commission, though it does not run in the name of the commonwealth nor mention that the vacancy happened between the terms or term, nor state the tenure of office. *Dew v. Judges*, 3 Hen. & M. 1.

C. QUALIFICATION.

Must Take Oath.—The act of November 16, 1863, prescribing an oath for the officers of the state of West Virginia is constitutional, and a clerk of court must take it in order to qualify. *Ex parte Stratton*, 1 W. Va. 304.

Bond.—As to the necessity of giving bond in order to qualify, see post, "Bond and Liability Thereon," VI.

D. INCOMPATIBLE OFFICES.

Clerks and Attorney.—The duties of a clerk of a superior court and of attorney in the same court are incompatible with each other and such a clerk can not practice as attorney in the court of which he is clerk, though he is licensed to practice law in all the courts of the commonwealth. *Ex parte Collins*, 2 Va. Cas. 222.

Deputy Clerk and Justice.—A justice of the peace accepted the office of deputy clerk, and being denied the right to exercise his duties as justice applied for a writ of mandamus to compel his admission to the exercise of his duty as justice. The superior court held the two offices incompatible and declared that whether the ac-

ceptance of the office of deputy clerk vacated the office of justice or not, it would not grant a writ of mandamus to compel the county court to admit the applicant to an office not belonging to him, if vacated, or which, if not vacated, could be taken from him. *Amory v. Justice of Gloucester*, 2 Va. Cas. 523. See post, "Deputy Clerks," IX.

II. De Facto Clerks.

See generally, the title DE FACTO OFFICERS. And see post, "Forfeiture," VIII, B.

Definition.—A person in undisputed occupancy of the office of clerk of courts and in reputed and notorious discharge of its duties is a clerk de facto. *Herring v. Lee*, 22 W. Va. 661.

De Facto Office and De Facto Officer.—In *Hawver v. Seldenridge*, 2 W. Va. 274, the court said, "Most of the cases cited are where the offices were legal and constitutional, but where there was some irregularity in the eligibility, election or qualification of the officers. A de facto office can not exist under a constitutional government, but when the government is entirely revolutionized, and all its departments usurped by force, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such cases the acts of a de facto executive, a de facto judiciary and a de facto legislature must be recognized as valid."

Validity of Acts—In General.—The acts of a clerk de facto are valid as to third parties and the public in collateral proceedings. *Herring v. Lee*, 22 W. Va. 661; *Hawver v. Seldenridge*, 2 W. Va. 274.

What Acts Are Valid.—Whether the government under which a clerk acts is a government de facto or paramount force or an actual though unlawful government, his acts, when not directly in aid of the war power must be re-

garded as valid. *Henning v. Fisher*, 6 W. Va. 238.

But in order to make valid the acts of a de facto clerk, he must be exercising the functions of a de facto or de jure office. *Hawver v. Seldenridge*, 2 W. Va. 274.

As to Whom Acts Are Valid.—If the person who invokes protection for the act of a de facto clerk knew when the act was done, that it was not the act of a legal officer, the law will not sustain such act or hold it valid as to such person but will declare it void. *Herring v. Lee*, 22 W. Va. 661.

Reason for Holding Acts Valid.—The policy and reason of the rule upon which the acts of a de facto clerk are sustained and held valid as to third parties and the public in collateral proceedings, are, that a person requiring official duties to be performed, can not be expected to inquire into the title of the clerk when he finds him in a open and undisputed occupancy of the office and in the reputed and notorious discharge of its duties. But when in civil cases, at least, the public or third persons having knowledge that the person so acting or pretending to act is not the clerk de jure, the reason of the rule ceases and the rule itself for validating such act does not apply. *Herring v. Lee*, 22 W. Va. 661.

Must Act in Name of Clerk.—Though a person is in undisputed occupancy of the office of clerk, and in such reputed and notorious discharge of its duties as to make him a clerk de facto, if in performing one of the duties of the office he acts in the name of another and signs the latter's name as clerk, he thereby gives notice to the party invoking his services that he is not the clerk, and as to that party he can not be held a clerk de facto. *Herring v. Lee*, 22 W. Va. 661.

Power to Swear Grand Jury.—Upon a presentment for gaming a plea in abatement that the clerk de facto who administered the oath to the grand jury

that made the presentment, was not a clerk de jure at the time, was held insufficient. *Hord v. Com.*, 4 Leigh 674.

As to the point that there can not be a de facto deputy clerk, see post, "Deputy Clerks," IX.

III. Powers and Duties.

A. AS TO CERTIFYING EXISTENCE AND USE OF RECORDS.

The clerk has power to certify that certain records exist in his office, but he has no power to certify what use was made of such records. *Cunningham v. Mitchell*, 4 Rand. 189.

B. AS TO REMOVAL OF RECORDS.

The clerk has no power to remove the records or papers of the court out of the county or corporation wherein his office is located, except on occasion of invasion or insurrection, where in the opinion of the court, or in a very sudden case, the clerk, the same will be endangered, after which they shall be returned as soon as possible, and except in such other cases as are specially provided for by law, but this does not prohibit the keeping of the records and papers of a county court in an office situated in a city which is within the county. *Board of Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380. See generally, the title RECORDS.

C. AS TO INSPECTION OF RECORDS.

See the title RECORDS.

D. AS TO ADMINISTERING OATHS.

See generally, the title OATH.

Clerk's Power — Former Doctrine.—The authority of a clerk to administer an oath out of court, only extends to cases in which, without regard to circumstances, the making the affidavit is a necessary prerequisite to the performance of the official act which the clerk is called upon to perform. *Com.*

v. Williamson, 4 Gratt. 554. But see *Maybush v. Com.*, 29 Gratt. 858.

Accordingly a clerk has no authority, when applied to for a marriage license, to examine a witness on oath as to the age of the parties. *Com. v. Williamson*, 4 Gratt. 554.

Present Doctrine.—By § 13, ch. 159, Va. Code, 1873, any clerk of a court, or his deputy, may administer an oath in any case wherein an affidavit is necessary or proper as the foundation of an official act to be performed by him. The words italicized "or proper" have been inserted in the statute since the decision of *Matthew Williamson's Case*, 4 Gratt. 554, wherein it was held, that a clerk, under the statute as it then was, had no authority, when applied to for a marriage license, to examine a witness on oath as to the age of the parties; the court construing the law as it then stood to apply only to such cases in which, without regard to circumstances, the making of the affidavit was necessary as a prerequisite to the performance of the official act required of the clerk. But the legislature soon after that decision at the revival of 1849, having amended the law by inserting the words above recited, evidently designed to authorize the clerks and their deputies to administer an oath in such cases, because it is highly proper that the clerk, before issuing the marriage license to parties who had not the consent of parents or guardians, or such evidence of it as the law required, should have authority to examine a witness on oath as to the age of the parties. The authority is given by the statute as it now stands. *Maybush v. Com.*, 29 Gratt. 858. See also, *Chesapeake, etc., R. Co. v. Patton*, 5 W. Va. 234.

Bill of Injunction.—By § 6, ch. 17, W. Va. Code, 1899, it is provided, that "a clerk of a court or his deputy may administer an oath in any case where an affidavit is necessary or proper." Under this section a clerk of the court

can administer the oath to a bill of injunction. *Chesapeake, etc., R. Co. v. Patton*, 5 W. Va. 234.

Power of United States Clerk.—The clerk of the district court of the United States for the district of West Virginia is authorized to administer an oath under Code of Virginia, 1860, ch. 176, § 27, in any case therein provided, the clerk of said court being embraced within the words, "or the clerk of any court." *Parker v. Clark*, 7 W. Va. 467.

E. AS TO TAKING GUARDIANS' BONDS.

See generally, the title **GUARDIAN AND WARD**.

Clerk's Duty.—It is the duty of the clerk to prepare a guardian's bond, insert the penalty directed by the court, and if executed by a party with security, to see that the bond be duly filed and preserved. *Page v. Taylor*, 2 Munf. 492.

Not a Judge of Sufficiency of Bond.—The taking of a guardian's bond is not a ministerial but a judicial act imposed by law upon the court, and the court and not its clerk is to judge of the sufficiency or nonsufficiency of the security offered. *Page v. Taylor*, 2 Munf. 492.

As to clerk's liability for taking insufficient guardian's bond, see post, "Liability for Errors and Negligence," VII. As to power and duties of deputy, see post, "Deputy Clerks," IX.

F. AS TO PRACTICING LAW.

See ante, "Incompatible Offices," I, D.

IV. Mandamus.

See generally, the title **MANDAMUS**.

To Restore Clerk to Office.—A peremptory mandamus will be awarded to restore to office a clerk of court, wrongfully deprived thereof. *Smith v. Dyer*, 1 Call 562.

The writ of mandamus is the proper remedy to restore to office a clerk ousted from his office by the illegal appointment of another person. Although possibly the clerk may have another remedy, there is no other so well adapted to the nature of the case. *Dew v. Judges*, 3 Hen. & M. 1.

William Stratton petitioned for a mandamus to the judge of the eighth circuit to compel him to allow the said Stratton to qualify as clerk of the circuit court of Logan county without taking the oath prescribed by the act of November 16, 1863, known as the test oath, claiming that the said act was unconstitutional and void. It was held, that the said act was constitutional and a mandamus was refused. *Ex parte Stratton*, 1 W. Va. 304.

The person occupying the office ought to be made a party to the rule, or to the conditional mandamus, or such rule or mandamus ought to be served upon him, so as to enable him to defend his right before the peremptory mandamus issues. But, if it appears from the record that he was apprised of the proceedings and defended his right, it is sufficient. *Dew v. Judges*, 3 Hen. & M. 1.

If the original rule be to show cause wherefore a mandamus shall not issue to admit the clerk, the subsequent rule, or the mandamus founded thereon, may nevertheless be to restore him to the said office; for such rules may be changed and modified so as to square with the rights of parties, and attain the real justice of the case. *Dew v. Judges*, 3 Hen. & M. 1.

Mandamus will not lie to compel a clerk to do an act going directly to enforce an invalid statute. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

Access to Records.—See the title **RECORDS**.

A peremptory mandamus will be granted to compel a clerk to grant

access to the records in his office. *State v. Long*, 37 W. Va. 266, 16 S. E. 578.

But it will not be granted if the sole purpose of the inspection is to obtain evidence for a criminal proceeding. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

Several persons who make common application to a clerk of a county court for inspection of public records and are refused it, if entitled to such inspection may unite in the mandamus proceeding to compel such inspection. *Payne v. Staunton*, 55 W. Va. 203, 46 S. E. 927.

Docketing of Memorandums.—A writ of mandamus will not be awarded to compel a clerk to docket and index the memorandum of a conditional sale unless the original contract has been produced before him and proved or acknowledged as prescribed by law. *Calhahan v. Young*, 90 Va. 574, 19 S. E. 163.

Receipt of Tax Redemption Money.—Mandamus may not be an adequate remedy to compel a clerk to receive the money tendered by the former owner of lands purchased at a delinquent tax sale by the state. An injunction lies to prevent the clerk from receiving the money from any one else. *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277.

Issuance of Certificate of Election.—The powers and duties of commissions of election, as prescribed by §§ 133, 134, 135, 136, 137, Va. Code, 1887, are to ascertain the results from the face of the returns, if regular, and if not regular, to cause the irregularity to be corrected as required by the statute, and then to ascertain the result from the returns as corrected. When the result has been thus ascertained, and signed by the requisite number of commissioners, and attested by the clerk, and an abstract of the votes cast thereto annexed, the duties of the commissioners cease and determine. When

the returns required by the statute have been made, and the result ascertained in the manner prescribed by law, the commissioners can not go behind the returns and throw out a precinct; and if they do, the clerk may be compelled, by mandamus to issue the certificate of election to the person previously ascertained to have been elected. *McKinney v. Peers*, 91 Va. 684, 22 S. E. 506.

As to mandamus to compel payment of fees, see post, "Compensation and Fees," V.

V. Compensation and Fees.

Statutory Provisions.—The fees prescribed by § 666, Va. Code, 1887, as amended (acts, 1899-1900, p. 885) are intended to compensate the officers for the services therein enumerated, but other incidental duties are imposed upon the clerk, the compensation for which is not specifically provided for, and for which they are entitled to demand the fees allowed by ch. 172, Va. Code, 1887. *Stone v. Caldwell*, 99 Va. 492, 39 S. E. 121.

By the act approved March 1, 1898, the general law contained in §§ 717, 718, Va. Code, 1887, relating to fines and costs before justices of the peace, is amended and re-enacted and all acts or parts of acts in conflict therewith are repealed. The act of March 3, 1886, was not referred to, nor was § 719, Code of 1887, prescribing the duties of the clerk as to certificates of fines and his compensation therefor mentioned. It was held, that the act of March 1, 1898, did not repeal the act of March 3, 1896. *Trehy v. Marye*, 100 Va. 40, 40 S. E. 126.

An act approved March 3, 1896, was entitled an act to amend and re-enact an act entitled an act to regulate the salary of the police justice of the city of Norfolk. This act contained certain provisions regarding the justice's salary and a clause repealing all acts requiring the justice to make returns to

the clerk, or allowing the latter compensation for transmitting the record of fines to the auditor. After the passage of this act the clerk brought a mandamus proceeding to force the payment of fees as provided under the former law, claiming that the act of March 3 failed to repeal the former provisions of Va. Code, 1887, because in violation of constitution, art. 5, section 15, which required each law to embrace one subject, which should be embraced in its title. The court of appeals held, that it was germane to the regulation of the salary to provide that the justice should keep and transmit the record and that the clerk should no longer do the work nor receive compensation therefor; that the law was therefore constitutional and that the writ of mandamus should not be granted. *Trehy v. Marye*, 100 Va. 40, 40 S. E. 126.

Clerk of Court of Appeals.—The clerk of the court of appeals, when acting as a clerk of a special court of appeals, constituted under the act of March 15, 1832, is not entitled to demand from the state, for any services which he may render in such special court, any other compensation than the annual allowance which shall be made to him by the judges of the court of appeals, as clerk of that court. *Allen v. Com.*, 6 Gratt. 529.

Allowing Inspection of Records.—The clerks can not charge a fee for allowing an inspection of the records. *State v. Long*, 37 W. Va. 266, 16 S. E. 578.

But he is entitled to a fee where he personally makes a search by request for a matter, of over a year's standing, or is required to make a copy. *State v. Long*, 37 W. Va. 266, 16 S. E. 578.

Statement on Sale of Delinquent Lands.—On an application to purchase delinquent lands from the commonwealth, the clerk is entitled to charge for only one statement of the amount of purchase money required and one calculation of interest for the entire time the land was delinquent although

it may have been delinquent for a number of years. *Stone v. Caldwell*, 99 Va. 492, 39 S. E. 121.

Liability of Heir for Clerk's Fees.—An heir is not bound for clerk's fees on taxes due from the ancestor and such claims can not be placed with bond creditors. *Haydon v. Goode*, 4 Hen. & M. 460.

This case was decided before the passage of the act making the real estate of a decedent liable for the payment of all debts whether due by simple contract or specialty. *Pol. Code, Va.*, § 2665.

Action for Fees—When Maintainable.—A clerk of a circuit court may maintain an action for his fees without first having them placed in an officer's hand and returned "No property found." *Johnson v. MacCoy*, 32 W. Va. 552, 9 S. E. 887. But see *Craig v. Lobb*, 12 Leigh 627.

Fees May Be Set Off.—Though no action lies for clerk's fees, till they are put into an officer's hands for collection, and he has returned that they can not be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due. *Craig v. Lobb*, 12 Leigh 627.

When Fee Bills Must Be Placed in Officer's Hands.—Before the statute 1839 there was no time within which fee bills were required to be placed in the officer's hands for collection, and the statute of limitations relating to actions in general did not begin to run against them until they were placed in the officer's hands and a return made that they could not be levied. *Craig v. Lobb*, 12 Leigh 627.

For the present law see *Pollard's Code, Va.*, § 3520.

Limitation of Action for Fees.—A motion was made against the administrator of a deceased sheriff to recover the amount of tickets for clerk's fees which had been placed in the hands of the said sheriff to collect. The court held, that the motion could be main-

tained and that the five years had elapsed; the sheriff could still have been sued on his bond and as that right of action was still existing, the act of limitations would not bar the motion. *Lee v. Peachy*, 3 Call 220.

Where the tickets of a clerk for fees were placed in the hands of an officer for collection, on June 5, 1821, it was held, that under the statute (1 Rev. Va. Code, 1819, p. 319, § 21. See Va. Code, 1887, § 3520), as the tickets were delivered after June 1, the officer was not bound to account for them before November 1, 1822. *Coplin v. McCalley*, 1 Leigh 280, 285.

Refusal to Act Till Fees Are Paid.—

A clerk may refuse to receive or file an application to purchase from the commonwealth land sold for delinquent taxes, if the fees allowed him by law are not secured or paid. *Stone v. Caldwell*, 99 Va. 492, 39 S. E. 121.

Payment of Fees Presumed.—On a motion by the personal representative of a deceased clerk against a sheriff for the amount of tickets for fees of the clerk which had been placed in the hands of the said sheriff for collection twenty-two years before the motion was made, it was proved that the clerk, in his lifetime, was pressed for money, that he had endeavored to obtain advances on his fees from the sheriffs of other counties before they were due, and the said sheriff and clerk frequently had money transactions and the sheriff frequently had paid money to the clerk, but upon what account was not known. It was held, under the circumstances, that the fees should be presumed to have been paid, though there was no positive proof to that effect. *Ross v. Darby*, 4 Munf. 428.

As to fees of deputy, see post, "Deputy Clerks," IX.

VI. Bond and Liability Thereon.

See post, "Liability for Errors and Negligence," VII.

The clerk of the court of appeals being required, by an act of assembly, enacted since he came into office, to give bond and security for the performance of his official duty, it is not proper for the court to dispense with or sanction the nonexecution of such bond or to pronounce any opinion as to the consequences of his failing to do so. It should be left to the clerk to decide whether or not he shall execute the bond, and in case of his failure to do so, the consequences to him should be adjudged by a court having competent jurisdiction of the case. *Dance's Case*, 5 Munf. 349.

Whether the clerks of the chancery district courts of Richmond, Williamsburg, and Staunton, and the clerks of the court of appeals and general court, were constitutionally bound to give bond and security, for performance of their official duties, being required to do so by an act of assembly enacted after they came into office, was left undecided in *Dance's Case*, 5 Munf. 349.

Filing of Bond.—Under the law requiring a clerk at the first session after his appointment to enter into bond with sufficient security (acts, 1788, ch. 67, § 19), he is allowed the whole term or session to provide and give the security so required; which, if he tenders it at the last hour of the session, the court is bound to receive and take his bond. *Dew v. Judges*, 3 Hen. & M. 1.

Condition of Bond.—The condition of the official bond of the clerk is that he will "account for and pay over, as required by law all money which may come into his hands by virtue of said office." This means, of course, such money as may be legally paid to him as such clerk, or which the law authorizes him to receive in his official capacity. *State v. Enslow*, 41 W. Va. 744, 24 S. E. 679.

Liability on Bond.—A party injured by the insufficiency of an appeal bond has his remedy on the official bond of the clerk of the court. Va. Code, 1887,

§§ 177, 178, 180. *Chase v. Miller*, 88 Va. 791, 14 S. E. 545.

There is no liability upon the sureties on his official bond, for the failure of a clerk to account for money received by him in a private capacity and not by virtue of his office. *Stuart v. Madison*, 1 Call 481; *State v. Enslow*, 41 W. Va. 744, 24 S. E. 679.

The payment of money to the clerk in vacation is not equivalent to the payment of the money into court, and if the clerk fails to return such into court, the sureties on his official bond can not be held responsible for its loss. *State v. Enslow*, 41 W. Va. 744, 24 S. E. 678.

The official bond of a clerk of a county or circuit court, with condition for the faithful execution of the office, required by the Virginia statutes of 1792, ch. 66, § 13, ch. 70, § 3, was not intended to secure the collection of taxes on law process, etc., though it has been made the duty of the clerk ex officio to collect and account for such taxes, nor are the clerk and his sureties liable upon this bond, for his failure to collect, account for, and pay such taxes into the treasury; the bond required by those statutes, extends only to those duties of the office that are properly clerical. *Auditor v. Dryden*, 3 Leigh 703. See generally, the title TAXATION.

VII. Liability for Errors and Negligence.

See ante, "Bond and Liability Thereon," VI.

Duties Not Required by Law.—A clerk incurs no official liability by failing to perform or negligently performing a service which he is not required to perform by law. *Page v. Taylor*, 2 Munf. 492.

Liability for Tax on the Admission of a Deed to Record.—A clerk who admits to record a deed without requiring the prepayment of the tax is liable for the amount of the tax. *Lucas v. Claffin*, 76 Va. 269.

Failure to Pay Taxes on Law Process.—A clerk who fails to pay taxes received by him, on law process into the treasury is liable to the penalty of \$600, even though he has accounted for the same to the auditor, and the auditor may recover for this delinquency by motion. *Steptoe v. Auditor*, 3 Rand. 221.

Issuing Scire Facias for Wrong Sum.—If a clerk of the court issues a writ of scire facias for too little, and the plaintiff obtains judgment and issues execution for the sum in scire facias, he shall recover against the clerk in a subsequent action, the difference between the true sum for which the scire facias ought to have issued, and that for which it did issue. Nor will it make any difference whether the special verdict finds special damages sustained by the plaintiff or not. *Russell v. Clayton*, 3 Call 41.

Liable for Money Paid to Him by Defendant.—If without the intervention of the court money is paid to the clerk of the court by a defendant who is sued, the clerk is personally but not officially liable, and his securities can not be charged. *Stuart v. Madison*, 1 Call 481.

Liability for Acts of Deputy.—A clerk of court is responsible for the malfeasance or neglect of the official duties of his deputies. *Page v. Taylor*, 2 Munf. 492; *Stuart v. Madison*, 1 Call 481; *Herring v. Lee*, 22 W. Va. 661.

But the clerk is not liable for money paid to his deputy (without the intervention of the court) by a defendant who is sued. *Stuart v. Madison*, 1 Call 481.

Liable to Censure of Court.—If a clerk of the court of appeals neglects to perform his duty in court or a clerk of an inferior court fail to furnish a copy of the record of the inferior court to enable the applicant to prosecute his appeal to the court of appeals, the court of appeals, will, after a rule to show

cause, animadvert upon his conduct. *Com. v. Beckley*, 4 Call 4.

Amount of Damages.—The amount of damages which may be recovered from a clerk by reason of the clerk's failure to perform his duty is measured by the actual loss which the plaintiff has suffered. *Russell v. Clayton*, 3 Call 41.

Indictment against Clerk for Issuing a Marriage License.—In an indictment under 1 Rev. Va. Code, 1873, ch. 106, § 16, against the clerk of the county court for issuing a marriage license for the marriage of an infant never before married, without the consent of the infant's father or guardian, it is not necessary to charge that the clerk knew that the party was an infant, or that he issued the license maliciously or corruptly, or that a marriage took place in pursuance of the license. *Com. v. Hill*, 6 Leigh 636.

Liability to Executor.—Whether an action upon the case lies in favor of the executor of a person injured by malfeasance in the office of clerk of court has not been decided in Virginia. *Monroe v. Webb*, 4 Munf. 73.

Taking Defective Guardian's Bond.—The clerk is not a proper party in a suit for the settlement of a guardian's account, brought to enforce the liability of the justices, for taking a defective guardian's bond. *Austin v. Richardson*, 1 Gratt. 310.

Liability for Endorsing Credits on Execution.—In an action against the clerk, or with his privity or consent, on an execution, to the injury of the plaintiff, it is not sufficient to charge, in the declaration, that the endorsements were made by the defendant as clerk, or with his privity or consent, whereby the plaintiff sustained a loss; but it should also be stated, that such endorsements were so made, without the order or consent of the plaintiff. *Monroe v. Webb*, 4 Munf. 74.

Defense by Clerk in Suit for Penalty.—On a motion against a clerk for the

penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books of his office, and certify thereupon as the law requires, and was prevented by the default of such commissioner from obtaining a quietus. And if he fail to make such defense, without a competent excuse, he can not obtain relief in equity on the same ground. *Auditor v. Nicholas*, 2 Munf. 31.

Injunction against Clerk.—A bill in equity will lie to enjoin a clerk from receiving the money on an insufficient application to purchase delinquent lands, and from making a deed to the purchaser. *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277.

In such a suit the clerk is not only a proper but a necessary party. *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277.

And § 746, Pol. Va. Code, conferring jurisdiction on the circuit court of the city of Richmond of cases involving claims against the commonwealth has no application. *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277.

VIII. Resignation and Forfeiture.

A. RESIGNATION.

Gawen Hamilton, clerk of the court wrote a letter to the court of Pendleton county in these words: "Your worships will please to take notice, I do intend to leave my resignation of my clerk's office in this county. I therefore notify you to prepare to chuse you a clerk in my room at the next court, as I shall continue in office no longer after that day." Signed Gawen Hamilton. The court of appeals held, that this letter received in open court and a verbal declaration to the court to the same effect made at the same term constitutes a valid resignation of the office of clerk. *Smith v. Dyer*, 1 Call 562.

B. FORFEITURE.

See ante, "De Facto Clerks," II.

Taking Up Residence in Enemies' Territory.—A clerk who voluntarily leaves his office and takes up his residence within the territory of one belligerent can not have a deputy conducting the business of the office for him within the territory of the other belligerent. *Herring v. Lee*, 22 W. Va. 661.

Engaging in Rebellion.—A writ was issued out of what was claimed to be the clerk's office of the circuit court of G. county on May 18, 1863, signed by C. A. S. as clerk. A bill, answers and some depositions were filed shortly afterwards in the cause. On April 12, 1866, the following order was entered: "This cause, having originated and being proceeded in before the late so called circuit court of the county of Greenbrier, a court in rebellion against the government of the United States, having no legal or political status or existence, and whose judicial acts and privileges (as well as officers) whether civil or criminal, can not be recognized as valid by this court; it is therefore adjudged, ordered and decreed by this court that the institution of the said suit and all the acts and proceedings had therein before the late so called circuit court of the county of G. are null and void. And on motion of the defendants by their counsel it is ordered that this cause be dismissed from the docket of this court. But without prejudice," etc. The court of appeals held that C. A. S., the clerk, was by the proclamation of the executive department of the government of the United States, declared to be in "insurrection and rebellion" against its authority on July 1, 1862, and under the ordinances of the convention that reorganized and restored the government of Virginia, at Wheeling, the offices of all who attempted to exercise the functions thereof in the interest of the insurgent government were declared to be va-

cant; therefore, he was not exercising the functions of an office de jure, and his acts were null and void. *Hawver v. Seldenridge*, 2 W. Va. 274.

The clerk who issued the writ was not acting in subordination to the authority of the United States but was acting in subordination to the authority of the insurrectionary government of the state of Virginia, then in "insurrection and rebellion" and committing acts of hostility, against the government of the United States, and having been by the latter declared to be in "insurrection and rebellion," the acts of the clerk were not the acts of a de facto officer exercising the functions of a de facto officer, as the insurrectionary government was never acknowledged by the political department of the United States government to be a de facto government. *Hawver v. Seldenridge*, 2 W. Va. 274.

When a state government is in insurrection or rebellion, and is committing acts of hostility against the government of the United States, and the same is so declared by the political department of the United States government the acts of a clerk claiming allegiance to and adhering to the state government that is so committing acts of hostility are null and void. *Hawver v. Seldenridge*, 2 W. Va. 274.

As to removal of deputy, see post, "Deputy Clerks," IX.

IX. Deputy Clerks.

Definition.—A deputy clerk of court is one authorized by the clerk to exercise the office which the clerk possesses, for and in his place. *Herring v. Lee*, 22 W. Va. 661.

Incompatible Offices.—See ante, "Incompatible Offices," I, D.

De Facto Deputy.—There can be no such officer as a de facto deputy clerk of court. To hold that there could be such an officer would be to hold that there may be an agent acting for and

creating liabilities against a principal who has conferred no authority, has no control over and who may be ignorant of the existence of the deputy or agent so acting. *Herring v. Lee*, 22 W. Va. 661.

Must Act by Authority of Clerk.—The deputy is the mere agent of the clerk and unless he acts by express or implied authority from the clerk his acts are void. *Herring v. Lee*, 22 W. Va. 670.

Power of Deputy to Issue Process.—All writs, process, attachment must be attested or signed in the name of the clerk of the court from which they emanate, and not in the name of his deputy, but the clerk's name may be signed by the deputy. *Pendleton v. Smith*, 1 W. Va. 16.

Power of Deputy to Take Acknowledgments.—Prior to the act of February 10, 1890 (Acts, 1889-90, p. 44), a deputy clerk of a county court could take acknowledgments of deeds to be recorded in the office of his principal. He had power to discharge any of the duties of his principal unless otherwise provided by law and this duty was not otherwise so provided. *Gate City v. Richmond*, 97 Va. 337, 33 S. E. 615.

As to the present law in Virginia, see Pol. Code, § 812.

Order Book May Be Proved by Deputy.—The original order book of a county court may be proved to be such by a deputy clerk, as well as by the clerk. *Ballard v. Thomas*, 19 Gratt. 14.

Notice to Agent Obtained While Acting as Deputy.—The fact that an agent before the commencement of his agency, and when acting as deputy clerk in the clerk's office where a judg-

ment is recovered, makes a copy of such judgment, is not sufficient evidence of his recollecting such judgment twelve months afterwards to charge his principal, who claims under a deed of trust executed to the agent at that time, with the knowledge of the judgment. *Morrison v. Bausemer*, 32 Gratt. 225.

Can Sheriff Distrain for Fees of Deputy.—Whether or not a sheriff can distrain for the nonpayment of fees stated in the clerk's bill as due the deputy clerk has not been decided in Virginia. *Anderson v. Bernard*, 1 Wash. 186.

As to what fees may be distrained for, see Pollard's Code, § 3518.

Removal of Deputy by Clerk.—A clerk of court has the right to remove his deputy or call him to an account for his acts. *Herring v. Lee*, 22 W. Va. 661.

When Power of Deputy Ceases.—If in any manner the power of the clerk over the office becomes extinct, the authority of the deputy ceases. *Herring v. Lee*, 22 W. Va. 661.

A clerk who is resident within the lines or a belligerent and his deputy who is a resident within the lines of the other belligerent are public enemies. They can have no communication or correspondence with each other and any business relation or agency existing between them before the war or at the time they became such enemies is ipso facto dissolved and any such relation established after they became such enemies is absolutely void. *Herring v. Lee*, 22 W. Va. 661.

Liability of Clerk for Acts of Deputy.—See ante, "Liability for Errors and Negligence," VII.

Clerks of Counties.

See the title COUNTIES.

Clerks of Municipalities.

See the title MUNICIPAL CORPORATIONS.

Client.

See the title ATTORNEY AND CLIENT, ante, p. 145.

Close of Argument.

See the title OPEN AND CLOSE

CLOSED.—For **closed** in the sense of terminated or executed, see *Lake v. Tyree*, 90 Va. 722, 19 S. E. 787.

The mere enclosure of the bar counter, while free access is permitted into the room in which liquors are dispensed, is not a compliance with § 3804, Va. Code, 1904, which requires the barroom to be **closed** within certain hours. The barroom must be faithfully **closed** and all access to it cut off during the prohibited hours, except, perhaps, to the casual entrance of the owner or his employee for some innocent and necessary purpose. *Morganstern v. Com.*, 94 Va. 788, 26 S. E. 402. See also, the title INTOXICATING LIQUORS.

Cloud on Title.

See the title QUIETING TITLE.

Clubs.

See the title ASSOCIATIONS, vol. 1, p. 844.

COAL.—Where **coal** was not within the contemplation of the parties, it was held not to have been covered by the word minerals used in the deed. *White v. Sayers*, 101 Va. 822, 45 S. E. 747. See generally, the title MINES AND MINERALS.

C. O. D.

See the title CARRIERS, ante, p. 671.

CODE.—In *Gaines v. Marye*, 94 Va. 227, 26 S. E. 511, it is said: "The **Code** is a revision of the statute law of the state as it existed at the time of the revision. It was adopted by the legislature as one act, and all its parts took effect equally and simultaneously. Notwithstanding the fact that the **Code** is a revision of the statute law, if its various sections are harmonious and their meaning plain, resort can not be had in construing them to the original statutes to see if any error was committed in the revision." See the title STATUTES.

The **Code** is but one act, and is to be construed as a whole. *First National Bank of Richmond v. Holland*, 99 Va. 495, 39 S. E. 126.

Co-Defendants.

See the title JUDGMENTS AND DECREES.

Codicil.

See the title WILLS.

Co-Employees.

See the title FELLOW SERVANTS.

COERCE.—In *Chappell v. Trent*, 90 Va. 928, 19 S. E. 314, it is said: “Coerce, says Webster, ‘had at first only the negative sense of chocking or restraining by force; as, to coerce subjects within the bounds of law. It has now gained a positive sense; viz., that of driving a person into the performance of some act which is required of him by another; as, to coerce compliance with the conditions of a contract; to coerce obedience. In this sense (which is now the prevailing one), coerce differs but little from compel, and yet there is a distinction between them. Coercion is usually accomplished by indirect means, as by the operation of law or the force of circumstances. Threats and intimidation are very often resorted to. Physical force is more rarely employed.’ The word coerce, to the ordinary mind not trained to nice distinctions, naturally carries with it the idea of physical force of threats of personal violence.” See also, the titles DURESS; THREATS AND THREATENING LETTERS; UNDUE INFLUENCE.

Cognovit Actionem.

See the title CONFESSION OF JUDGMENTS.

COHABIT.—See the titles ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 184; MARRIAGE.

In *Jones v. Com.*, 80 Va. 20, it is said: “Cohabit is defined by Webster: 1. ‘To dwell with another in the same place.’ 2. ‘To live together as husband and wife.’ Bouvier defines cohabit: ‘To live together in the same house, claiming to be married;’ ‘to live together in the same house.’ Obviously the legal sense of the term in the statute is to live together in the same house as married persons live together, or in the manner of husband and wife.”

In *State v. Miller*, 42 W. Va. 215, 24 S. E. 882, it is said: “The statute says ‘lewdly and lasciviously associate and cohabit together.’ Code, 1891, ch. 149, § 7. Webster gives the verb cohabit two meanings, one, ‘to inhabit or reside in company, or in the same place or country.’ Of course, the sense of the word in our statute is not this sense. Webster’s second definition is ‘to live together as husband and wife.’ Plainly, this is the meaning of the word in our statute. Black’s Law Dictionary, among several meanings, gives, as its first, ‘to live together as husband and wife.’ So does Bouvier. That this is the meaning of the word in our statute is apparent from the opinion by Judge Wood in *State v. Foster*, 21 W. Va. 767. And, on literally the same statute, it has been twice held in Virginia that, ‘to constitute the offense, it is essential that it be proved that the parties cohabit together; that is, live together in the same house as man and wife. Proof of occasional acts of incontinence merely is not sufficient.’ *Pruner & Clark’s Case*, 82 Va. 115.”

Collateral.

See the title DESCENT AND DISTRIBUTION.

Collateral Agreements.

See the titles FRAUDS, STATUTE OF; PAROL EVIDENCE.

Collateral Ancestors.

See the title DESCENT AND DISTRIBUTION.

Collateral Attack.

See the titles **BANKS AND BANKING**, ante, p. 261; **CORPORATIONS**; **JUDGMENTS AND DECREES**.

Collateral Condition in Bonds.

See the title **ASSIGNMENTS**, vol. 1, p. 754.

Collateral Facts.

As to relevancy of collateral facts, see the title **EVIDENCE**.

Collateral Inheritance Taxes.

See the title **SUCCESSION TAXES**.

Collateral Promise.

See the titles **FRAUDS**, **STATUTE OF**; **GUARANTY**.

Collateral Security.

See the title **PLEDGE AND COLLATERAL SECURITY**.

Collateral Undertakings.

See the title **FRAUDS**, **STATUTE OF**.

COLLECTION.—See **FOR COLLECTION**. And see the titles **AGENCY**, vol. 1, p. 240; **ATTORNEY AND CLIENT**, ante, p. 145; **BANKS AND BANKING**, ante, p. 254; **PAYMENT**; **POWERS**.

An attorney having received Confederate currency for a debt due to his client, deducts his fees from the amount, and deposits the balance in a bank in good credit, not in his own name but to "collection account," an account in which he deposits all moneys collected by him for his clients, and on the book of the bank, the name of the client is written opposite the sum deposited for him. The client not calling for his money until the end of the war, when the bank has failed, the attorney is not liable for it. *Pidgeon v. Williams*, 21 Gratt. 251.

COLLEGES AND UNIVERSITIES.

I. Definitions, 849.

II. Appointment, Removal and Tenure of Visitors, 849.

III. Administration and Government, 850.

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V. Appointment and Removal of Professors and Employees, 851.

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VI. Power to Contract Debts, 852.

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CROSS REFERENCES.

See the titles **CHARITIES**, ante, p. 790; **CORPORATIONS**; **PUBLIC OFFICERS**; **SCHOOLS**; **TAXATION**; **TRUSTS AND TRUSTEES**.

I. Definitions.

See post, "Administration and Government," III; "Appointment and Removal of Professors and Employees," V.

The West Virginia University is an organization endowed with corporate life, set up by the state in the performance of its high duty of popular education. "Though a corporation, it is not a private one created for private ends, but it is a public corporation, a branch of the state government, an instrumentality which the state has brought into being to aid it in carrying out this duty of educating the people. It is an arm of the state government, a part of it. It belongs to that one of the three departments of the state government called the executive department. Though it is under the unrestricted control of the legislature, and supported by its appropriation of public money, because it performs public functions, yet the university is a branch of the executive department. But though the university is a branch of the state government executing public ends, still it is a separate corporate existence, managing its own affairs under statutory law, subject only to legislative regulation. It has its governing body, the regents appointed by the governor with the assent of the senate." *Hartigan v. Board of Regents*, 49 W. Va. 15, 16, 38 S. E. 698.

The University of Virginia is in the strictest sense a public institution; its grounds and buildings are public property, the property of the state; it is governed and controlled solely by the state; its grounds and buildings are wholly dedicated to public uses; and the interest of the public constitutes its ends and aims. *Phillips v. University*, 97 Va. 472, 34 S. E. 66.

The medical college of Virginia is a public corporation. *Lewis v. Whittle*, 77 Va. 415. See post, "Appointment,

Removal and Tenure of Visitors," II; "Administration and Government," III.

Quære, if William and Mary College is not a public establishment. *Bracken v. William and Mary College*, 1 Call 161. See post, "Administration and Government," III; "In Virginia," V, B.

II. Appointment, Removal and Tenure of Visitors.

See ante, "Definitions," I.

Visitorial authority as to the medical college of Virginia is in the state. *Lewis v. Whittle*, 77 Va. 415.

Power of Legislature.—The power of removal and appointing the visitors of the medical college of Virginia is reserved in the charter to the legislature, and has not been granted to the governor. Visitors of this college hold simply by the will of the legislature, subject to be removed whenever the legislature shall so provide. *Lewis v. Whittle*, 77 Va. 415.

Power of Governor.—The charter of the medical college of Virginia empowers the governor to fill any vacancy which may occur in the board of visitors by reason of death, resignation or otherwise. But this does not give him power to remove and so create a vacancy in order to fill it. *Lewis v. Whittle*, 77 Va. 415.

Under the clause of the charter of the medical college of Virginia providing that "whenever any vacancy shall occur in the state board, by reason of death, resignation, or otherwise, then the governor shall fill the same, selecting the visitors so appointed from each of the grand divisions of the state," the governor can not remove the entire board of visitors and appoint a new board. *Lewis v. Whittle*, 77 Va. 415.

Remedy for Wrongful Deprivation.—In accordance with the doctrine that mandamus is the true specific remedy for a wrongful deprivation of an office it is the proper remedy where members of the board of visitors of a

college or university are wrongfully dispossessed of or kept out of their office. *Lewis v. Whittle*, 77 Va. 415. See the title MANDAMUS.

Holding by Life Tenure.—There is no such thing in this state as a visitor holding, as in England, by life tenure. *Lewis v. Whittle*, 77 Va. 415.

III. Administration and Government.

See ante, "Definitions," I.

The administration and government of colleges and universities established by the state belong to the executive department of the state. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

Power of Board.—Under chapter 45 of the West Virginia Code the regents establish such departments of education, which we call professorships or chairs, in literature, science, art, agriculture and military tactics as they may deem expedient, and they make rules, regulations and by-laws for the government of the institution." *Hartigan v. Board of Regents*, 49 W. Va. 16, 38 S. E. 698. See post, "In West Virginia," V, A.

The visitors of William and Mary College have power to change the schools, and abolish professorships. *Bracken v. William and Mary College*, 3 Call 573; *Bracken v. William and Mary College*, 1 Call 161. See ante, "Definitions," I; post, "In Virginia," V, B.

Legislative Control.—"From the time the University (of Virginia) was established down to the present, the law has expressly provided that the rector and visitors should be at all times subject to the control of the general assembly and should conform to such laws as it might, from time to time, enact for their government. * * * 1 Rev. Code, ch. 34, § 9; and Code of 1887, § 1515." *Phillips v. University*, 7 Va. 474, 34 S. E. 66. See ante, "Definitions," I.

Judicial Interference.—The judiciary is forbidden by the constitution from interference with the administration and governance of colleges and universities established by the state. So far as the courts are concerned the board of regents may do as it pleases without control, erroneous as its action may be. The legislature has confided the power to them, as it must be confided to some hands, and the legislature has given no judiciary process to review the board's action. The law makers have chosen not to make the action of the board subject to law suits. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698. See post, "In West Virginia," V, A.

In *Bracken v. William & Mary College*, 1 Call 161, the court refused to admit that it did not have power to intermeddle with the affairs of the college, upon the English precedent, applying to private donations to colleges; but which some of the judges thought did not apply to that college, which had a public, and not a private foundation. See post, "In Virginia," V, B.

IV. Acquirement of Private Institutions by the State.

It seems that it is valid for a college which is a private corporation to consent to be controlled by the legislature and to convey all its property to the literary fund of the state. *Lewis v. Whittle*, 77 Va. 415.

A college or university which is a private institution may become a public corporation by its own consent. In 1854 the Medical College of Virginia was incorporated, with a board of nineteen visitors, named in the charter, and required to make annual report to the second auditor. Power was reserved to the legislature to modify, alter or repeal the charter at pleasure. An appropriation of \$30,000 was made to the college in 1860, in consideration

that it convey all its property to the literary fund. The conveyance was made. In 1866, an appropriation of \$1,500 was made, and a like sum has been annually appropriated since then. *Lewis v. Whittle*, 77 Va. 415.

V. Appointment and Removal of Professors and Employees.

A. IN WEST VIRGINIA.

The W. Va. Code, ch. 45, gives the board of regents power to appoint professors, to fill the chairs in their several departments. By common law this power by appointment carries with it the power of removal, unless restraint by statute; but a power of removal is affirmed and in words conferred by the Code giving the board of regents authority "to remove them [professors] for good cause, but in case of removal the concurrence of a majority of the regents shall be required, and the reasons for removal shall be communicated in a written statement to the governor." *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698. See ante, "Definitions," I; "Administration and Government," III.

Considering the West Virginia University merely as a corporation, it is clear that the board of regents may remove its employees at pleasure; for the officers or employees of a corporation have no franchise or property in the offices, but are simply ministerial agents to carry out its corporate business, and unless its by-laws otherwise provide, may be removed at the pleasure of the corporation. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698, citing *Burr v. McDonald*, 3 Gratt. 215; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774. See ante, "Definitions," I.

"This statute, not only gives the regents power of removal, but it makes that power very wide, because it does not specify any cause constituting

ground of removal such as incompetency, immorality or other specific cause, but leaves it to the regents to judge of the cause of removal, to say what is good cause." *Hartigan v. Board of Regents*, 49 W. Va. 16, 38 S. E. 698.

Although the Code of West Virginia limits removal to "good cause" no cause of removal being specified, the words "for cause" are only directory and intended to be impressive upon the board of regents not to remove arbitrarily. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

Must Report Cause to Governor.—

"The Code commands the regents to report the cause of removal to the governor, the head of the executive department, thus making them accountable only to the governor. What their accountability to him is, what his powers as to any improper action in removal may be, it is not necessary for us to say; but the Code in that provision warrants us in saying that the legislature contemplated accountability of the regents, if any, only to the chief of the executive department, the power that appoints them. No intimation is breathed by the statute of their accountability to any court; but such accountability as is contemplated is to the executive." *Hartigan v. Board of Regents*, 49 W. Va. 16, 38 S. E. 698.

Notice and Hearing.—Notice and hearing are not required of a proceeding by the board of regents of the West Virginia University for the removal of a professor. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

Writ of Prohibition.—A writ of prohibition does not lie to prevent the board of regents of the West Virginia University from executing a resolution of that board removing a professor. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698. See the title PROHIBITION.

Review of Action of Board.—A court has no jurisdiction to review the action of the board of regents of the West Virginia University removing a professor. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698. See ante, "Administration and Government," III.

Professors Not Public Officers.—A professor in the West Virginia University is not a public officer, but a mere employee and subordinate of the board of regents. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698. See the title PUBLIC OFFICERS.

"A professor takes no oath, gives no bond, does not account for misfeasance or nonfeasance in a legal sense, has no term, no duties of a fixed determinate character fixed by law. He is no officer. He is no quasi-officer. There can be no such thing as a quasi-officer." *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

Relation Is Contractual.—The relation which a professor in the West Virginia University stands to the board of regents is simply of a contractual nature. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

A professor in the university stands in the same relation to the board of regents that a teacher in a public school occupies with respect to the school district by which he is employed, and that is purely a contract relation. *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

B. IN VIRGINIA.

See ante, "Definitions," I; "Administration and Government," III.

Effect on Salaries.—It having been decided, that the visitors of William and Mary College have power to change the schools and put down professorships, the statute of December, 1779, discontinuing the grammar school abolished the professorship, and the salary attached thereto. Thereafter the

professor would have no right to the salary. *Bracken v. William & Mary College*, 1 Call 161. See also, *Bracken v. William & Mary College*, 3 Call 573.

Appointment as Contract.—Appointment to such offices as that of treasurer of the Virginia Military Institute is not a contract, and vests no right in the appointee to the salary or emoluments thereto attached. *Frazier v. Virginia Military Institute*, 81 Va. 59.

The Board of Visitors of the Virginia Military Institute on July 30, 1884, ordered that the treasurer's salary be \$1,000 per annum, and \$100 for fuel and lights, and that he have the use of the hospital building, and appointed F. such treasurer for the term of one year from that day. The new board, on December 16, 1884, vacated the office; but F. withheld the building, claiming that the old board had rented it to him for one year at \$180, deducted in advance from his salary of \$1,280. On unlawful detainer for its possession, it was held: F.'s right to possess the building being part of the emoluments of the office, ceased at his removal. *Frazier v. Virginia Military Institute*, 81 Va. 59.

No Appeal Allowed.—No appeal from the decision of the visitors abolishing a professorship was allowed in the cases of *Bracken v. William & Mary College*, 1 Call 161, and of *Bracken v. William & Mary College*, 3 Call 573.

Writ of Mandamus.—In the case of *Bracken v. William & Mary College*, 3 Call 573, it was held, that a writ of mandamus to restore the plaintiff to the office of grammar master and professor of humanity in said William & Mary College would not lie, the visitors having abolished the professorship. See also, *Bracken v. William & Mary College*, 1 Call 161. See ante, "Administration and Government," III. See the title MANDAMUS.

VI. Power to Contract Debts.

The rector and visitors of the University of Virginia "are expressly prohibited from contracting any debts whatever on account of the university without the consent of the general assembly previously obtained. 1 Rev. Code, ch. 34, § 9; and Code of 1887, § 1554." *Phillips v. University*, 97 Va. 474, 34 S. E. 66. See ante, "Definitions," I; "Administration and Government," III.

The fact that "The rector and visitors of the University of Virginia" was given authority to borrow money and issue bonds therefor, to be secured by a deed of trust on the property of the university, to enable it to erect other buildings in the place of those destroyed by fire, constitutes no authority to the contractor, subcontractor, or other person, who did the work or furnished the materials therefor, to assert a mechanic's lien upon the buildings erected with the money so borrowed. The act authorizing the deed

of trust was intended solely for the benefit of the lender of the money. No other lien was provided for, and as its grounds and buildings are the property of the state, used for public purposes, no mechanic's lien can be claimed upon them. *Phillips v. University*, 97 Va. 472, 34 S. E. 66. See the title **MECHANICS' LIENS**.

VII. Power to Sue.

Trustees of Colleges May Sue by Corporate Title.—The trustees of a college, being incorporated, may sue by their corporate title, without setting out their individual names. *Legrand v. Hampden Sidney College*, 5 Munf. 324. See the title **CORPORATIONS**.

For the Construction of a Will.—An incorporated college may maintain a suit in equity for the construction of a will in which it has an interest, and to have the trust created by the will properly executed. *Emory, etc., College v. Shoemaker College*, 92 Va. 320, 23 S. E. 765. See the title **WILLS**.

COLLISION.—In *Cline v. Western Assurance Co.*, 101 Va. 496, 44 S. E. 700, it was held, that striking a sunken or floating obstruction was not a collision in the sense in which the term is used in marine insurance. The court said: "It must be borne in mind that the court is dealing with a contract of marine insurance, and it is in that relation that the meaning of the term collision is to be ascertained. Bouvier defines it to be 'the act of ships or vessels striking together, or of one vessel running against or foul of another.' Bouvier's Law Dict. (Rawle's Revision) 349." See generally, the title **NEGLIGENCE; SHIPS AND SHIPPING**.

Colloquium.

See the title **LIBEL AND SLANDER**.

Collusion.

See the title **FRAUD AND DECEIT**.

COLONIAL RECORDS.—Entries in the books of the office of the register of land office, labelled "Patents," without signature or seal, are not patents, nor grants, but are admissible in evidence as colonial records, tending to prove that proceedings had been taken looking to the execution and issuing of a grant, to be followed, if possible, by evidence tending to show that the grant so contemplated and begun was actually executed, issued, and delivered. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658. See the titles **PUBLIC LANDS; RECORDS**.

Colorable Imitations.

See the title PATENTS AND TRADE MARKS.

COLORED PERSON.—See the titles BASTARDY, ante, p. 334; CIVIL RIGHTS, ante, p. 829; CONSTITUTIONAL LAW; JURY; MISCEGNATION; SLAVES.

The term "negro" is identical in signification with the term **colored person**, as defined by § 2, ch. 103, Va. Code, 1873; that is, "a person with one-fourth, or more, of negro blood." *Jones v. Com.*, 80 Va. 538. See also, *McPherson's Case*, 28 Gratt. 940; *Francis v. Francis*, 31 Gratt. 283, 286.

In *Scott v. Raub*, 68 Va. 728, 14 S. E. 178, it is said: "The act of February 27, 1866, speaks of **colored persons**, and the act of 1865-'66, ch. 17, § 1, p. 84, defines what a **colored person** is, as follows: 'Every person having one-fourth or more of negro blood shall be deemed a **colored person**.'" See also, *Francis v. Francis*, 31 Gratt. 283. And see the titles BASTARDY, ante, p. 334; MARRIAGE; SLAVES.

Color in Pleading.

See the title PLEADING.

Color of Office.

See the titles DE FACTO OFFICERS; PUBLIC OFFICERS.

COLOR OF TITLE.—See the title ADVERSE POSSESSION, vol. 1, p. 206.

In *Griffin v. Cunningham*, 20 Gratt. 66, it is said: "Now, what are we to understand by claim and color of title? Cases involving questions of adverse possession of land, 'which is nothing more nor less than a possession under a claim and color of title,' may throw light upon it. Blackwell on Tax Titles (p. 566), says: 'To repel the presumption of holding under, or in privity with the title of the true owner, it is essentially necessary that the tenant of the freehold should show a possession under a claim and color of title—under an apparent right.' Again, on next page, 'anything which clearly defines the extent of the claim which professes to pass the land, and is not obviously defective, will constitute the basis of an adverse possession.' In *Moore v. Brown*, 11 How. U. S. R. 414, one of the grounds upon which it was held that the defendant was not entitled to the benefit of the limitation law was that the deed under which he claimed to have held the adverse possession was void upon its face. It was a deed for a tax title, and recited a sale of the land on December 9, 1823; when, under the law, it could not have been made before December 15. Judge Wayne, delivering the opinion of the majority of the court, said: 'Being a void deed, possession under it can not be said to be under color of title.' In the case of *Irving v. Brownell*, 11 Ill. R. 402, the court goes still farther. It is held, that by the words 'claim and color of title, made in good faith' (which are the words of the statute), 'must be understood such a title as, tested by itself, would appear to be good. Not a paramount title, capable of resisting all others, but such a one as would authorize the recovery of the land when unattacked; as if no better title was shown; that is, a prima facie title.'"

Claim of title and color of title distinguished. See *Stonestreet v. Doyle*, 75 Va. 372.

COLT.—In *Com. v. Clark*, 6 Gratt. 679, it is said: "And when a statute used the words 'horse, gelding or mare,' an indictment using the word colt was held bad. *Rex v. Beaney*, Russ. & Ryan 416." See generally, the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**.

Combinations.

See the titles **LABOR; MONOPOLIES**.

Comity.

See the titles **CONFLICT OF LAWS; EXTRADITION**.

Commencement of Suit or Action.

See the title **ACTIONS**, vol. 1, p. 132.

COMMERCE.—See the title **INTERSTATE COMMERCE**.

"Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Western Union Tel. Co. v. Reynolds*, 100 Va. 466, 41 S. E. 856.

Commercial Broker.

See the titles **FACTORS AND COMMISSION MERCHANTS; LICENSES**.

Commercial Law.

See the title **BILLS, NOTES AND CHECKS**, ante, p. 401.

Commercial Manure.

See the title **FERTILIZERS**.

Commercial Paper.

See the title **BILLS, NOTES AND CHECKS**, ante, p. 401.

Commercial Travelers or Drummers.

See the title **HAWKERS AND PEDDLERS**.

COMMISSION.—In *Dew v. Judges of Sweet Springs*, 3 Hen. & M. 31, it is said: "A **commission** is a delegation by warrant of an act of parliament, or of the common law, whereby jurisdiction, power, or authority is conferred to others. They are like the king's writs; such are to be allowed which have warrant of law, and continual allowance in courts of justice." And at page 43, it is said: "I take a **commission** to mean a warrant of office, a written authority or license, granted by a person or persons, duly constituted by law for the purpose, to a public officer, empowering and authorizing him to execute the duties of the office to which he may be appointed; and where there is no particular form of such **commission** prescribed by law, those who are constituted for the purpose, may use such form and language as to them may seem proper;

so that the purport of such **commission** be clearly understood." See also, the title **PUBLIC OFFICERS**.

For commission merchant see the title **FACTORS AND COMMISSION MERCHANTS**. For commission of lunacy, see the title **INSANITY**. For railroad commission, see the title **RAILROADS**. For commission to take testimony, see the title **DEPOSITIONS**.

COMMISSIONATED.—The defendant was the first of the three recommended by the county court; a blank commission was sent up to the clerk of the county court, under the seal, with directions from Mr. Robertson to offer the commission to the defendant, and if he refused, to put in the name of the next person recommended. Defendant refused the county court, and the commission was filled up with the name of another; and whether the defendant was liable to the penalty of the act, was the question. The words of the act are, "that every person hereafter **commissionated** to be sheriff, and refusing, shall forfeit," etc. In this case the defendant never was **commissionated**; his name was never in the commission, and so not within the act. Judgment for the defendant. *King v. McClanahan*, Jeff. 9.

Commissioner.

As to commissioner of agriculture, see the titles **AGRICULTURE**, vol. 1, p. 288; **FERTILIZERS**. As to commissioner of revenue, see the title **REVENUE LAWS**. As to United States Commissioner, see the title **UNITED STATES**. As to commissioner of elections, see the title **ELECTIONS**. As to railroad commissioners, see the title **RAILROADS**. As to jury commissioners, see the title **JURY**. As to commissioner to assess compensation for property taken for public use, see the title **EMINENT DOMAIN**. As to county commissioners, see the title **COUNTIES**. See also, the title **AFFIDAVITS**, vol. 1, p. 227.

Commissioners in Chancery.

As to proceeding before commissioner for accounting, see the title **ACCOUNTS AND ACCOUNTING**, vol. 1, p. 82. As to exceptions and objections to master's report, see the titles **APPEAL AND ERROR**, vol. 1, p. 547; **REFERENCE**. As to authority to make sale of lands, see the title **JUDICIAL SALES**.

Commission Merchants.

See the titles **FACTORS AND COMMISSION MERCHANTS**.

Commissions.

See the titles **CLERKS OF COURT**; **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**; **RECEIVERS**; **SHERIFFS AND CONSTABLES**; **TRUSTS AND TRUSTEES**.

As to commissions for sale of lands under decree of court, see the title **JUDICIAL SALES**. As to commissions of committee of lunatic, see the title **INSANITY**. As to commissions of consignee, see the title **FACTORS AND COMMISSION MERCHANTS**. As to commissions of real estate agents, see the title **BROKERS**, ante, p. 628.

E. E. S.
12/27/23





